



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)”

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.

55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/00FY/LDC/2020/0007**

Property : **Cranbrook House, Cranbrook Street,
Nottingham NG1 1ES**

Applicant : **Kewmoor Ltd (1)
Cranbrook House Residents Ltd (2)**

Representative : **None**

Respondents : **The lessees of the residential flats at the
Property**

Representative : **None**

Type of application : **Application for the dispensation of all or
any of the consultation requirements
provided for by section 20 of the
Landlord and Tenant Act 1985**

Tribunal member : **Judge C Goodall
Mr V Ward FRICS – Regional Surveyor
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **7 September 2020 by Cloud Video
Platform**

Date of decision : **16 September 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. Cranbrook House is a 14-storey residential tower block in central Nottingham, let to 101 residential long lessees and two commercial units. It exceeds 50m in height. The freehold is owned by Kewmoor Ltd, whose directors are a Mr Singh and a Mr Panayi. The shares are owned by Mr Singh. The secretary is Grainnie Taylor.
2. The building was built in the 1990's as commercial offices. In the early part of this century, it was converted into residential use. Leases were granted for 150 years. The lease is tri partite. The grantor is Kewmoor Ltd. There is a management company called Cranbrook House Residents Ltd ("CHR"). All lessees have one share; Mr Singh has retained 99 shares in CHR in addition. The director of CHR is Mr Singh. The secretary is Mr Panayi. All residential lessees are Respondents in this case (called the "Lessees").
3. CHR has appointed a company called Highstar Ltd to manage Cranbrook House. Mr Panayi is a director of Highstar, and the secretary is Grainnie Taylor. Highstar holds itself out to be a professional residential property management company.
4. The relationship between Kewmoor, CHR and Highstar is clearly not at arms-length. This application was brought by Kewmoor Ltd, who named CHR as their representative. In reality, CHR should have brought this application as they are the party who may levy service charges upon the Lessees. There is a clear substantive issue in this case that needs to be resolved in a timely manner, and it is in the interests of justice that we

therefore add CHR as an applicant in these proceedings, under Rule 10 of the Tribunal Procedure ((First-tier Tribunal) (Property Chamber) Rules 2013. It was not possible to make a distinction between representations on the part of Kewmoor, CHR and Highstar in the hearing in this case, and in this decision we shall describe all such representations as being made by or on behalf of all three of these companies who we describe as the Applicants.

The Leases

5. The residential leases oblige CHR to maintain in good and substantial repair the main structure, foundations, planting areas, communal roof terraces and the roof on Cranbrook House. It is also required to maintain the forecourt and parking areas, the services and fittings, the walls and boundary fences, the footpaths, the communal facilities, the lifts, the entry phone, entrance hall, passages, staircases and landing, and to paint all wood cement, plaster and ironwork. They are also to insure.
6. The lessees have covenanted to pay a service charge to CHR being a fixed percentage of the costs incurred by the CHR in complying with the repairing and insuring covenants described above, and the proper and reasonable remuneration and expenses of the surveyors and other agents servants or workmen as CHR decides to employ to comply with the covenants described above.
7. Kewmoor Ltd has no obligation under the leases to carry out any works on Cranbrook House, and no right to collect any service charges, unless CHR goes into liquidation or otherwise collapses.

The Issue

8. Cranbrook House is clad with an aluminium cladding board. Post the Grenfell Tower disaster, a spotlight has turned on whether the building as a whole is safe. Essentially, the Applicants have been advised it is not. Furthermore, Nottingham City Council (“NCC”) do not think it is either, and they have taken statutory enforcement action under the Housing Act 2004 to make it so. The lessees and occupiers of Cranbrook House find themselves in a most challenging position. According to NCC and CHR’s own fire safety adviser, Cranbrook House is only safe to occupy at the moment if a waking watch is provided. That is very expensive. The value of the flats is likely to be minimal, at least whilst it is clad with combustible material. Some lessees may be facing financial ruin. Substantial amounts will need to be spent on Cranbrook House.
9. There is possibly some light at the end of the tunnel, in that the government has launched the Building Safety Fund (“BSF”), under which the costs of remediation may be recoverable. However, many detailed and technical issues will need to be skilfully navigated to access that fund. One of the technical areas is compliance with the legal framework that applies

to long leases under the Landlord and Tenant Act 1985 (“the Act”). The Applicants take the view that they will need to ask lessees to pay for a substantial amount of the cost of getting from where they are now to a completed remediation. They are concerned about the process of consultation. If they don’t comply with the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 (“the Act”), or obtain dispensation from them, they will not be able to claim the costs they have spent, or the costs they think they need to spend from the lessees to access the BSF. There are also some fire safety works that have been identified which cannot be included in any works undertaken under the BSF.

