Neutral Citation Number: [2010] EWHC 833 (Ch)

Case No: HC08C00558

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2010

Before :

THE HON MR JUSTICE LEWISON

- -

Between :

(1) Paddington Basin Developments Ltd	**Claimants**
(2) European Land and Property Ltd	
(3) Paddington Basin Management Ltd	
- and -	
(1) West End Quay Estate Management Ltd	**Defendants**
(2) Mr Alan Sharr	

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Katherine Holland QC (instructed by **Speechly Bircham LLP**) for the **Claimants**
Mark Warwick (instructed by **Barker Gillette**) for the **First Defendant**
Stuart Hornett (instructed by **Cliftons**) for the **Second Defendant**

Hearing dates: 15th April 2010

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Judgment

Mr Justice Lewison:

Introduction

1. Paddington Basin, between Paddington Station and the Westway, has been under development for over twenty years. It consists of a large site, about the size of Soho, containing a variety of different forms of development. This preliminary issue is concerned with three blocks of residential flats called Westcliffe Apartments, Peninsula Apartments and Balmoral Apartments. Between them the three blocks contain 467 flats, each of which has been sold on a long lease. They stand on part of the development called West End Quay. Each of the leases requires the lessee to pay a service charge. Part of the charge is payable to a block management company for services provided to the individual block. The remainder is payable to West End Quay Estate Management Ltd which is described in the lease as the Estate Management Company.

2. West End Quay Estate Management Ltd is party to an estate management deed dated 5 September 2005 under which it covenants to permit Paddington Basin Management Ltd to enter the West Quay Land in order to provide services to the whole of the Paddington Basin Estate (including West End Quay) and to pay a fair proportion of the cost incurred by Paddington Basin Management Ltd in providing those services. Paddington Basin Management Ltd manages the whole of the Paddington Basin estate, including West End Quay. The issue is this: is the estate management deed a "qualifying long term agreement" for the purposes of the Landlord and Tenant Act 1985 and the Service Charges (Consultation etc) Regulations 2003?

3. Ms Katherine Holland QC, appearing for Paddington Basin Management Ltd says that it is not. Mr Mark Warwick, appearing for West End Quay Estate Management Ltd, and Mr Stuart Hornett appearing for Mr Alan Sharr, a lessee of one of the flats, as a representative of all lessees, say that it is.

The documents

4. Having set the scene, I must now describe the documents in a little more detail. On 5 December 1995 British Waterways Board granted a lease of the whole of the Paddington Basin site to Paddington Basin Developments Ltd. The term of the lease was 999 years beginning on 25 March 1995. On 2 August 1996 European Land & Property Developments Ltd agreed with Frogmore Developments Ltd that it would procure the transfer of part of the leasehold interest from Paddington Basin Developments Ltd to Frogmore Developments Ltd. That agreement contained provisions relating to the future provision of services to the contemplated development. Clause 13 said:

> "13.1 The Property includes areas of land and the Works include works which, in the context of the Seller's proposals for the comprehensive redevelopment of the Retained Land and adjacent lands are intended (together with parts of the Retained Land and adjacent lands) to be common areas for the use and enjoyment of all persons having resort to the Retained Land and adjacent lands and the Property. The Seller will develop as soon as conveniently may be, within the framework of its proposals for the comprehensive redevelopment, detailed arrangements ("Estate Services") for the repair maintenance and renewal of all such common areas ("Estate Areas") for the benefit of all occupiers of the comprehensive development of the Property. The cost of such Estate Services shall be borne on a fair and equitable basis by the occupiers of the comprehensive development inclusive of the Property ("the Estate Service Charge").
>
> 13.2 The Seller currently anticipates that an estate management company will be created in order to provide the Estate Services and that this company will be granted leasehold interests in the Estate Areas. The Buyer will not unreasonably withhold agreement to the form and substance of any arrangement relating to the Estate Services and/or the Estate Areas and/or the Estate Service Charge and will in particular,

> grant to any such estate management company a lease in such form as may be agreed with the estate management company, the Seller and the Buyer in relation to those parts of the Estate Areas which fall within the Property."

