FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UC/LDC/2020/0110 CHI/21/UC/LIS/2020/0016
Property	**:**	South Cliff Tower 16 Bolsover Road Eastbourne, BN20 7JN ("the property")
Applicant	**:**	South Cliff Tower (Eastbourne) Limited
Representative	**:**	Winston Jacob, Counsel instructed by Chandler Harris LLP (Mr Simon Stopher) for South Cliff Tower (Eastbourne) Limited
Respondents	**:**	Barry Southon Angela Southon Andrea Bloom Marian Simpson RW Downs A & M Giddings M & B Crocker T Tamplin Enders M Jenkyns
Representative	**:**	Richard Tamplin Enders for T Tamplin Enders
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Members	**:**	Tribunal Judge H Lederman Tribunal Member B Bourne MRICS MCIArb
Dates of hearings	**:**	23rd March 2022 and 25th April 2022 (by cloud video platform)
Date of Decision	**:**	20th June 2022

Decision and reasons

Decision

The Tribunal decides:

a. To grant the Applicant retrospective dispensation from compliance with the requirements in Schedule 1 to the Services Charges (Consultation Requirements) (England) Regulations 2003 SI 1987 ("the 2003 Regulations") concerning a qualifying long term agreement dated 16 October 2017 ("the QLTA") appointing Faithful & Gould Limited ("FG") as project manager (and any variation or continuation thereof) concerning works to South Cliff Tower for each of the service charge years 2017, 2018, 2019 and 2020, subject to the following conditions: (i) payment of a £12,000.00 (twelve thousand pounds including VAT) to Mr Barry Southon and Mrs Angela Southon within 14 days of the date of this Decision as a contribution towards their legal costs of establishing this breach (ii) that this dispensation shall not take effect if the Applicant's ability to recover or enforce its estimated losses or damage sustained by reason of FG's acts or omissions (such allegations to have reasonable prospects of success according to the Opinion of competent Counsel) is limited or restricted by the provisions of the QLTA.

b. To grant the Applicant unconditional retrospective dispensation from compliance with the requirements in paragraphs 4(5)(c) and 4(11) of part 2 of Schedule 4 to the 2003 Regulations breached by the failure to make available copies of estimates for works to South Cliff Tower tendered by 2 proposed contractors to Reginald Downs and Andrea Bloom on 24th April 2018.

c. To grant the Applicant unconditional retrospective dispensation from compliance with the requirements in paragraph 5 of part 2 Schedule 4 to the 2003 Regulations in respect of the Applicant's failure to have regard to the written observations of Mr Downs of 1st May 2018 prior to appointing CBG Construction Limited ("CBG") as main contractor.

d. To grant the Applicant unconditional retrospective dispensation from compliance with the requirements in paragraph 5 of part 2 Schedule 4 to the 2003 Regulations in respect of the Applicant's failure to make available the estimates referred to in the Statement of Estimates dated 12 April 2019 (the 2019 Statement of Estimates) to Reginald Downs and Andrea Bloom.

e. None of the Applicant's legal, management or other costs of the proceedings to determine whether there was a breach of the consultation requirements in the 2003 Regulations leading to the decision of 5th March 2021 (CHI/21UC/LIS/2020/0016) or of this application (CHI/21UC/LDC/2020/0110) shall be

relevant costs for the purpose of determining service charges payable by any of the Respondents for the purpose of section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

f. The Applicant shall reimburse to Barry and Angela Southon the application and hearing fees paid to the Tribunal leading to the decision of 5th March 2021 (CHI/21UC/LIS/2020/0016) amounting to £300.00 within 14 days of the date of this Decision.

g. The Applicant shall bear the costs of the application and hearing fees paid to the Tribunal leading to this application and Decision (CHI/21UC/LDC/2020/0110). Those fees shall not be relevant costs for the determining service charges payable by any of the Respondents for the purpose of section 20C of the 1985 Act.

h. The Applicant shall not charge or debit to Barry and Angela Southon or any of the Respondents to this application by way of administration charge any legal, management or other costs of the application to determine whether there was a breach of the consultation requirements in the 2003 Regulations leading to the decision of 5th March 2021 (CHI/21UC/LIS/2020/0016) or this application (CHI/21UC/LDC/2020/0110) pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

i. The other lessees of South Cliff Tower shall be at liberty to apply to this Tribunal to ask for orders under section 20C of the 1985 Act and/or under paragraph 5A of Schedule 11 to the 2002 Act.

j. The Tribunal declines to make an order that the Applicant pays the costs of the Respondents Barry and Angela Southon under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169 on the ground that the Applicant has acted unreasonably in the conduct of these proceedings, or in CHI/21UC/LIS/2020/0016.

Questions relating to the reasonableness of the costs incurred in the External refurbishment works , whether the works were carried out to a reasonable standard are not addressed in this Decision. Those issues could be the subject of a separate application to the Tribunal under section 27A of the 1985 Act by any of lessees (past or current) who may have a liability to pay service charges for any of the relevant service charge years.