10. The Applicants have therefore brought this application for dispensation from consultation.
11. Unusually, rather than request dispensation in respect of specifically identified works, the Applicants have applied for dispensation in respect of specific expenditure. In the table below, we have reorganised the information originally presented by the Applicants as we think it is easier to understand if we identify expenditure that has already been incurred as opposed to anticipated expenditure. We have changed the descriptions of the proposed expenditure so that it more accurately reflects what the various reports and surveys have actually been called. We have removed the one item which was withdrawn during the hearing. Where actual quotes have now been provided, we have substituted the lowest quote figure for the estimates initially given. The historic and proposed expenditure for which the Applicants were requesting dispensation at the end of the hearing is:

Description	Net (£)	Gross incl VAT (£)
Waking watch costs (incurred and to be incurred)	160,965.00	193,158.00
Costs already incurred		
FRC intrusive inspection and report 19 May 2020	7,190.00	8,628.00
Tri Fire report (instructed by FRC) 4 June 2020	5,619.00	6,742.80
FRC budgetary cost plan	2,495.00	2,994.00
Tri Fire consultancy services as per quote 2 June (and actually expended) comprising:		
Preparation of a fire strategy report	4,200.00	840.00
Fire risk assessment	675.00	135.00
Fire door survey	1,890.00	378.00
Fire stopping survey	1,890.00	378.00
General advice and Council liaison	4,200.00	840.00
Costs proposed to be incurred		

Costs to fire doors and compartmentation work – using Nene Valley figures	31,604.00	37,924.80
Costs for armoured cable using CC Electrical figures	2,495.00	2,994.00
FRC building contract prelim costs as per quote 16 June 2020	69,525.00	83,430.00
CHR / Highstar management of building contract	14,462.20	17,354.64
FRC contract supervision	283,880.42	340,656.50
Totals	591,090.62	709,308.74

12. The question for us is therefore whether to grant dispensation from consultation for the underlying works anticipated in this actual and proposed expenditure.

The hearing

13. A video hearing took place on 7 September 2020. Mrs Karole Levene presented the case on behalf of the Applicants. Also attending on behalf of the Applicants were Mr Richard Kellaway and Ms Lisa Rickard. The Tribunal had the benefit of attendance by the professional team instructed by the Applicants: Mr Dorian Lawrence and Mr Jamie Copeland from FRC Consultants, and Mr Adam Kiziak from Tri Fire.
14. A number of lessees also attended. As it was a CVP hearing, it is not known exactly who was on the meeting, but at various points, the Tribunal heard from Mr Mark Cox, Mr & Mrs Copeland, Mr Nigel West, Miss Jennifer Meadows, Lisa O'Neill, Yaxin Lu, Niko Salmon, Mr Lupton, and Louise Cripps.
15. A bundle of selected documents was provided by the Applicants. Although the Tribunal had directed that the Applicants provide a statement explaining the purpose of the application and the reasons for it, what was provided was a single sheet with 20 lines of text, which was entirely inadequate to fully explain the factual context and the reasons as to why the Applicants felt they needed to make the application. The hearing therefore proceeded by the Judge conducting a structured exploration with the Applicants of the background and reasons for the application. Most of the questions were answered by Mrs Levene. She passed some of the questions to other members of the Applicants' team as necessary. From the replies to these questions, and the documentation supplied, the following factual resume, which we find to be the factual context under which we need to make our determination, explains the application.

The facts

16. Following the Grenfell fire, Mr Singh sought some information from the architects of Cranbrook House when it was originally constructed about the cladding. The architects wrote to him on 26 July 2017 stating that the cladding used had been a Hunter Douglas Luxalon Sandwich Wall Panel, which was a composite panel with a colour-coated aluminium outer sheet (0.7mm thick) with a polyurethane foam core. The architects said that this material complied with building regulations at the time it was installed.
17. At around the end of 2019, the statutory authorities began to contact Kewmoor Ltd, as the freeholder, concerning the construction of Cranbrook House. Mrs Levene was not able to provide a detailed historical account of these contacts. She read out a letter to us which referred to a letter from NCC dated 30 October 2019 asking for information. That letter had not been in the bundle. She provided a copy of a letter dated 15 November 2019 from NCC asking for data on external wall materials for tall buildings over 18m that was required by MHCLG. It is not clear to whom that letter was sent; there is no addressee shown on it. Whether it was received by Kewmoor, CHR or Highstar is not clear. However, it does seem that no timely reply was sent.
18. Mrs Levene was able to recall that NCC were chasing to arrange an inspection of Cranbrook House. She mentioned a Joint Local Authority Inspection Team. She said she thought an inspection had taken place on 11 or 12 February 2020. No documentation was provided regarding this inspection. If it was a statutory inspection by NCC, perhaps jointly with the Fire Service, it is almost certain that it would have been preceded by, and followed up with, letters and/or notices. It is surprising to the Tribunal that the Applicants do not have and have not produced this documentation.
19. In the budget on 11 March 2020, the government announced the establishment of a new £1bn fund for the remediation of non-ACM Cladding Systems in England. In May 2020, the prospectus was issued. The fund is called the Building Safety Fund (“BSF”). Registration for the fund could commence on 1 June 2020. The fund was intended to cover the cost of works directly related to the replacement of unsafe non-ACM cladding systems, fees of the professional team in respect of those works and managing agents’ fees in respect of administering the qualifying expenditure. The fund does not cover ongoing revenue costs, such as the cost of interim safety measures.
20. At some point between November 2019 and the end of April 2020, it seems that the Applicants began to get into gear regarding the cladding and fire safety issues at Cranbrook House. FR Consultants Ltd (“FRC”) were instructed, probably in April, to carry out an intrusive inspection of the external wall system and fixtures including all associated components

and to report their findings. The report was commissioned in response to the BSF Programme.

21. Eight sample tests were carried out on eight relevant areas of Cranbrook House. The Area 1 test was of steel frame external balconies that run vertically. Although these used a timber handrail, the risk from these balconies was considered to be extremely low. The tests to Areas 2, 3 and 8 established that the external cladding consisted of a 2mm PPC Aluminium layer, through to a core of 53mm rigid foam insulation before an internal face of 2mm aluminium – i.e. a sandwich panel. Behind the panel was a large empty cavity with varying amounts of additional mineral wool insulation. There was no evidence of cavity closers or barriers within the voids. The cladding in Area 4 was a render of a sand/cement product which had been applied to 50mm thick expanded polystyrene (“EPS”) insulation. The Area 5 test was an attempt to visually inspect the curtain glazing panels in the commercial premises on the south east elevation. The test could not be completed as the glazing panels were not accessible. Tests on Areas 6 and 7, found the external cladding consisted of a 25mm brick slip product applied to 40mm thick EPS insulation, which the report concluded was combustible.
22. FRC’s conclusion was that the façade to Cranbrook House would be unlikely to pass a BS8414-2 test. It is therefore unlikely to comply with clause B4(a) of the Building Regulations. They therefore recommended remedial work in accordance with the MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings.
23. FRC conducted their survey on 29 April 2020. Their report was dated 19 May 2020. The cost was £8,628.00 including VAT. This included the cost of the EWS1 form referred to below.
24. On 4 May 2020, NCC issued an improvement notice in respect of Cranbrook House. The Tribunal was unable to elicit from the Applicants what steps had occurred leading up to the issue of this notice. The Tribunal would normally expect an inspection would have taken place under section 239 Housing Act 2004, but Mrs Levene was unable to confirm whether this was the case. It may have been the inspection that she mentioned might have taken place on 11/12 February. That an inspection had taken place is evident from the Improvement Notice itself. We were disappointed that Mrs Levene seemed unaware of significant events at the building which she was managing.
25. The Improvement Notice was in respect of the hazard of fire, which was considered by NCC to be a category 1 hazard. The notice described the deficiencies at Cranbrook House as being inadequate fire risk assessment, inadequate fire stopping and compartmentation, including gaps in the fire doors, missing intumescent strips, some damaged fire doors, combustible items in all riser units, lack of routine testing and servicing of the fire

fighting lift, failure to record time taken for fire drills, and lack of testing of the smoke control systems.

26. Sixteen remedial actions were required. Some involved works to the physical structures and fittings at Cranbrook House. These were primarily works to fire doors and to the fire fighting lift, both of which sets of work required a professional survey first to identify the precise works required. The date on which remedial action was to start was given as 3 June 2020, and the remedial action was to be completed within 6 months (i.e. by 2 December 2020). Provision of a waking watch was not required in the Improvement Notice.
27. On 28 May 2020, a Ms Elizabeth Davies from the Environmental Health Department of NCC emailed Mrs Levene to say that an additional risk to the occupiers at Cranbrook House had been identified and she said a waking watch should be implemented as a temporary measure until the Fire Engineer had decided whether the building was safe to occupy in its current state. She said she had been unable to contact “your consultant” to discuss.
28. On 29 May 2020, Mr Steve Matthews, Principal Environmental Health Officer at NCC, sent another email to Mrs Levene at 12.02 to say that he and Ms Davies had been constantly calling her over the last hour to ascertain the position regarding a waking watch. He said that failure to put a waking watch in place by the end of that day could result in closure, or partial closure, of Cranbrook House.
29. Mrs Levene replied at 14.00. She said that Magpie (a Waking Watch provider) had verbally confirmed they would provide waking watch cover. There is a second email, this time from Ms Davies to Mrs Levene, also on 29 May, thanking her for “getting this organised so quickly”. Ms Davies also gave notice in that email that she intended to carry out a section 239 inspection at 12 noon, which was possibly intended for that time on the following working day as 29 May was a Friday.
30. It appears from the contents of an email dated 5 June 2020 from Mr Matthews that a meeting did indeed take place on Monday 1 June 2020. In his email, Mr Matthews said that at the meeting “you gave us assurances that you were going to communicate face to face information in relation to the waking watch” to the occupiers. He requested further detailed information regarding compliance with that assurance. He also arranged for service on Highstar of a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking information about Highstar’s interest in Cranbrook House. That was responded to by Highstar on 18 June 2020. We do not know if the reply was considered satisfactory by NCC. We do not know if a formal section 239 inspection took place on 1 June, and if so its outcome.