5. Pursuant to that agreement on 29 December 1997 Paddington Basin Developments Ltd assigned part of its leasehold interest to Frogmore Developments Ltd. That part is what is now known as West End Quay. On 4 May 2000 Frogmore Developments Ltd assigned on to West End Quay Ltd which carried out the development consisting of the three blocks of flats. It has subsequently assigned on to Freehold Managers (Nominees) Ltd. West End Quay Ltd incorporated West End Quay Estate Management Ltd on 30 January 2002. According to its objects clause the purpose for which it was incorporated was:

> "To undertake the management and administration of the communal parts including car parking of the development known as West End Quay, Paddington, London W2, the leasehold title to which is currently registered at HM Land Registry under Title No. NGL758149, and to provide such services for the owners and occupants thereof and to carry out such reconstruction, renewal, repairs, maintenance or renovations thereto as may be necessary or desirable."

6. Its issued share capital consisted of three shares, each of which was held by the developer, West End Quay Ltd. At the same time West End Quay Ltd incorporated three other companies, each of which was to perform management services for one of the three blocks. Between 2002 and 2004 the long leases of the flats were sold off. As mentioned, West End Quay Estate Management Ltd was a party to each of those leases, in which it was described as the Estate Management Company. So also was that one of the three companies appropriate to the block in question. Clause 3.1.2 of the lease requires the lessee to pay the Estate Management Company a service charge called the Estate Service Charge. The charge is calculated in accordance with clauses I and J of the lease. Clause I deals with the mechanics of accounting, while clause J sets out the items to be included in the accounts. These include the provision by the Estate Management Company of the services in the fifth schedule to the lease. These in turn include such matters as the repair and maintenance of estate common parts, external decoration, maintenance and replacement of security systems; cultivation of garden areas, lighting the estate common parts and so on. However, clause J 4 also enables the estate service charge to include:

> "Any payments to be made by the Landlord and/or by the relevant Management Company to the Superior Landlords and/or to the company authority or body which manages and maintains the whole area known as the Paddington Basin of which the Estate forms part whether under the provisions in the Headlease or otherwise including the maintenance of the Basin as set out in the Headlease."

7. Paddington Basin Management Ltd was incorporated for the purpose of providing management services for the whole development, including West End Quay. On 5 September 2005 the estate management deed was made. The parties to that deed were

(1) Paddington Basin Developments Ltd and European Land & Property Ltd (then known as Paddington Development Corporation Ltd) (2) Paddington Basin Management Ltd and (3) West End Quay Estate Management Ltd. By clause 4 of the deed Paddington Basin Management Ltd covenanted with (among others) West End Quay Estate Management Ltd to provide estate services. These services included the maintenance of the estate common parts, the maintenance of fire and smoke alarms, the lighting of the common parts, the provision of security services and personnel, the maintenance of hard and soft landscaping, the collection and disposal of refuse, the control of traffic and so on. Clause 10.6 entitles Paddington Development Corporation Ltd and Paddington Basin Management Ltd (but not West End Quay Estate Management Ltd) to terminate the agreement by six months notice to expire at the end of a financial year. Clause 11 of the estate management deed provides that it can be terminated by any party by six months notice given at the end of every twenty five year period. Its minimum duration is, therefore, twenty five years.

8. The first payment due under the estate management deed, which was quantified in the deed itself, exceeded £270,000 per annum. West End Quay Estate Management Ltd paid that and the next few payments; but stopped paying in March 2006. For a number of procedural reasons, which I need not explain, the trial of this preliminary issue has been long delayed. The arrears due under the estate management deed now stand at over £1.1 million.

The preliminary issue

9. Paddington Basin Developments Ltd and Paddington Basin Management Ltd claim the amounts which they say are due from West End Quay Estate Management Ltd. The defence asserts that it is an implied term of the estate management deed that West End Quay Estate Management Ltd is only liable to pay what is lawfully recoverable from the lessees of the individual flats. It asserts that as regards those lessees West End Quay Estate Management Ltd is itself a "landlord" for the purposes of the service charge legislation and that:

> "the Estate Management Deed (vis à vis the under-lessees) is a [qualifying long term agreement] as defined by and for the purposes of section 20 of the 1985 Act and the Service Charges (Consultation etc) Regulations 2003".