The Application

1. The Tribunal is required to determine an application under section 20ZA of the 1985 Act asking for dispensation from compliance with the Consultation Requirements in the 2003 Regulations relating to the breaches determined in the Tribunal's decision of 5th March 2021. The Tribunal is also required to determine issues relating to hearing fees, costs payable as service charges or administration charges outstanding from the Tribunal's decision of 5th March 2021 in CHI/21UC/LDC/2020/0016.

2. This application (CHI/21UC/LDC/2020/0110) was issued on 17th December 2020 following directions given on 19th October 2020. In the period from 5th March 2021, sadly one of the main protagonists suffered from serious health issues. The dispensation hearing was postponed to enable all parties to participate.

3. As the Tribunal emphasised in the course of the hearing, this application does not address the entirely separate question whether the External Refurbishment works were carried out to a reasonable standard or whether the services provided by Faithful & Gould ("FG") or others were to a reasonable standard or whether any of the costs of the major works carried out to South Cliff Tower in 2019-2020 were reasonably incurred or sums were payable under sections 19 of the 1985 Act. That issue could yet be the subject of a separate application to the Tribunal under section 27A of the 1985 Act by any of lessees (past or current) who may have liability to pay service charges for any of the relevant service charge years, or the Applicant.

The Parties

4. References to the Applicant in these Reasons should also be taken where the context requires to its status as the landlord named as the Respondent in the decision of 5th March 2021. Each of the Respondents were lessees for one or more of the relevant service charge years 2017, 2018, 2019 and 2020, but only Barry and Angela Southon (referred to for convenience as Mr Southon) were parties to the decision of 5th March 2021. Mr and Mrs Crocker appear to have acquired their lease in South Cliff Tower in August 2019 and may have a potential liability for service charges for those years. Ms T Tamplin-Enders was represented by her father Richard Enders who resided in Flat 1C South Cliff Tower as a licensee. "Skeleton arguments" were received from all parties and from Counsel for the Applicant. Mrs. Marion Simpson was unable to attend either hearing and offered her apologies to the Tribunal. The Tribunal hearings were also attended by Ms Cynthia Baron and Mr H Evans, directors of the Respondent, and by Mary Hawes as observers or members of the public. They did not participate in the hearing or give evidence. Deputy Regional Judge Jonathan Dobson attended the hearing but did not participate in the hearing or any of the decisions made by the Tribunal.

Documentation and procedure

5. Page references in [ ] are to the bundle filed for the hearing on 23rd March 2022 (409 numbered pages) and the supplementary bundle filed for the adjourned hearing on 25th April 2022 (numbered 1-263 but referred to in these reasons as SB1 1-263 respectively).

6. Pursuant to directions given following the hearing on 23rd March 2022, Mrs Lynn Maguire-Wheatley (who will respectfully be referred to as "LMW") prepared a written statement of 5th April 2022. Annexed to that statement were some 256 pages of additional documents, which she referred to – paginated in an unhelpful way as pages 1-263 but referred to in these Reasons as [SB1-263]. LMW attended the hearing remotely on 23rd March 2022 but was not well enough to give evidence. At the outset of the hearing on 25th April 2022 the Tribunal explored the possibility that those documents would not be admitted into evidence, as some of the Respondents had not had the opportunity to consider them, or the implications of those documents. The Respondents consented to those documents being considered by the Tribunal. The Tribunal also took into account those documents in the hearing bundle used for the 5th March 2021 decision which were referred to in that decision or which addressed the issue of dispensation.

7. Each of the Respondents prepared written statements or comments which were included in the hearing bundle. Each of the Respondents also gave oral evidence or were given the opportunity to do so if they attended the hearing. The statements and documents referred to were voluminous and often referred to or were included in emails concerning issues unrelated to the question of dispensation. If the Tribunal does not refer to pages or documents in these Reasons, it should not be assumed that the Tribunal has ignored or left them out of account. Some of the statements (including some of those prepared by or for the Applicant) strayed into issues which were beyond the jurisdiction of the Tribunal at this hearing. By way of example only Mr and Mrs Giddings' statements and documents are at [218-267], Mr Jenkyns' comments are at [280-285], Mr and Mrs Crocker's comments are at [269], and Mr Tamplin-Enders comments are at [270-278].

8. These reasons focus on the key issues. The omission to challenge or make findings about dates, statement or documents put in issue should not be taken to be a tacit acknowledgement of the accuracy or truth of statements made. In particular, many challenges were made to the statements of LMW and Mr Wicks and corporate governance issues upon which the Tribunal has not found it necessary to reach conclusions. That should not prevent another Tribunal or Court from making findings on those issues, if appropriate. In these reasons the terms "tenants" and "lessees" have the same meaning.

Factual background

9. The full facts are found in the Decision of 5th March 2021 (paragraphs 11 – 63). For this purpose much of the summary in the Applicant's Counsel's skeleton argument of 21st March 2022 can be adopted, subject

to amendments which appear below.