31. Invoices have been provided which show that Magpie have been charging the sum of £2,268 plus VAT per week for a waking watch service from 30 May 2020. The contractor was changed though in early July to Triton, who are charging £2,058 plus VAT per week.
32. On 1 June 2020, Highstar applied to register under the terms of the prospectus for the Building Safety Fund. No documentation regarding this process has been supplied to the Tribunal, or we understand to Lessees.
33. In their report dated 19 May 2020, FRC recommended that due to the presence of combustible insulation, a holistic fire safety review, undertaken by a qualified Fire Engineer was also required to confirm the interim fire safety measures that might be needed.
34. FRC therefore commissioned Tri Fire Ltd, a firm specialising in advising on fire issues, to prepare a fire safety review of their report. A report dated 4 June was prepared. It identified that Cranbrook House currently has a strategy of full simultaneous evacuation in the event of fire. There is a fire detection and alarm system which extends into the flats. It is linked to ADT who would request fire service attendance in the event of alarm activation. It further concluded:
 - a. The existing aluminium panels should be replaced;
 - b. An annual fire risk assessment should be carried out for Cranbrook House;
 - c. A waking watch should be implemented;
 - d. An action plan should be developed for the remedial works to the external façade;
 - e. Cars should be removed from the car parking area adjacent to the external cladding;
 - f. A new fire strategy should be developed.
35. The Tri Fire fire safety review report cost £6,742.80 including VAT. It was invoiced by FRC as it had been directly commissioned by them.
36. Also, on 4 June 2020, and possibly as part of the work carried out by Tri Fire in preparing their report of that date, Mr Adam Kiziak of Tri Fire issued a form EWS1. The form concluded that an adequate standard of safety is not achieved at Cranbrook House. The Tribunal understands the impact of the issue of this form with that conclusion is that mortgage lenders would not lend to buyers of the individual flats, which effectively have become unsaleable.
37. It is clear that the Tri Fire fire safety review referred to above was commissioned via FRC. But it appears Highstar were also in direct contact with Tri Fire regarding engaging their services. The Tribunal was provided with a fee quotation from them dated 2 June 2020 offering the following services:

Preparation of a fire strategy report	£4,200.00
Fire risk assessment	£675.00
Fire door survey	£1,890.00
Fire stopping survey	£1,890.00
General advice and Council liaison	£4,200.00
Total	£12,855.00
	plus VAT

38. On 15 June 2020, the Applicants sent a notice of intention to carry out works (under section 20 of the Act) to the Lessees. At paragraph 2, the notice said that:

“1. It is the intention of Kewmoor Ltd Freeholder of Cranbrook House, Cranbrook Street, Nottingham NG1 1ES to enter into an agreement to carry out works in respect of which we are required to consult leaseholders... .

2. The works/services to be carried out under the agreement are as follows:

Costs incurred for waking watch as required by Fire Engineer
 Costs incurred to carry out Fire Stopping and Compartmentation inspection and quote for works as requested by Nottingham City Council Environmental Health Department
 Fire Door Survey and costs for works – as request by Fire Risk Assessment and Nottingham Environmental Health Department
 Consultancy fees to advise and produce Fire Strategy as requested by Nottingham City Council Environmental Health Department
 Further consultancy costs that may be involved in relation to the above”

39. On 16 June 2020, FRC sent the Applicants a fee proposal for the provision of professional services to facilitate the implementation of remedial works to the cladding. This contemplates preparation of the brief, design, statutory and third-party liaison, including planning and building control approvals, preparation of tender documents, and awarding the contract. It does not include professional fees in connection with the supervision of the works. At the hearing, Mr Lawrence of FRC said the form of contract was not known at this stage. It might be a standard JCT contract run by the client’s professional team, or it might be a JCT With Contractors Design (WCD) contract. Under the first form, the supervisory professional fees would be payable by the client. He would be requesting 8.5% of the contract price if he were engaged. If the second form of contract were used, the contractor would pick up the professional fees.
40. The fee proposal was for a sum in the region of £83,430, including VAT. It would vary slightly dependent upon the form of contract used as handover and close out fees would be required if a standard form of contract were used, whereas they would not if a JCT WCD form was used.

41. At the hearing, the Judge asked Mrs Levene whether she thought the proposed contract with FRC for professional services in connection with the contract for the remediation works was a contract for works (meaning works on a building) or a long term qualifying agreement. She plumped for arguing it was a qualifying long-term agreement as the work was likely to last more than 12 months. Mr Lawrence said that he was unaware of the precise termination provisions in his professional contracts.
42. On the same date – 16 June 2020 – FRC also provided a budgetary cost plan for the remedial works to the cladding. This set out in more detail the constructions works that would be required and provided a cost estimate of £3,339,769.68, to include design work and project management. It is not clear whether this amount included VAT. We suspect not.
43. FRC charged Highstar the sum of £2,994.00 including VAT for preparing this budgetary cost plan.
44. Mr Lawrence said that his firm was a specialist firm dealing with building façade issues and he was heavily involved with other projects also seeking government funding under the BSF. There was a cut-off date of 31 December 2020 by when all details relating to each project were required to be provided to MHCLG. Whichever professional firm was instructed to do the preliminary work, it was vital that they should be instructed urgently, as availability of people with the experience required to do this work competently was in short supply, and there was little time left to meet the 31 December 2020 deadline.
45. On 2 July 2020, Highstar facilitated a Zoom meeting with Lessees to inform them of the situation regarding the works to the cladding. FRC attended this meeting, for which they charged £595 plus VAT. CHR had requested that the Tribunal grant dispensation from consultation requirements in relation to this meeting. At the hearing they withdrew that request.
46. Clearly, at some point Highstar instructed Tri Fire to proceed with the works for which they had quoted on 2 June 2020. On 17 July 2020, Tri Fire provided a fire risk assessment as per their quote for which they charged £675 plus VAT. They also provided a fire strategy for £4,200.00 plus VAT. The Tribunal has not been shown copies of either document.
47. Tri Fire have also carried out the two further surveys for which it had quoted on 2 June: namely a survey of the fire doors and a survey of the fire stopping. These surveys are in the form of a detailed list of all items requiring attention, in the case of the compartmentation survey, including photographs.
48. The surveys were required by NCC in the Improvement Notice, and they are needed to identify what works are required to the fire doors, the riser

cupboard doors, and the compartmentation works against which CHR can obtain quotes. In supplementary documents only provided in late August 2020, it appears that the Applicants have obtained two quotes for the work on the fire doors and compartmentation works as specified in the two surveys by Tri Fire. The first is from a company simply described as “Alpha Fire and Air”. No address is given. Their quote is £48,080.21 including VAT. The second is from Nene Valley. Again, no address is given. They quote £37,924.80. The quotes were for the works that had been specified in the Tri Fire surveys referred to above. No copies of any correspondence regarding these works has been provided, nor have any details of the experience and qualifications either of these firms have to carry out this work. Time scales for carrying out the work and arrangements for payment have not been given. The selection process has not been explained.

49. It appears that there is a need for some additional electrical work, in the form of provision of a new fire-rated armoured cable to supply the fireman’s lift at Cranbrook House. Two competitive quotes have been provided. One is from Breedon Electrical, in Bulwell, Nottingham, who quoted £6,600 plus VAT. The other is from Chris Cope in Sandiacre who quoted £2,595.00. He does not ask for VAT, though Highstar have indicated they think he should be charging it. Again, there is no documentation to explain why this new cable is required, or how these proposed contractors have been selected, though we think it is probable the need for the electrical work stems from the requirement in the Improvement Notice that the lift had to comply with BS EN 81-72:2015.
50. On 18 August 2020, CHR sent a notice under section 20B of the Act informing leaseholders that estimated costs of £1,000,000 would be incurred in the financial year ending 28 February 2021 relating to Fire, Health and Safety issues on Cranbrook House and the service charge budget for 2020/21.

The Law

51. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a “relevant cost” under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).
52. Section 20 imposes another control. It (and the regulations made under it) limits the leaseholder’s contribution towards a service charge to £250 for “qualifying works”, and to £100 for payments due under a “qualifying long term agreement” unless “consultation requirements” have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under

a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with “consultation requirements” or obtain dispensation from them.

53. The wording of section 20ZA is as follows:

“(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or 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 works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

54. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)). We shall not summarise the process here in detail. In general summary terms, an initial notice must be served describing the work to be carried out in general terms and the reasons why it is necessary. The recipients have 30 days to respond, after which the landlord has to obtain estimates from any contractor suggested, prepare a “paragraph b” statement summarising the estimates and responses received and inviting representations within 30 days to which the landlord must also have regard. A consultation is therefore likely to require around 2-3 months to complete.
55. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).
56. The Tribunal’s role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.
57. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the

consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

58. The Tribunal may impose conditions on the grant of dispensation. Commonly, a Tribunal might require that the landlord should pay the leaseholders costs of seeking dispensation.
59. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised recently in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

60. Another question that often arises in dispensation cases is that of aggregation. If a series of small costs need to be incurred on the same job, do they need to be added up such that consultation is required if combined they exceed the statutory maximum of £250? Might a number of individual items have to be considered as a single set of works to which the consultation requirements might apply? This question was resolved in the Court of Appeal case of *Philips v Francis* [2014] EWCA Civ 1395. The Master of the Rolls said that:

“It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.”

61. The other legal issue that arises in this case relates to long term qualifying agreements. In *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102, the test of whether a contract is a LTQA was said by Lord Justice McFarlane at para 37 to be:

“... the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

"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." (emphasis added)"

The Respondents submissions

62. Eighteen Respondents sent representations to the Tribunal. They raised the following points:
- a. The proposed costs are too high and unaffordable for lessees;
 - b. The flow of information from CHR had been very poor and lessees did not feel they had been consulted. A single Zoom call where no more than 10 lessees attended was felt to be inadequate;
 - c. The freeholder had failed to respond to correspondence from the Council. Had they done so in a timely fashion, there would have been more time for meaningful consultation;
 - d. The freeholder owner was negligent when the building was constructed / converted. The freeholder should contribute to the costs;
 - e. The waking watch is not required at evenings and weekends, not 24/7;
 - f. The building has adequate fire alarm systems and the waking watch person would not be able to contact 101 apartments over 14 floors, so is not necessary;
 - g. The waking watch guard sits next to the concierge in the lobby all day and is not adding anything to fire safety;
 - h. Alternatives to the waking watch have not been adequately explored bearing in mind the existing fire protection arrangements;

- i. The costs do not fall within the covenant in the lease, which limits the amounts the lessees have to contribute to routine ongoing and miscellaneous expenses;
- j. One lessee feels he was misled by replies to Leasehold Property Enquiries completed by Highstar when he purchased his flat;
- k. Some of the costs should be recoverable from government funding;
- l. The denial of liability by Kewmoor and the construction company and/or architect for defective building work on the grounds that there is a defence under the Limitation Act is incorrect and should be challenged;
- m. Granting the dispensation would mean the lessees would have to pay more service charge;
- n. CHR is not being run properly. A lessee complained that he had never been informed of any AGMs even though he is a shareholder;
- o. Although CHR has lessee shareholders, it is not truly run for the benefit of the lessees;
- p. The appointment of FRC and Tri Fire should have been put out to tender;
- q. Lessees should not have to bear the costs of historic issues;
- r. In respect of the costs that have already been incurred for which dispensation is sought, the lessees have lost the opportunity to nominate contractors;
- s. If it grants dispensation, the Tribunal should do so with a condition that prevented the Applicants from seeking payment of the costs to bring the building into compliance with building regulations and the demands of local and national government;
- t. Upgrading the fire alarms should be considered;
- u. Lessees are not liable for the external walls of Cranbrook House;
- v. Some of the flats are being used in breach of the lease. The suggestion is that the person in alleged breach is the freehold owner;
- w. There is a conflict of interest in that as the management company receives a percentage of the building costs, it is in their interests for the costs to be high;

- x. There should be more exploration of alternatives to the current suggestions, with particular reference to the fire adviser chosen.
63. At the video hearing, nine Lessees made submissions to us. One Lessee pointed out that the purpose of consultation was to protect the Lessees from paying for improper works, or from paying costs that were too high. All the contributors expressed concern at the way the Lessees seemed to have been treated by the Applicants. They raised a perception of a conflict of interest, in that CHR and Highstar seemed to be looking after the freeholders interests rather than the Lessees. Some complained about the lack of communication and discussion with the Lessees about how to resolve the fire issues at Cranbrook House. There was a significant thread in the submissions indicating that the Lessees could not trust the Applicants to do the right thing by them, and concerns were expressed about the Applicants' competence.
64. By reason of these points raised, the Lessees' asked that the Tribunal should not grant dispensation because that would mean the Applicants would be relieved of the need to consult with the Lessees, which they had shown they were incapable of doing unless forced to.

Discussion

65. We intend to limit this decision to the question raised in the application; should we grant dispensation from consultation. In our view, we should not endeavour to interpret the lease terms, or to consider whether costs have been or would be reasonably incurred. If any Lessee brought proceedings, it would be for the Applicants to establish to the satisfaction of a future tribunal that the costs anticipated in this application were payable by the Lessees.
66. We think the proposed works the Applicants wish us to grant dispensation for break down into five categories:
- a. The waking watch costs
 - b. The expenditure that has already been incurred
 - c. The proposed works on the fire doors, compartmentation, and electrical cable
 - d. The proposed FRC work to progress the building remediation work
 - e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be entered into

a. waking watch costs

67. The major difficulty we have is deciding whether the waking watch costs are costs for which the Applicants require dispensation at all. As can be seen from the text of section 20ZA above, consultation is only required in respect of “qualifying works” or a “qualifying long term agreement”. Works means “works on a building or other premises”. To our mind, works on a building means physical works on a building. The language in the consultation requirements is all about physical works. It talks of works to be “carried out”. It invites “estimates”.
68. In our view, the provision of personnel to attend a building to watch for fire is not a contract of works but a contract for a service. The core subject matter of the contract is the provision of human resources. There is nothing that the watchers have to do to the building.
69. A contract for service can easily be terminated. In contrast, works on a building cannot easily be undone. We think the point of the consultation provisions is to give the lessees a say on expenditure that makes a physical change to the building before money is spent that may be unnecessary, or too much is spent. Expenditure on works and expenditure on services are fundamentally different, and we do not think the Act was intended to bring in consultation requirements for the latter.
70. There is no evidence that the contract for a waking watch is a QLTA in this case. Indeed, the contrary, as the first contract was terminated fairly quickly, and presumably legally.
71. In relation to the waking watch therefore, we refuse to grant dispensation from the consultation requirements as we do not think they apply anyway.
72. This determination should not be taken as a decision that the waking watch costs are reasonably incurred, or payable under the lease. Some lessees have argued that insufficient account has been taken of the existing fire alarm protections, and that the person carrying out the waking watch is not adding any value, at least during office hours when a concierge is present, or could not do the job of raising the alarm anyway. It may be this cost is not covered by the lease. The Applicants of course will argue that they have no choice but to do what they are told by NCC (supported by their adviser). These may all be valid arguments, but we have not explored them in this decision. These arguments raise the question of whether the waking watch cost is reasonably incurred, and if the Applicants or Respondents wish for certainty on that question, they will need to make a separate application under section 27A of the Act. They do not affect whether dispensation should be granted.

b. Expenditure already incurred to pay FRC and Tri Fire for the nine items listed in the table at paragraph 11 above

73. It is necessary to establish the consultation threshold; the amount of a proposed cost which might result in an individual lessee being charged

more than £250. If the proposed cost is below that threshold, there is no need to consult in any event, even if the expenditure is for qualifying works. We were told by Mrs Levene by separate enquiry after the hearing that the highest percentage service charge contribution payable by any lessee is 2.265%. The threshold is therefore £11,037.52. There would be many lessees whose percentage contribution is below that figure, but payment of any sum above the threshold exposes the CHR to the risk of under recovery of 100% of the cost incurred if the payment is for works on a building and there has been no consultation or dispensation. Conversely, if the payment is for a sum below the threshold, even if for works on a building, there is no need to consult as no lessee will be charged more than £250 anyway.

74. All of the items listed in the table in paragraph 11 as already incurred costs are below the threshold. We therefore have to consider whether they need to be considered as a single set of works which together exceed the consultation threshold.
75. As we have reviewed the factual narrative above, we have become convinced that each of the items for which expenditure has already been incurred was separately considered, contracted for at different times, for a different service and for different purposes, and by two different organisations. We do not think that, following *Francis v Philips*, they should be aggregated. We are also far from persuaded that the individual elements are for qualifying works.
76. The story started in late April with a decision to obtain a report from FRC on the cladding. At that point it was not known what conclusion the consultant would reach. It is not reasonable to expect the Applicants to anticipate that aggregate costs of subsequent decisions to do more work might reach such a total that they should have consulted when instructing FRC to prepare their intrusive inspection.
77. What came out of the FRC report was a need for a further advisory report from Tri Fire. Again, it would not have been known at that point what further work Tri Fire would suggest, nor that the Applicants would follow their advice and incur such further costs, and the decision to commission it was a separate decision. The Tri Fire report was also not, in our view “works on a building”.
78. Then FRC prepared a budgetary cost plan costing £2,994 incl VAT. This was potentially the very early incubatory stage of the process of placing a building contract for the remediation works. But again, we are not of the view that these consultancy costs were works on a building, nor that if they were, it was necessary to aggregate them with the cost of works which might follow so that they exceeded the threshold and consultation should have occurred. A common-sense approach has to be taken and it is a matter of fact or degree. The amount of the cost for the plan at around £30 per flat (apportioned equally) is in our view at such an early stage that it

would stretch practicality were we to find that the Applicants should have consulted on this expenditure, bearing in mind that there was no knowing then (and still now) whether that contract will be able to progress.

79. Finally, three of the five additional services carried out by Tri Fire (see page K6 of the bundle) were not primarily works on a building. An invoice was raised for all of them together, but they were separately itemised. In respect of the fire risk assessment, the preparation of a fire strategy, and the consultancy advice and general liaison, these do not involve any works on a building, and each has a distinct and separate purpose. Not only do we think each of these are separate items each falling below the threshold, and they should not be aggregated, but we also think they are not works on a building. For these reasons there is no obligation to consult on these items.
80. There is a case, just as for the FRC budgetary cost plan, for saying that the costs of the fire door survey and the fire stopping survey (each £1,890 plus VAT) are the preliminary stages of the proposed works to rectify those elements. But again, this raises the question of at what point the Applicants have to stop what they are doing and start a consultation or seek dispensation. Our view is that they should do that at the point where it becomes clear that the Applicant's will have to incur expenditure on works that may exceed the threshold. We do not think on the facts that proceeding with these surveys to enable the scope of work to be identified at relatively minimal cost, on the facts of this case, is the point at which those survey costs need to be aggregated with the future costs so as to require that consultation should have taken place at that point.
81. So for the two survey fees charged by Tri Fire we determine that consultation is not necessary for they fall below the threshold.
82. We qualify this part of the determination with the same qualification we have issued above. Our determination is not to be taken as confirmation that the expenditure in this section was permitted expenditure under the lease, or reasonably incurred. Those questions would be for a section 27A application. We have not seen all of the material which justified the need for the works which are the subject of the surveys, nor the invitations to tender or the terms of that tender, or details of the tenderer selection process.

c. The proposed works on the fire doors, compartmentation, and electrical cable

83. We take the view that the cost of a new cable for the lift shaft is essentially part of the cost of remedial work to the non-cladding fire safety works required. There is no doubt that these works are works on a building and they are over the threshold such that either consultation or dispensation are required.

84. We therefore have to determine whether to grant dispensation. We have to consider whether it would be reasonable to do so, bearing in mind the prejudice to the lessees. If we do grant dispensation, the lessees will have lost the opportunity to comment and possibly to persuade the Applicants to do things differently. They will also have lost the opportunity to suggest other contractors. We are also mindful of the fact that these works cannot be recovered under the BSF application, for they are not for the replacement of cladding. We also note that the lessees have only known about the estimates obtained since the last week or so of August. We know nothing about the process that resulted in these estimates being produced.
85. Despite our concerns about the impact upon the lessees as described above, we will grant dispensation for these works. The reason is that the building is subject to an Improvement Notice and the Applicants must either challenge the Notice or arrange for the works required in that Notice to be completed by 2 December. In our view there is insufficient time to conduct a full-scale consultation. The risk of non-compliance with the Improvement Notice, involving the possibility of committing a criminal offence; or having a civil penalty imposed, and/or of a prohibition notice being issued, is too great. We also take into account that these works will increase the fire protection capability at Cranbrook House, which must be to the advantage of the lessees and occupiers and may have an impact upon the continuing need for a waking watch. We also note that two quotes have been obtained. The Applicants will need to progress these works and do so urgently.
86. We gave very careful consideration to the question of imposing conditions upon this dispensation. In particular, we considered whether there was enough time to require the Applicants to consider any alternative contractors suggested by Lessees. Although finely balanced, we took the view that in the absence of evidence to the contrary it appeared the selection of the contractors was above board and reasonable, and they were quoting against a professionally prepared specification from the Applicants' independent fire adviser. We were mindful of the time pressures upon the Applicants to do these works. We took the view that no conditions we might impose would reduce the prejudice the Lessees had already suffered from the failure to consult adequately, but we did not consider that prejudice could be remedied by conditions or quantified in financial terms.
87. Once again, this is not to be taken as approval of the reasonableness of the proposed expenditure.
- d. The proposed FRC work to progress the building remediation contract, estimated at £69,525.00 plus VAT
88. It became clear to us at the hearing that Mr Lawrence has a good level of expertise regarding the specialist field of cladding remediation following Grenfell. His evidence was that it was urgent for the Applicants to move

to the next step of preparing their submission to the BSF. It would be tragic for all the lessees at Cranbrook House if that application failed because of delay arising from the need to consult on his engagement.

89. We have carefully considered whether consultation is needed at all. After all, FRC will not be carrying on any works on the building. But unlike waking watch costs, fire risk assessment costs, liaison with the Council, and preparation of a fire strategy, all of which seems to us about providing a service, not works, it is undeniable that the work proposed in designing, applying for planning and building regulation consent, preparing tender documents and entering into a contract is so closely related to the carrying out of building works that we are of the view that there would be a legal obligation to consult.
90. Indeed, we consider that were this not a rather abnormal situation, this would be the point at which a full consultation not just in relation to the professional prelims, but in relation to all the cladding remediation works would be required. So, we do consider this proposed fee would be a contract for works on which consultation would be required.
91. We have considered Mrs Levene's argument that the proposed contract with FRC would be a QLTA, rather than a contract for works on a building. We reject that argument. We have considered whether we should adjourn to obtain a copy of the proposed contract, to satisfy ourselves on that point. However, the Tribunal is an expert Tribunal, and we have never come across a professional appointment in this situation which would be likely to be a QLTA. Our view is that it is not normal for appointments such as this to contain a term that makes them non-terminable within 12 months. We think that the nature of this type of contract is that it is job specific rather than time specific. It is not a question of whether it could last more than 12 months, which it very well may. It is a question of whether it has a minimum term such that it is incapable of determination within 12 months. We have decided that the contract is a contract for works, and not a QLTA.
92. So, should we grant dispensation for this item? In our view, the decisive factor is time. The Applicants must pursue their application to the BSF with maximum diligence and speed. Dependent upon their contract negotiations, they may have to fund FRC's fees up-front even though there is a high chance of them ultimately being paid by the BSF.
93. Unless Kewmoor were to voluntarily fund these fees, it is difficult to see how FRC's fees could be funded other than via the service charge, and the only way funds could be collected via that route is if we give dispensation in relation to this item. Even if there is a case for suing the original builders, their professionals, the Council, Kewmoor or anyone else, there is no chance whatsoever that such routes could produce funds to progress the BSF application quickly enough.

94. We therefore grant dispensation from consultation in respect of the proposal to engage an appropriate professional adviser to progress the necessary work on the building contract and the application for funding under the BSF, which FRC said at the hearing would mean instructing them or a similar firm to do the work set out in their budgetary cost plan.
95. Again, we have carefully considered whether any conditions should be imposed. We cannot formulate any conditions that we think would reduce any prejudice likely to be suffered by the Lessees that would not also jeopardise the speedy progress of the BSF application, for which this contract is essential.
96. Our usual warning about this determination not being our approval of the reasonableness of this expenditure applies with greater force here. This determination is not to be taken as confirmation that the cost of the FRC work would ultimately fall to the service charge payers. We make this point because there is a high degree of expectation that the FRC fee would eventually be funded by the government, and any fees paid would therefore be refunded to CHR to be credited to the service charge account. Any departure from this expectation would be likely to result in a reasonableness challenge under section 27A of the Act.

e. The management fees and building supervision fees that are anticipated should a contract for cladding remediation be awarded

97. If the BSF application fails, it may eventually be necessary for the lessees to fund remediation works themselves. If so, they would not just be liable for the proposed fees anticipated under this heading; they would be asked to pay for the building contractor as well. On the basis of the FRC budgetary cost estimate, the total would be likely to be between £3 - 4m.
98. It is far too premature to grant dispensation for a small part of the costs that may be sought from lessees if this eventuality were to come to pass. If it were, the tribunal cannot see any reason at this stage why the lessees should not have the benefit of full statutory consultation in relation to those works.
99. This element of the application is refused.
100. We now need to provide a response to the Lessees' written and oral representations. We should comment that in our view the informal consultation that had taken place thus far does seem to us to be inadequate to develop any confidence in the Lessees that the Applicants are competent, acting transparently, or deserve the trust and confidence of the Lessees. We make this comment because the evidence presented to us was that there had been no attempt to communicate the approach the Applicants were taking to the fire issues, and to provide adequate documentation, apart from one Zoom meeting, which was sparsely attended. We hope the Applicants will substantially improve their

communications with the Lessees. We need to say that we have no power to require this and we offer our comment in the hope that it is helpful, rather than it being enforceable.

101. Our decision to grant dispensation has been finely balanced, but our view has been that the degree of urgency to progress the BSF works and compliance with the Improvement Notice have had to take precedence over the undoubted benefit that a proper consultation would have produced.
102. We simply say that if the Lessees have lost trust and confidence in CHR, there are other remedies available to them on which they should take advice.
103. The list of other points the Lessees made in their written observations raise possibly valid substantive issues which may require to be resolved. But this application is not the right place for consideration of claims for negligence, negligent misstatement, or oppression of a minority, nor consideration of the financial impact on Lessees, poor communication, recoverability of the costs under the lease, or the reasonableness of the service charge. The Lessees who wish to do so will need to pursue those claims elsewhere.

Decision

104. We grant dispensation from the consultation requirements in section 20 of the Act for the following works:
 - a. Works on the fire doors and compartmentation at Cranbrook House required for CHR to comply with the fire safety works required in relation to these items in the Improvement Notice from NCC dated 4 May 2020;
 - b. Preliminary professional costs to lead to a building contract to remediate the cladding system at Cranbrook House under the Building Safety Fund scheme.
105. We refuse dispensation from consultation for all other costs or works referred to in the application.

Appeal

106. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that

party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)