10. It goes on to allege that, on the basis that the estate management deed is a qualifying long term agreement, and as a result of the pleaded implied term, the sums claimed are not due because the consultation requirements have been neither complied with or dispensed with.

11. In parallel with this action one of the individual lessees (Mr Raymond Gritz) applied to the leasehold valuation tribunal. The respondent to the application was West End Quay Estate Management Ltd. Mr Gritz claimed (among other things) that the estate management deed was a qualifying long term agreement. Thus it was possible that both the leasehold valuation tribunal and the High Court would have to determine the same issue.

12. Following a hearing Master Moncaster ordered the trial of a preliminary issue. The issue was formulated as follows:

> "whether the Estate Management Deed dated 5th September 2005 … is a "qualifying long term agreement" within section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation etc) Regulations 2003."

13. It will be noted that the issue as formulated omits the pleaded phrase "vis à vis the under-lessees". It will also be noted that even if the issue is answered in the affirmative, it still leaves open the question whether the alleged term is to be implied, and thus whether an affirmative answer to the question will give rise to a valid defence to the claim. In the meantime the leasehold valuation tribunal stayed Mr Gritz' application pending the outcome of the High Court proceedings.

The legislation

14. Service charges, and the expenditure borne by lessees of wasting assets, have been a source of controversy for decades, if not longer. Shakespeare himself posed the question:

> "Why so large cost, having so short a lease
>
> Dost thou upon thy fading mansion spend?"

15. Parliamentary regulation of service charges began with the Housing Finance Act 1972, nearly thirty years ago. Over the intervening period regulation has been extended and strengthened. The relevant provisions are now found in sections 18 to 30 of the Landlord and Tenant Act 1985 which have themselves been amended and extended, most recently by Part 2 of the Commonhold and Leasehold Reform Act 2002.

16. Section 18 of the Landlord and Tenant Act 1985 provides:

> "(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
>
> > (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
> >
> > (b) the whole or part of which varies or may vary according to the relevant costs.
>
> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
>
> (3) For this purpose—
>
> > (a) "costs" includes overheads, and

> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period."

17. Section 19 limits service charges to amounts that are reasonably incurred. Section 20 imposes additional limits on the right to recover service charges. It provides (so far as relevant):

> "(1) Where this section applies to any … qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
>
> (a) complied with in relation to the … agreement, or
>
> (b) dispensed with in relation to the … agreement by (or on appeal from) a leasehold valuation tribunal.
>
> (2) In this section "relevant contribution", in relation to a tenant and any … agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred … under the agreement.
>
> (3)…
>
> (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
>
> (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
>
> (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
>
> (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
>
> (a) an amount prescribed by, or determined in accordance with, the regulations, and
>
> (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
>
> (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs

> incurred … under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
>
> (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined."

18. This limitation is amplified by section 20ZA which provides (so far as relevant):

> "(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any … qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
>
> (2) In section 20 and this section—
>
> "...."
>
> "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
>
> (3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
>
> (a) if it is an agreement of a description prescribed by the regulations, or
>
> (b) in any circumstances so prescribed.
>
> (4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
>
> (5) Regulations under subsection (4) may in particular include provision requiring the landlord—
>
> (a) to provide details of proposed … agreements to tenants or the recognised tenants' association representing them,
>
> (b) to obtain estimates for proposed … agreements,

> (c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
>
> (d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed … agreements and estimates, and
>
> (e) to give reasons in prescribed circumstances for … entering into agreements."

19. The expression "landlord" includes any person who has a right to enforce payment of a service charge: section 30. There are certain kinds of tenancies which fall outside these provisions (e.g. tenancies at registered rents and short tenancies held from local authorities) but these are irrelevant to this case.