10. South Cliff Tower is a block of flats of around 19 stories, on the sea front with 72 (not 68 as Counsel contended) flats according to the witness statement of LMW of 6th April 2022 (paragraph 17). It was constructed in about 1965. Design problems that resulted in serious rain penetration affecting a large number of flats: see the report prepared by Ashburnham Cameron Partnership in 2017 ("the ACP Report") [39-57] at [40-41]).

11. In May 2017, the Applicant appointed new managing agents described as Southdown Surveyors Limited ("SSL"). In October 2017, the Applicant (by its then director, Mr Jordan now deceased) appointed FG as project manager for External Refurbishment works under the QLTA. The Applicant failed to carry out the relevant consultation process in relation to this appointment.

12. In 2018, the Applicant through SSL carried out a consultation process. In 2019, a further consultation process was carried out by SSL. The initial notice gave rise to questions from some lessees, which were responded in writing (LMW's witness statement, paragraph 13 [21]; email, questions and answers [72-87]). LMW contends concerns raised by Mr Jenkyns resulted in a change to the works (see her witness statement paragraph 13 [21-22]). On 18 May 2019, a lessees' meeting took place at which the contractors gave a presentation explaining the works (LMW's statement, paragraph 13 [22]; minutes of meeting [92-97]). (Mr Gidding does not recall such a presentation but there are records of written responses to lessees' questions).

The legal principles to be applied to the Applicant's request for dispensation

13. Section 20 of 1985 Act provides that relevant contributions of tenants by way of service charge to any qualifying works or QLTA are limited to a specified sum (£250 for qualifying works, or £100 in any accounting period for a QLTA) unless the Consultation Requirements have either been complied with or dispensed with in relation to the works or the QLTA respectively.

14. The Tribunal may make a determination to dispense with the consultation requirements "if satisfied that it is reasonable to dispense with the requirements" under section 20ZA(1) of the 1985 Act. In *Daejan Investments v Benson* [2013] 1 WLR 854, the Supreme Court set out principles upon which the Tribunal should make decisions about dispensation.

15. The Applicant's Counsel highlighted the following propositions from *Daejan* by reference to paragraph numbers in that decision:

    a. The issue which the Tribunal should focus on is the extent, if any, to which lessees were prejudiced in either respect by the failure of the landlord to comply with the requirements (paragraph 44). This will normally be the sole question for the Tribunal (paragraph 50).

b. The factual burden is on lessees to identify some relevant prejudice that they would or might have suffered (paragraph. 67).

c. The following are irrelevant considerations:

i. whether the failure to consult was serious or minor, save in relation to any prejudice it causes (paragraph 47);

ii. the financial consequences to the landlord of not granting dispensation; although such consequences are often inversely reflective of the relevant prejudice to the tenants, which is centrally important (paragraph 51); and

iii. the nature of the landlord (paragraph 51).

d. The consultation requirements in sections 20-20ZA of the 1985 Act are not concerned with public law issues or public duties; there is no justification for treating consultation or transparency as ends in themselves (paragraph 52).

e. The Tribunal has power to grant a dispensation on such terms as it thinks fit, provided that any such terms are appropriate in their nature and their effect (paragraph 54).

16. The Court of Appeal in *Aster Communities v Chapman* [2021] 4 W.L.R. 74 confirmed that if all lessees in a development suffer prejudice because a defect in the consultation process means that one did not persuade the landlord to limit the scope or cost of works in some respect, the Tribunal can make dispensation conditional on every lessee being compensated. The thinking is that the reduction in the scope or cost of works would have benefitted each lessee. If dispensation was to be granted against them all, the totality of the prejudice should be addressed.

17. The Upper Tribunal in *Northumberland & Durham Property Trust Limited v Marshall* [2022] UKUT 92 noted that this Tribunal must identify the steps which the landlord has taken and those which it has omitted and for which it required dispensation. It must enquire into the consequence of those steps not having been complied with.

18. The *Marshall* decision highlighted a passage from the speech of Lord Neuberger in *Daejan* who explained at paragraphs [65, 67 and 68] that it was necessary to take account only of the sort of prejudice which section 20 of the 1985 Act was intended to protect against:

> "... the only disadvantage of which the [lessees] could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted"

19. Lord Neuberger also explained that "the landlord can scarcely complain if the [Tribunal] views the tenants' arguments sympathetically." He continued, at paragraph [68] of *Daejan*:

> "The [Tribunal] should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the [Tribunal] is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the [Tribunal] is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the [Tribunal] should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that [Tribunal] should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown *a credible case for prejudice*, the [Tribunal] should look to the landlord to rebut it."
>
> (emphasis and insertions added)

20. The Applicant's Counsel highlighted the following passages from the *Marshall* decision which he said were relevant to the evidence and submissions of the Respondents following the hearing on 23rd March 2022:

> "104. …. this issue does not go to the scope of the work but to their quality, and whether they have been carried out to a reasonable standard. Proper consultation with the appellant [the Lessee], and the opportunity for him to propose an additional contractor, would not have avoided the risk of poor workmanship in the installation of the new boiler (if that is what it is). That is highly relevant when considering on what terms dispensation ought to be granted. As Lord Neuberger explained in Daejan at [65] "the only disadvantage of which they [the tenants] could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted". I do not intend to suggest that poor workmanship is irrelevant to dispensation, but there must be some basis on which it can be suggested that proper consultation might have avoided it. If, for example, proper consultation would have elicited information that the landlord's proposed contractor was not properly qualified or had a record of providing poor quality work I can see that that might justify a refusal of dispensation, but the suggested performance issue in this case is quite

different”

and

"106. Proper consultation would not have resulted in a different contractor being appointed, or different work being done; there is therefore no need to determine at this stage whether the suggested deficiencies in the quality of the work were real or illusory. If the appellant considers that there is substance in the complaint that poor quality work was carried out by [the contactor chosen] which ought to result in a reduction in the cost charged to leaseholders, that point can be made in a separate application under section 27A, 1985 Act, challenging the amount of the service charge”

The Applicant’s Counsel argued those passages should be read as showing that the Respondents’ complaints about the quality of the work, the methodology of contracting, scope of works and choice of contractor were not relevant to the issue of whether or not a credible case of prejudice was caused by the breaches of the Consultation Requirements found to have occurred in the Tribunal’s decision of 5th March 2021.

The rival contentions

The Faithful & Gould QLTA

21. The Tribunal found that the Applicant entered into a consultancy agreement with FG on 16th October 2017 a copy of which was in the hearing bundle for the March 2021 decision: see paragraph 14 of its March 2021 decision.

22. Mr Southon’s statement of case (used in the January 2021 hearing when he had the benefit of legal advice), asserted FG was appointed without any consultation. He said “The role of Project Manager is fundamentally important in shaping the outcome of any major works. The lessees were, however, deprived of the opportunity to consider FG’s anticipated costs and performance history – and, importantly, to compare those factors against competitor firms.” (paragraph 12).

FG’s role and fees

23. The scope and extent of services which the agreement with FG covered was highlighted in part by Mr Downs in his oral and written evidence at the dispensation hearings and by the Tribunal in paragraph 14 of its 5th March 2021 Decision. They are found in Schedule 1 to the FG Agreement at pages 157-165 of the Bundle used at the March 2021 hearing. The services to be provided included Employers Agent, Lead Consultant for pre-contract and coordination phase and post contract phase, Quantity Surveyor, Principal Designer preconstruction stage and contract stage, client CDM advisor, structural engineer, including review of client brief. Section 20 notices and Client Liaison were excluded from FG’s brief.

24. The projected level of FG's fees was £166,200 exclusive of VAT (see clause 6.2. None of this was challenged by Mr Jacob.

Terms of the FG consultancy agreement

25. One of the features of the consultancy agreement with FG which Mr Downs complained of was the contractual limit of its liability in clause 9 of the agreement. Although at times he described this as the level of indemnity insurance, it is clear limitation of liability was the substance of his complaint. The relevant parts of clause 9 of the FG agreement provided:

> "9.2. [FG] shall not be liable to the Client under or in connection with this Agreement for any:
>
> (a) loss of income, loss of actual or anticipated profits, loss of business, loss of contracts, loss of goodwill or reputation, loss of anticipated savings, loss of, damage to or corruption of data, or for any indirect or consequential loss or damage of any kind, in each case howsoever arising, whether such loss or damage was foreseeable or in the contemplation of the Parties and whether arising in or for breach of contract, tort (including negligence), breach of statutory duty, indemnity or otherwise;
>
> (b) use of the Pre-Existing Materials, Deliverables or the Services for any purpose other than that for which they were prepared or provided in relation to the Project;
>
> (c) *delay or failure by [FG] to perform or comply with any obligation under or term of this Agreement to the extent that such delay or failure is attributable to any act or omission of or by the Client or any of its employees, agents, contractors or other consultants or suppliers (including without limitation any breach by the Client of any obligation under or term of this Agreement)*; or
>
> (d) any liability howsoever arising in relation to Asbestos Matters.
>
> 9.3 *[FG's] maximum aggregate liability to the Client under or in connection with this Agreement, whether arising in or for breach of contract, tort (including negligence), breach of statutory duty, indemnity or otherwise, shall in no circumstances exceed the Fees payable hereunder*.
>
> 9.4. Without prejudice to Clause 9.2 and Clause 9.3, [FG's] *liability to the Client shall be limited to such sum as it would be fair and equitable to pay having regard to the extent of the Consultant's responsibility for the Client's loss or damage and on the assumption that there are no joint insurance or co-insurance arrangements between the Client and any third party who is responsible to any extent for that loss or damage*."

9.5 Nothing in this Agreement shall exclude or in any way limit [FG]'s liability for:

(a) fraud;

(b) death or personal injury caused by its negligence;"

(emphasis added)

Projected cost of the refurbishment work at 2017

26. None of the Respondents had any significant legal experience or legal expertise, but it is clear that they were concerned about the provisions which sought to limit FG's potential liability or responsibility for what has turned out to be a ruinously expensive refurbishment exercise which (as Mr Wicks noted in his statement) threatens the solvency of the Respondent landlord. This is not mere hindsight. Mr Southon's unchallenged evidence was that on 5th December 2017 SSL sent an estimated service charge budget to lessees which included an anticipated contribution of £2,016,000 (Two million and sixteen thousand pounds) to reserve fund by way of provision for the External Refurbishment Project. The potential value of the External Refurbishment project had previously been costed at between £2,865,300 and £3,195,300 in the Ashburnham Cameron John D Clarke report (June 2017) at page [54].

27. In other words, the Applicant had agreed a contractual limit of liability to an upper limit of £166,200.00 (possibly with the addition of VAT) if the agreement was so interpreted, against a potential total work cost well in excess of £3 million (three million pounds).

The process of appointment of FG - concerns

28. The contemporaneous evidence of communications by Mr Giddings, makes it clear that he was concerned about the appointment of FG "without competition" and that FG had been appointed without a "Project Brief" agreed by the Board of the Applicant: see his email of 31st August 2017 at [245]. Mr Giddings prepared further confidential statements to the Board on 14th November 2017 which indicated that the Board still had not been provided with a copy of the FG agreement: see [259] and [261]. This mirrors the evidence of Mr Downs who complained that even to this day, the Applicant had not produced any evidence of a client brief to FG (or others) other than the Ashburnham Cameron John D Clarke report (June 2017) at pages [39-57] which presented different options or Cost Plans.

29. Mr Wicks responded to the suggestion that the failure to consult about the appointment of FG caused the Respondents prejudice in paragraph 4 of his statement of 18 November 2020 at [12] as follows:.

> "The scope of the works clearly required a project manager and at no stage has their work been the subject

> of criticism, or that the fees paid (£166,200.00, amounting to approximately 13% of the total contract price) are unreasonable for such a large project which was completed on time, Put simply, the Board then, (and indeed now), consists of unpaid, retired individuals, who were in no position to manage such a large project. The works themselves were to cost over £2.4m. The Board had neither the time, skills nor inclination to manage such a project. Further, the contract was [sic] required the contractor to "design and build" the works. It was therefore vital to have a professional organisation to ensure that the design work and the construction work itself were performed to a good, cost effective standard. As I set out below, the works have proven to be extremely cost effective in that they have very substantially enhanced the value of each of our properties."

30. As Mr Wicks must have appreciated at the date of preparing his statement, the standard, cost effectiveness and scope of the works and their design have been in issue and have been the subject of detailed criticism by the Respondents in various respects. Many flats in the South Cliff Tower have been left with extensive water penetration, draughts, excessive wind noise and other defects some of which are listed at pages SB 215-229 (item 5 of the attachments to LMW's witness statement of 5th April 2022).

FG's role and the scope of the refurbishment works

31. LMW describes these (and other) defects as "snagging" items which are the subject of a retention clause in paragraph 12 of her statement of 5th April 2022. She expresses the view that it was "normal" to expect "snagging." LMW further reports that a "handful" of resident were "still experiencing water ingress" and noted that FG and CBG (the main contractor) have expressed the view that "the defects noted in the [Stuart Radley building surveyor report] were never part of their original project": see paragraph 13 of her statement of 5th April 2022.

32. LMW also asserts that the purpose of the external refurbishment works as described in the notice of intention relating to the qualifying works were not stated to make the building entirely watertight: paragraph 13 of her statement of 5th April 2022. She was referred to item 6.3 Minutes of the Lessee Meeting held on 18th May 2019 at pages [92-98] (produced as part of her evidence) where a part of an exchange between a lessee and Mr Coe of CBF the main contractor it was agreed that a purpose of the works was to make the building watertight. (The accuracy and completeness of those Minutes was not agreed by the Respondents and was challenged in some respects by Mr Giddings). However LMW attended that meeting in the course of her professional duties and vouchsafed those Minutes.

33. It is possible that LMW was attempting to draw a distinction between attempts to make the building watertight and making the building watertight.

34. There are various other references to attempts to make the building watertight in written answers from CBG responding to lessees' questions. At page 96 in answer to a question from Mr Jenkyns, CBG or FG commented "We are going to improve the watertightness of the balcony and entire south elevation) through

- Providing a new waterproof layer membrane to the balcony floors
- Installation of a new standardised upstand to the doors through the south elevation
- Repairing all identified concrete defects and redecorating the south elevation in anti-carbonisation paint….

We are therefore concentrating on making the building more watertight instead of increasing drainage provision"

35. The Tribunal is unable to reach a finding about the purpose of the work in the absence of the relevant specification or tenders. It is however clear from the Second Stage tender report prepared by FG dated 30th January 2019 at [405] that the risk of water ingress and concerns about the detail were key considerations at that stage. The Tribunal found LMW's approach to this part of her evidence very difficult to follow. In the absence of the Applicant producing any of the specifications tenders or other contemporary documents other that the JCT Design and Build contract, the Tribunal is unable to accept LMW's evidence as a complete or accurate description of the scope or purpose of the works or her communication of the purpose to lessees.

36. At its very lowest, the Tribunal is satisfied there are genuine concerns about the design, scope, standard, cost and implementation of the External Refurbishment works and some of those concerns were expressed by Mr Giddings. The causes of the defects and the extent to which they can be attributed to FG, CBG and/or the Applicant have yet to be finalised or determined. The precise scope of the services rendered by FG remain to be clarified.

37. FG's role in design of the pre-contract work tender, specification monitoring and commenting upon the tenders, scope of works and cost was pivotal: see for example the Second Stage Tender Report of January 2019 which is found at pages [398-409]. The Applicant was a non-professional organisation commissioning the design and execution of a complex project which would have stretched even an experienced professional. FG's role continued after the project reached practical completion: see supplementary bundle and their comments on the Stuart Radley report of 2022. FG's current role includes investigating multiple outstanding defects according to the evidence of LMW.

QLTA Consultation Requirements which should have been followed

38. The Consultation Requirements in the 2003 Regulations concerning a QLTA are set out in regulation 2(1) and Schedule 1 to those Regulations. Regulation 2(1) defines "relevant matters" which must be the subject to consultation namely the goods or services to be provided or works carried out under the QLTA. There is an opportunity for each lessee to nominate a person from whom alternative estimate should be sought for the "relevant matters". There are other detailed provisions in the remainder of that Schedule including detailed consultation provisions relating to the landlord's proposal.

39. Mr Downs gave unchallenged evidence that he was a retired quantity surveyor and former member of the Chartered Institute of Builders. He expressed concern that the precontract service agreement with CBG and permitting CBG to enter into design and build contract were serious strategic errors and about the scope of works. His concerns expressed in very strong terms were shared by all of the Respondents who gave evidence. It is clear from his enquiries, his attempts to inspect and the written evidence of his questioning in 2019 that he took a very serious interest in the scope of work and their conduct in 2018 and 2019. He expressed concern that FG had been allowed to contract upon terms that purported to enable them to limit their liability to the amount of their fees. He suggested better terms might have been available had different estimates and contractors been nominated for consideration.

40. **The FG Agreement -A credible case of prejudice**?

The Tribunal finds it very difficult to understand how an upper limit of contractual liability for potential error on a complex project of this kind of £166,200 plus VAT (with a possible deduction from that sum on the basis of "just and equitable" FG's share of responsibility with others) could be regarded as suitable against a possible total cost of works which at that stage were estimated to cost in excess of £3 million.

Other terms of the FG agreement mirror those which are often found in "pro-supplier" type agreements of this kind, including a restricted ability for the Applicant to terminate, despite the duration of the contract.

41. LMW's response to this was threefold:

A. the lessees are protected by the insurance, contract and indemnity provisions in the JCT design and build contact produced as an annex to the latest statement from LMW (including collateral warranty);

B. the Applicant is likely to have claims against CBG and sub contractors which will be a significant part of any loss (submissions of Applicant's Counsel);

C. The Board of the Applicant would have needed the assistance of construction professionals of the kind such as FG to initiate and manage a project of this kind: (see the witness statements of J Wicks);

42. The context to this issue is the Applicant's decision to minimise the information and documents available to the lessees, its failure to produce tenders, specifications or other documents relating to the works or documents concerning the process of appointment of FG within these proceedings. The Respondents' concerns about their apparent inability to formulate a case of prejudice because of the absence of access to relevant documents were articulated very clearly by Mr Downs, Mrs Bloom and Mr Giddings at the hearing on 23rd March 2022 at which the Applicant's legal advisers and directors were in attendance by video platform. The Tribunal infers the Applicant took a decision not to provide the Respondents with further information or documents.

Conclusion on prejudice - QLTA

43. The Tribunal finds the Respondents have established a credible case of factual prejudice in respect of the appointment of FG in October 2017 for 3 reasons:

A. the contractual terms upon which FG were appointed were notably favourable to FG and not to the Applicant, particularly in respect of limitation of liability provisions and the qualified duty ("reasonable efforts") to maintain indemnity insurance upon "commercially reasonable terms" (clause 9.6); the Tribunal is satisfied that more favourable terms could have been obtained from FG had compliant consultation taken place with input from the Respondents and others;

B. The Applicant has failed to adduce any satisfactory evidence of alternative quotations for any part of the extensive range of different professional services offered or provided by FG; the Tribunal is satisfied that a wider range of competitive quotations, services and terms could have been obtained for each of the components of the services offered by FG, had a compliant consultation taken place;

C. The Applicant has failed to adduce evidence that legal or professional advice was obtained upon the terms of FG's appointment; the Tribunal is satisfied that more favourable terms could have been negotiated from FG or if not from other construction professionals for the same or materially identical services, had compliant consultation taken place;

The Tribunal does not require the alternative quotations or estimates to support its view that there was a credible case of factual prejudice because of the nature of this agreement and the circumstances surrounding FG's appointment. The FG agreement was a "pro-supplier" document. If alternatives were required, comparison with the JCT design and build contract and the limitation of liability provision in that

contract show that other construction professionals were willing to contract upon more balanced limitation of liability provisions.

44. The Tribunal does not accept Mr Downs' argument that the exclusion from FG's terms of appointment of the requirement to carry out consultation pursuant to section 20 of the 1985 Act was the kind of prejudice, which the breaches of the consultation requirements in the 5th March 2021 decision could be expected to produce. FG were construction professionals and at initial stages were providing advisory and project manager services. Service of notices upon lessees is a function usually expected of managing agents, landlords or their advisers.

45. The Applicant's Counsel argued that if prejudice was established it was balanced or outweighed by the existence of the Applicant's ability to make claims against CBG and/or the nominated sub-contractor for complaints made about the standard of the External Refurbishment works. This response does not address or meet the situation where CBG and/or the sub-contractor argue that the issues complained of related to the scope of works or parts of design or instructions for which they were not responsible. One of the roles undertaken by FG was the employer's agent under the JCT contract. FG also gave advice about the scope of works and contract structure/ configuration: see for example the FG excerpted presentation at [195-201]. There are other references in the hearing bundles to FG giving advice about these issues and other pre-contract issues which the Tribunal is unable to reach findings about, on the limited documentation available. At this stage it is a real possibility that FG may have a potential liability or responsibility for defects or other issues which is entirely unrelated to the role of CBG and the subcontractor.

46. The Applicant's Counsel did not argue that the circumstances in which FG were appointed would have made no or little difference to the terms of the FG agreement in terms of prejudice. Nor did he argue that the directors or former directors of the Applicant might have a liability to the Applicant for defects, a line of argument pursued by a number of the Respondents.

47. The Tribunal has carefully considered the factual background to FG's appointment. Compliance with consultation requirements relating to the QLTA would have left the Applicant, SSL, LMW or its advisers to require the terms of the October 2017 appointment to be renegotiated, the appointment terminated or put out to tender. By December 2017 SSL, Mayo Wynn Baxter solicitors and others were considering consultation and service charge demands and that process would have been achieved without commercial difficulty, given the professional conduct obligations of a number of the members of FG and the potential reputational damage to FG of being seen to insist upon contractual obligations which (as they would have been advised at the stage of renegotiation) breached the consultation requirements. Individual members of FG were members of Royal Institute of Chartered Surveyors and RIBA. Their professional obligations to act fairly and properly to clients would have been the

backdrop to such negotiations.

48. Mr Wicks asserted that Peter Jordan "was responsible for inviting tenders for that role including incidentally a sister company of Southdown Estates Limited (who declined that role)" see paragraph 3 of his statement of 18th November 2020. The Tribunal cannot find that statement is a reliable indication that an acceptable tender process took place particularly as it conflicts with the contemporaneous evidence of Mr Giddings in his emails of August 2017. The Tribunal was impressed with the integrity, reliability and accuracy of Mr Giddings' evidence. He was prepared to make concessions where they did not support his case. He recognised the limitations of his expertise and expressed his views moderately and with great patience, given the serious misconduct which he alleged. The Tribunal has no difficulty in preferring his evidence to that of LMW and Mr Wicks where there is any inconsistency. LMW in particular did not appear to have reviewed her professional records (or those of SSL) to provide the Tribunal with accurate information as to how and when her company became aware of the appointment and involvement of FG, as the Tribunal explains below.

49. Mr Wicks' evidence about the appointment of FG can be discounted in this context in view of his unwillingness to make himself available to give evidence at the dispensation hearings. (He was present and in the same room as LMW when she gave evidence at the video hearing in January 2021). Since he made that statement he has disposed of his interest in his flat at South Cliff Tower and is no longer a director of the Applicant. Complaint of lack of transparency and misconduct has been made in this case against the Board of Directors of the Applicant in which Mr Wicks played a leading role. No explanation has been given for his absence or unwillingness to give evidence at the dispensation hearings. This means that the Tribunal must exercise considerable caution before placing any weight upon any parts of his evidence which are in issue, particularly as the Applicant has not produced any of its records relating to the circumstances of the appointment of FG.

50. LMW's evidence about the appointment of FG is found in paragraph 4 of her statement of 20 November 2020 at [17]. In summary, she says that Southdown *Estates* Limited were not involved in the appointment of FG at all. She says FG's appointment was "managed" by Peter Jordan who passed away in November 2018 (emphasis added). In her oral evidence she said that Southdown *Estates* Limited were the contracting party with the Applicant at a later unspecified stage despite the clear reference to Southdown Surveyors Limited in the agency agreement at page [24]. Her name and signature featured at page 27 on page 4 of that agreement on behalf of Southdown Surveyors Limited in May 2017. When questioned about this by some of the Respondents she suggested that Southdown *Surveyors* Limited had decided to divide the work it carried out as surveyors from its managing agent role. She suggested Southdown Estates Limited was the managing agent and this was part of what she termed a "rebranding exercise." The Tribunal found this explanation difficult to follow in the absence of any evidence of variation or novation

of the agency contract. It formed the view that LMW had an incomplete understanding of basic principles of contract law in this respect.

51. Mr Wicks' statement that Peter Jordan was responsible for appointing FG requires careful scrutiny. The consultancy agreement for FG was between the Applicant and FG, although Mr Jordan was a named contact person within that agreement. The Board of the Applicant could not escape responsibility for FG's appointment, although the terms of the FG agreement appear to have been improperly withheld from Board members such as Mr Giddings. It is common ground that Southdown Surveyors Limited was appointed as managing agent on 1st May 2017 as the copy agency agreement at pages [24-36] confirms.

52. The Tribunal is unable to accept the inference which LMW seeks to draw in paragraph 4 of her statement of 20th November 2022 at [17] that SSL (or whichever corporate entity LMW or her fellow directors were trading through at the relevant time) had no input into the role or appointment of FG. Whilst the contract may have been initiated by Peter Jordan, SSL were managing agents who had been engaged among other things to comply with section 20 requirements. SSL and the Board had been considering invoices for major works in late 2017 in consultation with solicitors then advising the Applicant Mayo Wynne Baxter: see the letter of 6th December 2017 at annex 3 to the statement of 5th April 2022. LMW accepts that she "must have become aware" of FG's appointment at some stage. She and SSL were also aware of the need to restart the consultation process when the scope of the major works changed in late 2018/early 2019. Whether or not she was "aware" of the precise date of appointment, had the QLTA consultation requirements been complied with, SSL and the Applicant would have had to take steps to (among other things) circulate estimates and seek nominations for alternative quotations which would have resulted in the prejudice identified above being eliminated or significantly minimised.

53. The Tribunal does not reach its findings on this issue by reference to the burden of proof but takes the evidence available as a whole.

Conditions for grant of dispensation from compliance with QLTA consultation requirements

54. The causes of the defects, "snagging" items, delays and other outstanding issues concerning the External Refurbishment Works are being investigated. The Tribunal has not been provided with information as to the steps the Applicant is taking to investigate whether recourse is available from any of the entities or individuals who participated in the design oversight, execution or implementation of the works or the extent to which recovery is likely to be possible. Mr Downs and other Respondents have very properly mentioned the possibility of claims against former directors, against Southdown Surveyors Limited (or whichever entity LMW and her fellow directors say they were trading through from time to time) as well as the various construction and legal professionals involved from time to time.

55. Whether or not the Applicant's current Board of Directors, or a

manager appointed by the Tribunal pursue these claims, there is a real possibility that claims may at some stage be made against FG (whether in mediation or otherwise), in view of their extensive role in the design tender, implementation and execution of these works. At that stage the amount of any prejudice to the Applicant will become clear. The extent to which the unfavourable terms of FG's appointment particularly as to limitation of liability or indemnity insurance have caused the Applicant prejudice will be quantifiable.

56. Mr and Mrs Southon incurred extensive legal costs in investigating and pursuing the Consultation Requirements proceedings and the dispensation proceedings in 2020-2021 which they now estimate to be in the region of £125,000. A schedule of their legal costs incurred to 18th September 2020 was produced at pages 240-242 of the Bundle used at the hearing leading to the decision on 5th March 2021. By the date of the hearing in January 2021 their estimated legal costs were £26,000. However, they chose to use solicitors whose charge out rates could not be regarded as appropriate or proportionate to the sums in issue. Those solicitors in turn used Counsel who appears to have had a significant role in the work undertaken. There are many other solicitors who would have had the necessary expertise at lower charge out rates and might not have used Counsel to the same extent. It is also apparent that much of the work done by those solicitors related to other issues apart from the FG issue. Taking all those matters into account, the fact that Mr and Mrs Southon have only succeeded on one of number of issues (and Mr Jacob's submissions that the £125,000 was a disproportionate sum to allocate to these proceedings) an appropriate sum for payment to him as a condition of dispensation is £12,000 including VAT.

Breach no 2: The Applicant's failure to make available copies of estimates for works to South Cliff Tower tendered by 2 proposed contractors to Reginald Downs and Andrea Bloom as lessees on 24th April 2018

Breach No 3: The Applicant's failure to have regard to the written observations of Mr Downs of 1st May 2018 prior to appointing CBG Construction Limited as main contractor was in breach of paragraph 5 of part 2 Schedule 4 to the 2003 Regulations as far as it affected Mr Downs

57. The evidence available shows that Mr Downs and Mrs Bloom were able to inspect a copy of estimates in report marked "*draft* tender report" at a later stage. Unfortunately that draft tender report was not in the hearing bundles. It is not entirely clear, but it seems likely that draft tender report contained most of the key information which the statement of estimates would have contained. