

IN THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER

B E T W E E N:-

**THE MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF LAMBETH**

and

Applicant

THE LEASEHOLDERS OF 5,363 PROPERTIES

Respondents

WITNESS STATEMENT OF ANDREW MARSHALL

I, Andrew Marshall, ICIOB, of Civic Centre, 6 Brixton Hill, London SW2 1EG WILL SAY as follows:-

1. I am employed by the London Borough of Lambeth (the "Council") and am based at the above address. I am the Assistant Director of Housing Capital & Asset Management at the Council. I have held this role since 2020.
2. I am authorised to make this witness statement on behalf of the Council in support of its application seeking a dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("LTA 1985") from all of the consultation requirements under section 20 LTA 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") relating to a contract for responsive repairs and voids which it has entered into in respect of residential properties in the north area of the Borough.
3. The information contained within this witness statement is from matters within my own knowledge and/or from having consulted the records held by the Council and/or from information provided to me by colleagues within the Council. Where information has been provided to me by others, I set out the source of that information below. The information provided to me by others is true to the best of my knowledge and belief.

4. Documents referred to in the witness statement are produced in the exhibit bundle marked "AM1". The references below to page numbers are to this exhibit.

Background

5. The Council is required to carry out responsive repairs and maintenance works to the properties it lets to its tenants and leaseholders to ensure safety compliance and good quality housing and living conditions. This work also covers communal areas in blocks and on its various estates. These works may well result in an individual leaseholder being required to pay a service charge of more than £250 a year in respect of the works undertaken to their block or estate. They will therefore be 'qualifying works' under LTA 1985 and consultation is required under the Regulations. In addition, even if the works in question are only responsive repairs carried out on a regular basis to each block, the cost of those works is likely to amount to in excess of £100 per leaseholder which is the threshold for consulting on a qualifying long-term agreement under LTA 1985.
6. In 2021, Housing Services procured and awarded new contracts for responsive repairs and maintenance for the northern (Lot 1) and southern (Lot 2) areas of the Borough. Consultation with leaseholders took place as required under the provisions of LTA 1985 prior to these contracts being awarded.
7. A Notice of Intention in respect of the Council's intention to enter into a qualifying long-term agreement for the carrying out of responsive repairs and maintenance was served on all leaseholders in the Borough on 2 August 2019. This was in the same terms for all leaseholders. A copy of the covering letter and the Notice of Intention is at page 1. It included a list of frequently asked questions ("FAQs") and details of how leaseholders could contact the Council about the letter.
8. The covering letter explained that Notices of Intention were also being served at the same time in respect of other contracts. Those contracts are not the subject matter of this application which relates only to "Contract 1: Responsive repairs and maintenance" as set out on page 1 of the letter dated 2 August 2019. A copy of the Notice of Intention in respect of this contract only is therefore produced by me. Leaseholders were invited to make observations within 35 days.
9. Following the Notice of Intention consultation, the Council designed the long-term agreements which were advertised in the Official Journal of the European Union. A pre-qualification and shortlisting stage then took place to ensure that those who had expressed an interest had the ability to provide the services being procured. Those who passed that

stage were then invited to submit full tenders which were evaluated based on cost and quality criteria. The tenders that scored the highest across all the criteria became the preferred bidders.

10. The Council's Cabinet approved the award of the proposed contracts to the identified preferred bidders at its meeting on 15 March 2021. A copy of the Report to Cabinet is at page 13. Appendix B to the Report consisting of the Open Tender Report is at page 30.
11. Following this, a Notice of Proposal was served on all leaseholders on 22 April 2021. Different Notices were served on leaseholders in the northern (Lot 1) and southern (Lot 2) area of the Borough as the contract for each area was being awarded to different companies. A copy of the Notice of Proposal in respect of the northern area with the covering letter is at page 78. Only the Notice of Proposal in respect of "Contract 1 Part 1: Responsive Repairs and Voids" is exhibited by me as the other Notices are not relevant to this application.
12. A number of observations had been received in response to the 2 August 2019 letter - approximately 50 to 100 - and the Notice of Proposal set out a summary of the observations received. The Notice provided information as to where further information about the process could be found and included links to the relevant Council Report from 2019 (Cabinet Member approval to start redesigning, inter alia, the Council's current housing and repair contracts) and the 2021 Cabinet report referred to above. It also included a set of FAQs. The FAQs explained that the Council had taken the decision to split the Repairs and Maintenance Services into four parts awarded to four separate contractors during the review of how it delivered the services which took place as part of the tendering process. Contract 1 Part 1 was in respect of responsive repairs and voids. Four other Notices in respect of other contracts were served with the letter dated 22 April 2021; they are not relevant to this application and have not therefore been included in the exhibit bundle.
13. Leaseholders were invited to make observations within 34 days. The responses were received were reviewed by the Council.
14. The Notice of Proposal stated that the Council proposed to accept the tender from Fortem Solutions Limited ("Fortem") with Breyer Group being issued a reserve contract due to the size and nature of the service. The Notice stated that Breyer would be called upon if Fortem failed or were unable to deliver the required services.
15. Fortem were awarded the Lot 1 Contract for responsive repairs for the north area of Lambeth commencing on 12 July 2021 (the "Contract"). The Contract period was for a six-

year initial term, with two four-year extension options. The notional tender value of the Contract was £7,700,000 annually. The Contract included a break provision which gave the Council the right to terminate the Contractor's employment after the fourth anniversary (July 2025) of the commencement of the Contract term.

16. The Contract operated on a Price Per Property model ("PPP") where the contractor was paid an annual sum for the maintenance of each property. Any works which cost above the £2,000 inclusive work order limit ("IWOL") were valued on the tendered schedule of rates and paid as an extra over to the IWOL, in addition to the PPP amount. The onus was on potential service providers to carry out due diligence at the time of bidding and familiarise themselves with the Council's stock.
17. Breyer Group Plc ("Breyer") were the formal reserve contractors for the north area.
18. As part of the 2021 procurement, Wates Property Services ("Wates") were awarded the equivalent Lot 2 contract for responsive repairs for the southern area of the Borough. The contract awarded to Wates operated on the same PPP model. Morgan Sindell Property Services Limited were the formal reserve contract for the southern area. A copy of the Notice of Proposal dated 22 April 2021 in respect of responsive repairs and voids served on the leaseholders in the south of the Borough with its covering letter is at page 92.
19. The best-scoring contractor based on quality/price split for both the north and south was Fortem. However, the procurement rules did not permit Fortem to be awarded the contract for both areas; the south area contract therefore was awarded to Wates, the next best-scoring contractor.

The Leases

20. Under the leases granted by the Council, each of the Respondents is required to pay a service charge to the Council. The service charge payable by each Respondent includes a proportion of the reasonable expenses and outgoings incurred by the Council in complying with its obligations under the leases to maintain, repair, renew, reinstate, rebuild, clean and repair the structure of the building and the common parts including, inter alia, the external and internal walls, window frames and timbers, electric cables and wires.
21. The leases for the 5,363 leasehold properties which are the subject of this Application are in similar terms. Details of the relevant clauses within a sample lease for a property at Oakwell House dated 2007 are set out below.

22. Under clause 2.2, the leaseholder covenants *"To pay to the Council at the times and in manner aforesaid without any deduction by way of further and additional rent a rateable and proportionate part of the reasonable expenses and outgoings incurred by the Council in the repair maintenance improvement renewal and insurance of the Building and the provision of services therein and the other heads of expenditure as the same are set out in the Fourth Schedule hereto such further and additional rent (hereinafter called the "Service Charge")..."*.
23. Part 1 of the Fourth Schedule relates to the building in which the property is situated and provides as follows – *"All costs charges and expenses incurred or expended or estimated to be incurred or expended by the Council (whether in respect of current or future years) in or about the provision of any Service or the carrying out or any maintenance repairs renewals reinstatements improvements rebuilding cleansing and decoration to or in relation to the Building and in particular but without prejudice to the generality of the foregoing all such costs charges and expenses in respect of the following:*
- 1 *The expenses of maintaining repairing lighting redecorating improving and renewing amending cleaning repointing painting the Building and parts thereof and all of the appurtenances apparatus and other things thereto belonging and more particularly described in Clauses 3.2, 3.3 and 3.4 hereof".*
24. Part 2 of the Fourth Schedule provides as follows – *"All costs charges and expenses incurred or expended or estimated to be incurred or expended by the Council (whether in respect of current or future years) in or about the provision of any Service or the carrying out or any maintenance repairs renewals reinstatements improvements rebuilding cleansing and decoration to or in relation to the Estate and in particular but without prejudice to the generality of the foregoing all such costs charges and expenses in respect of the following:*
- ...
- 2 *The cost and expense of making repairing maintaining improving rebuilding lighting and cleansing all ways roads pavements sewers drains pipes watercourses party walls party structures party fences walls or other conveniences which may belong or be used by the Building in common with other premises on the Estate".*
- 3 *The upkeep of the gardens forecourts unadopted roadways and pathways within the curtilage of the Estate".*
25. Under Clause 3.2 the Council covenants – *"... to maintain repair redecorate renew amend clean repoint and paint as applicable and at the Council's absolute discretion to improve*
- 3.2.1. *the structure of the Building and in particular but without prejudice to the generality hereto the roofs foundations external and internal walls (but not the interior face of such part of the external or internal walls as bound the Flat or the rooms therein) and the window frames and timbers (including the timbers joists and beams of the floors and ceilings thereof) chimney stacks gutters and rainwater and soil pipes thereof*
- 3.2.2 *the sewers drains channels watercourses gas and water pipes electric cables and wires and supply lines in under and upon the Building*
- 3.2.3 *the boilers and heating and hot water apparatus (if any) in the Building or elsewhere...*

3.2.4 *the passenger lifts lift shafts and machinery (if any) enjoyed or used by the Tenant in common with others and the boundary walls and fences of and in the curtilage of the Building...*

26. Under clause 3.3, the Council covenants – “*So far as practicable to keep lighted the passages landings staircases and other parts of the Building enjoyed or used by the Tenants in common with others and forecourts roadways pathways (if any) used in common with the Building or adjoining or adjacent thereto being the property of the Council*”.

The Fortem Contract

27. There were challenges from the commencement of the Contract. There were also commercial pressures placed on the Council to keep the service operating effectively.
28. Fortem were of the view that unless significant changes were made to the commercial model it was unviable for them to continue delivering the services. Fortem would have required a 90.88% uplift on their originally tendered annual contract value to, in their view, be in a position to viably continue under the Contract to July 2027. This was not sustainable nor was it commercially viable from the Council's point of view.
29. Given the evolving challenges and following a period of discussion and negotiations with Fortem, the Council concluded that it needed to agree an exit strategy with Fortem. This was necessary as there was no contractual option to terminate the contract until July 2025 at the earliest. A copy of the Report to the Cabinet Member dated 24 June 2024 is at pages 106 (save for Part II which is exempt from disclosure). The recommendation in this Report (see page 107) was that the Cabinet Member approve and authorise a clean break and an exit from the Fortem Contract in the form of an exit agreement, details of which were set out in the confidential Part II report. The recommendations were approved by the Cabinet Member.
30. The Contract with Fortem came to an end by mutual agreement on 31 July 2024.

The New Wates Contract

31. Prior to the Fortem Contract ending, the Council engaged in confidential discussions with Breyer, the reserve contractor, around the remaining length of contract and a review of the commercial model. In order for them to step in as the main contractor, Breyer required an increase from a pricing perspective and also a longer contractual term. The terms proposed by Breyer were not acceptable to the Council and it was therefore agreed that the reserve contractor would not be taking up the contract.

32. The Council also engaged in discussions with Wates, the incumbent south area repair and maintenance contractor, and decided to grant a direct award of the north area contract to Wates. The decision to do so was made under the special urgency provisions contained in the Council's Constitution in order to ensure continuity of delivery for this essential service provision to both tenants and leaseholders. The 24 June 2024 Cabinet Report referred to above also recommended the award of a direct contract to Wates - see page 108.
33. The contract with Wates for the north area repairs and maintenance services is for an annual value of £10,316,000 (£8,599,000 revenue and £1,717,000 capital) and a total contract value of £20,632,000 (£17,197,000 revenue and £3,434,000 capital) over the two-year contract term running from 1 August 2024 to 31 July 2026. This is based on 'uplifted' rates which are higher than Wates' tendered rates from 2019-21 to take account of matters such as inflation and specific risks arising out of staff transfers, such as redundancy costs and TUPE issues.
34. A contract of two years was agreed with Wates as the Council was not able to re-procure the north area contract within the limited time period available. A two-year contractual term enables the Council to maintain service delivery, whilst future procurement is considered. In addition, the two year time period aligns with the term that was remaining of the Fortem Contract. Whilst a long term contract may have resulted in more competitive pricing, it was not deemed possible for the Council to consider extending the term given the considerations and limitations imposed by the Public Contracts Regulations 2015 (as amended).
35. The Council considered that the best option was to directly award to Wates as it provides continuity of delivery by an existing provider and a transition that was not negatively felt by residents. Wates has experience of delivering against a PPP and Price Per Void (PPV) model. Importantly, Wates was able to commence work on 1 August 2024 with a short lead-in period as it is already providing similar services in the south of the Borough.
36. Despite being higher than their original tendered rates in 2021, the rates being offered by Wates in respect of this new contract are still significantly lower than the rates Fortem were requesting to continue with the Contract and lower than the rates Breyer were willing to offer if they were to take over as the main contractor.
37. From 1 August 2024, the works and services in the north of the Borough will therefore be provided to leaseholders by the remaining 'best' scoring contractor from the compliant procurement exercise that led to the 2021 contracts being awarded, with the lowest tendered prices, albeit those prices now have an 'uplift'.

Benchmarking exercise

38. If the Council went to market now, the Council believes that the tendered prices it would receive would be higher than those that Wates are offering.
39. The Council has sought to carry out a 'benchmarking exercise' and has commissioned a report from Mr David Miller of Rand Associates Consulting Services which is at 117 ("Rand Report"). Mr Miller is a Member of the Royal Institution of Chartered Surveyors, a Fellow of the Chartered Institute of Building and a Member of Chartered Institute of Housing and has over 40 years' experience of working in the Social Housing maintenance sector. He has been involved in the procurement and implementation of social housing maintenance and improvement contracts for a number of Housing Associations and Local Authorities.
40. The Council approached Mr Miller to provide an independent overview of the current market and also to provide some comparable figures, in so far as that is possible, based on his extensive experience of this sector. As Mr Miller states in paragraph 5.01 of his report, social housing providers are moving away from the PPP and PPV model as the contracting sector now views those types of contract as being too great a risk for them. A direct 'like-for-like' comparison is therefore extremely difficult for this reason. Mr Miller has provided a comparable annual tender figure based on extrapolating figures from another recent tender process from May 2024 involving another London local authority – see paragraph 4.04 of his report.
41. As can be seen from the comparison table below, the figure proposed by Wates in respect of taking over the contract for responsive repairs in the north of the Borough is the lowest:

Fortem (Proposed North Area)	Breyer (Proposed North Area)	Wates (Proposed North Area)	Rand Report (paragraph 4.04) - Comparable tender
£14,540,000.00	In excess of £10.5M ¹	£10,316,246.04	£11,420,350.00

Conclusion

¹ The figure put forward by Bryer formed part of the confidential and commercially sensitive discussions with the Council referred to in paragraph 31 above. The exact figure is therefore not included in this table for this reason. If required, the Council can provide the exact figure to the Tribunal only on a strictly confidential basis.

42. For the reason set out above, the Council had no practical alternative but enter into a new contract with Wates The Council has not been able to comply with the relevant statutory consultation requirements under LTA 1985 as it has needed to move quickly to ensure the continuity of service to all its residents. It cannot put responsive repairs and maintenance works 'on hold' whilst it carries out a full consultation under LTA 1985.
43. I understand from the Council's solicitors that by section 20ZA(1) the Tribunal may make a determination "*if satisfied that it is reasonable to dispense with the requirements*". I also understand from the Council's solicitors that in the case of Daejan Investments Ltd v Benson [2013] 1 WLR 854 the majority of the Supreme Court held that the existence or absence of prejudice to leaseholders due to non-compliance with the Regulations is the fundamental (and normally sole) consideration for a Tribunal when considering whether to grant dispensation.
44. The Council considers that the leaseholders in the north area of the Borough will not suffer any relevant prejudice because of the lack of consultation. The failure to comply with the Regulations has not caused the leaseholders prejudice either by them having to pay for inappropriate works or by having to pay more than would be appropriate in all the circumstances.
45. For the avoidance of doubt, the Council will be undertaking the Schedule 3 consultations as and when necessary.
46. For the reasons set out above, the Tribunal is asked to grant a dispensation as sought in the Council's application.

STATEMENT OF TRUTH

I believe that that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed.....

Andrew Marshall

Dated 28 January 2025