20. In exercise of the regulation making powers the Secretary of State made the Service Charges (Consultation etc) Regulations 2003 which came into force on 31 October 2003. Regulation 3 sets out a list of agreements that are not long term qualifying agreements:

> "(1) An agreement is not a qualifying long term agreement—
>
> (a) if it is a contract of employment; or
>
> (b) if it is a management agreement made by a local housing authority and—
>
> (i) a tenant management organisation; or
>
> (ii) a body established under section 2 of the Local Government Act 2000;
>
> (c) if the parties to the agreement are—
>
> (i) a holding company and one or more of its subsidiaries; or
>
> (ii) two or more subsidiaries of the same holding company;
>
> (d) if—
>
> (i) when the agreement is entered into, there are no tenants of the building or other premises to which the agreement relates; and
>
> (ii) the agreement is for a term not exceeding five years.
>
> (2) An agreement entered into, by or on behalf of the landlord or a superior landlord—

> (a) before the coming into force of these Regulations; and
>
> (b) for a term of more than twelve months,
>
> is not a qualifying long term agreement, notwithstanding that more than twelve months of the term remain unexpired on the coming into force of these Regulations.
>
> (3) An agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, which provides for the carrying out of qualifying works for which public notice has been given before the date on which these Regulations come into force, is not a qualifying long term agreement."

21. Regulation 4 (1) provides that:

> "Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100."

22. It is common ground that the figure of £100 is "the appropriate amount" for the purposes of section 20. Accordingly unless the consultation requirements are complied with or dispensed with, the tenants' contributions are limited to £100 each in any accounting period.

23. Regulation 5 and Schedule 1 contain the consultation requirements. I need not set them out in detail because it is common ground that they have been neither complied with nor dispensed with. However, I need to give a short account of them because of the submission made by Ms Holland QC to the effect that if the consultation requirements applied to the estate management deed the result would be absurd and unworkable. The landlord must give the tenants notice of his intention to enter into the agreement. This notice must give general details of the proposal and invite observations in relation to the proposed agreement. It must also invite each tenant to propose the name of the person from whom the landlord should try to obtain an estimate in respect of the services to be provided under the agreement (§ 1). If the tenants make observations the landlord must have regard to them (§ 3). Likewise if the tenants nominate a person the landlord must try to obtain an estimate from that person (§ 4). At the next stage of the procedure the landlord must prepare at least two proposals in respect of the services to be provided under the agreement; at least one of which must propose that services are provided by a person unconnected with the landlord. The proposal must state (among other things) the services to be provided under the agreement; the name of the parties to the agreement; an estimate of the expenditure to be incurred and the duration of the agreement (§ 5). The tenants now have a second chance to make observations; and, if they do, the landlord must have regard to them (§ 7). When the landlord enters into the agreement he must give the tenants notice of that fact and state his reasons for making that agreement. He must also summarise any observations to which he was bound to have regard (§ 8).

24. In *Ruddy v Oakfern Properties Ltd* [2007] Ch 335, 350 Jonathan Parker LJ observed that the picture that emerged from a review of the legislative history of the service charge provisions was not entirely coherent. In those circumstances, he said:

> "the right approach must be to attempt to construe the relevant statutory provision in its legislative context, and having reached a provisional conclusion as to what it means, to test that meaning to see whether it would, if adopted, lead to such absurd consequences in practice that Parliament cannot possibly have intended it. If the provisional conclusion would lead to absurd consequences, then it may be necessary to revisit it."

25. So far as the policy of the service charge provisions are concerned, in paragraph 78 of his judgment Jonathan Parker LJ expressly approved the following statements of Judge Cooke in *Heron Maple House Ltd v Central Estates Ltd* [2002] 1 EGLR 35:

> "For my part, I would not seriously doubt that the protection of the individual resident is the primary object of the legislation. But it does not seem to me that where there is a chain of leases the object has necessarily to be achieved by protecting only those at the end of the chain and denying protection to those higher up…"

> "In the case of service charge provisions, the policy of the Rent Acts is undoubtedly to stop the exploitation of residential tenants, but (cf. the Rent Acts, where the occupier's security need only be achieved by protecting him and nobody else) that object does not have to be achieved by ignoring the practical problems that occur where there are chains of tenancies."

26. The policy of the legislative provisions is undoubtedly part of the context in which they must be construed. Mr Hornett submitted, and I agree with him, that there are two separate strands to the policy underlying the regulation of service charges. Parliament gave two types of protection to tenants. First, they are protected by section 19 from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Second, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a qualifying long term agreement and the consultation process has not been complied with or dispensed with. It follows that the consultation provisions are imposed for an additional reason; namely, to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement. As Robert Walker LJ observed in *Martin v Maryland Estates Ltd* [1999] 2 EGLR 53 in relation to a previous version of the consultation requirements:

> "Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants, that tenants may not know what is going on or what is being done, ultimately at their expense."

27. One other general point needs to be made. The relevant provisions of the Landlord and Tenant Act 1985 do not prohibit a landlord from entering into whatever contract he pleases for the carrying out of works or the supply of services. They merely prevent him from passing on the cost of the works or services to the lessees unless he has satisfied the statutory requirements about price, quality and consultation. As between the landlord and the contractor or service provider, the landlord remains liable on his contract. To put the point another way, even if the estate management deed is a qualifying long term agreement, it will have no legal consequences as between Paddington Basin Management Ltd and West End Quay Estate Management Ltd unless the alleged implied term is held to exist.

The definition of qualifying long term agreement

28. It is common ground that the only express definition of a "qualifying long term agreement" is to be found in section 20ZA (2) of the 1985 Act. Subject to the effect of regulations, the definition consists of three elements:

    i) an agreement;

    ii) entered into, by or on behalf of the landlord or a superior landlord, where "landlord" bears the extended meaning given by section 30;

    iii) for a term of more than twelve months.

29. The estate management deed is undoubtedly "an agreement" since it contains contractual rights and obligations binding on the parties to it. West End Quay Estate Management Ltd is entitled to enforce the payment of a service charge, because it is a party to the leases under which the lessees covenant to pay it the Estate Management Charge. It is therefore a "landlord" within the extended meaning given by section 30. It seems probable that the requirement that the agreement is one that is entered into "by or on behalf of a landlord" means that the agreement is question must be entered into by or on behalf of a landlord in has capacity as such. In other words it must have something to do with his rights and responsibilities as landlord. But that limitation is satisfied in the present case.

30. Although the estate management deed has no fixed term, it is incapable of determination by West End Quay Estate Management Ltd until the expiry of twenty five years. Accordingly it is an agreement for more than twelve months; and Ms Holland did not argue to the contrary. It follows that all the elements of the definition are satisfied.

31. It is not suggested that the estate management deed falls within any of the exclusions in the 2003 regulations.

32. This leads on to another point. Can an agreement be a qualifying long term agreement as against some people but not others? Ms Holland submitted that even if the estate management deed was a qualifying long term agreement as between West End Quay Estate Management Ltd and the individual lessees, it was not a qualifying long term agreement as between Paddington Basin Management Ltd and West End Quay Estate Management Ltd. In my judgment either the estate management deed falls within the statutory definition or it does not. If it does, then the legal consequences are spelled

out by the Landlord and Tenant Act 1985. Absent the alleged implied term there are no legal consequences as between Paddington Basin Management Ltd and West End Quay Estate Management Ltd. In just the same way, if a contract between a landlord and, say, a landscape gardening company were held to be a qualifying long term agreement, it would have no legal consequences as regards the contractual relations between those two contracting parties; although it might have serious consequences on the ability of the landlord to recover expenditure through a service charge. Accordingly, in my judgment the answer to the preliminary issue is a simple "yes" or "no".

33. For the reasons I have given my provisional conclusion is that the estate management deed is a qualifying long term agreement. I must now go on to inquire whether that conclusion is so absurd that Parliament cannot have intended it.

Is my provisional conclusion absurd?

34. Ms Holland QC says that that the draftsman cannot have intended to encapsulate within this definition *any* agreement entered into by or on behalf of a landlord for a term of more than 12 months, as that would lead to an absurd result. Nor can the draftsman have been intending to encapsulate within this definition an agreement governing the provision of services to the tenant and the payment for such services by the tenant. Instead, she says that the legislation was obviously aimed at agreements entered into by or on behalf of the landlord with contractors for the provision of works and services which would then, in turn, be the subject of part of the service charge to the tenant. In the present case the estate management deed was part of the leasehold structure contemplated by the overall development of the estate and some provision for estate-wide services was necessitated by the partial assignment of the original lease.

35. She points out, correctly in my judgment, that the statutory provisions differentiate between (1) agreements made between a landlord and a third party contractor or service provider; and (2) the agreement between the landlord and the lessee under which the lessee is required to pay a service charge. An agreement in the former category may be a long term qualifying agreement, but an agreement in the latter category cannot. I agree.

36. Although I consider that Ms Holland's submissions on the construction of the statutory language are correct, in my judgment they miss the point. The estate management deed is not an agreement between a landlord and a lessee for the payment of a service charge. West End Quay Estate Management Ltd is not a lessee of anything. It is a management company. The agreement between the landlord and the lessee under which a service charge is payable is the lease itself. Paddington Basin Management Ltd is not a party to that lease. Thus in my judgment the estate management deed does not fall within the second category of agreement that Ms Holland identifies.

37. The estate management deed is an agreement under which Paddington Basin Management Ltd agrees to provide services to West End Quay Estate Management Ltd in return for a payment. It is therefore, in my judgment, an agreement made between a landlord (West End Quay Estate Management Ltd) and a third party service provider (Paddington Basin Management Ltd). It therefore falls within the first

category of agreement. The width of the definition is borne out by the fact that the regulation 3 (1) (b) of 2003 Regulations specifically excludes certain kinds of management agreements, of which the estate management deed is not one. It is important to stress, however, that the mere fact that the estate management deed falls within the first category of agreement does not necessarily mean that Paddington Basin Management Ltd is precluded from recovering the amounts claimed from West End Quay Estate Management Ltd. Whether it is so precluded depends on the existence of the implied term. And that is not the subject of this preliminary issue.

38. Entry into the estate management agreement was not, I think, a necessary consequence of the development of the overall estate. For one thing, Paddington Basin Management Ltd could have been made a party to each of the leases and could have had the benefit of a covenant by each lessee to contribute towards the estate-wide costs. In that event although the covenant itself would not have been a qualifying long term agreement the lessees would have had the right to challenge individual items of expenditure, and individual long term agreements made with service providers. Second, the estate management deed was not made until some years after the first of the leases was sold off. Third, the sale agreement of 2 August 1996 envisaged that a lease of the common parts would be granted to the estate management company; and that does not appear to have happened. Ms Holland placed some reliance on clause J 4 in the lease. However that clause is drafted in very general terms. It does not oblige anyone to provide estate-wide services. Nor does it confine itself to the provision of estate-wide services by a dedicated management company. I do not consider that clause J 4 will bear the weight that Ms Holland seeks to place upon it.

39. Ms Holland next said that where an agreement relates to a plurality of services it could not be a qualifying long term agreement. That expression was confined to agreements with individual service providers. I do not agree. The statutory definition does not say so; and if such a construction were to be adopted it could lead to easy evasion of the statutory requirements merely by combining two or more services in the same long term agreement. Nor do I consider that I can accept Ms Holland's submission that the estate management deed is "akin to" a lease and should thus be treated as if it were. Quite apart from the imprecision of the phrase, as Mr Warwick submitted it is not for the courts to carve out exceptions to a comprehensive and detailed statutory scheme for the regulation of service charges. I do not therefore accept the submission that the leasehold and contractual structure compels the conclusion that the estate management deed is not a qualifying long term agreement; or that it means that a conclusion that it is such an agreement is absurd.

40. Ms Holland goes on to say that the consultation requirements contemplated by section 20ZA (5) cannot have been intended to apply to an agreement such as the estate management deed. Sub-section 20ZA (5) (a) refers to regulations being made for landlords to be required to provide details of proposed agreements to tenants. Ms Holland says that it is difficult to see what the purpose of such a consultation requirement would be with the other contracting party. Likewise, when looking at the details of the consultation requirements set out in the 2003 Regulations, paragraph 7 of Schedule 1 imposes a duty to have regard to tenants' observations. Ms Holland says that it would be absurd if Paddington Basin Management Ltd was under a statutory duty to have regard to the observations of the other party to the deed when

entering into the deed with that other party. I agree, but again this misses the point. It is not alleged that Paddington Basin Management Ltd should have consulted West End Quay Estate Management Ltd before entering into the estate management deed. Rather, it is said that West End Quay Estate Management Ltd should have consulted the lessees of the individual flats before entering into the estate management deed with Paddington Basin Management Ltd. I cannot see that that is an absurd conclusion.

41. Next Ms Holland says that if the estate management deed is held to be a qualifying long term agreement that would produce an unworkable result. The unworkability (if that is a word) of the result is said to stem from the difficulty of applying the consultation requirements. Assuming (without deciding) that it is difficult to apply the consultation requirements, that would lead to the conclusion that it would be reasonable to dispense with them. The leasehold valuation tribunal has power to dispense with all or any of the requirements. It may do so either prospectively or retrospectively: see *Auger v London Borough of Camden* LRX/81/2007, a decision of the Lands Tribunal. The very fact that Parliament provided for the dispensation of the consultation requirements shows, in my judgment, that it contemplated that agreements might well fall within the definition of qualifying long term agreements even though the consultation requirements might be difficult, or even impossible, to apply.

42. In addition I do not consider that the consultation requirements are in fact difficult or impossible to apply, at least in part. There could have been no difficulty in giving notice to the tenants of West End Quay Estate Management Ltd's intention to enter into the estate management deed; nor in giving details of what was to be provided under the deed, the parties to it or its duration. If and to the extent that the tenants had observations on the contents of the deed, there would have been no difficulty in West End Quay Estate Management Ltd having regard to them. It was not, after all, bound to accept them. I accept that there would have been limited (if any) scope for the tenants to have nominated an alternative service provider; and that West End Quay Estate Management Ltd might have found it difficult to prepare more than one proposal. However, I do not consider that the fact that a landlord proposes to enter into a long term agreement with a monopolist (e.g. a water company) is a reason for excluding such an agreement from the definition of qualifying long term agreements or necessarily excluding it from all the consultation requirements. I accept also that there might have been some difficulty in providing estimates of the expenditure to be incurred under the estate management deed in future years, although for the first year of its operation the amount of the required payment was specified in the deed itself. But that, as it seems to me, might amount to a reason why that particular consultation requirement should be dispensed with.

43. In support of her submissions Ms Holland sought to rely on extracts from Hansard. Even if they are admissible (which I doubt) I did not find them helpful. They do not address the point which arises in this case.

44. Ms Holland also relied on general statements in the textbooks. But these, too, were not concerned with the precise point that arises in this case and, moreover, did not contain detailed reasoning. I did not find them helpful either.

45. Ms Holland asserts that as a result of the structure that has been adopted expenditure incurred by Paddington Basin Management Ltd is immune from challenge, either at the suit of West End Quay Estate Management Ltd or at the suit of individual lessees. She also asserts (and Mr Hornett accepts) that if she is right, then the individual lessees have no right to be consulted before the entry by Paddington Basin Developments into any long term agreement, because Paddington Basin Developments is not a "landlord" and is not therefore affected by the consultation requirements. Such a result would not, in my judgment, accord with the legislative policy behind the regulation of service charges.

46. Lastly Ms Holland said that if West End Quay Estate Management Ltd was a landlord (as in my judgment it was) it could not rely on its own failure to comply with the consultation requirements in order to defeat Paddington Basin Management Ltd's claim against it. But as I have explained, unless the alleged implied term exists, the fact that the estate management deed is a qualifying long term agreement has no legal consequences for Paddington Basin Management Ltd's claim against West End Quay Estate Management Ltd. This point, too, is not relevant to the preliminary issue as formulated. It may, however, be very relevant to the question of implying a term.

47. Despite Ms Holland's able argument I have not been persuaded that my provisional conclusion leads to an absurd result.

Result

48. The estate management deed falls within the statutory definition of "qualifying long term agreement" and the consequences of that are not absurd. I therefore answer the preliminary issue "Yes".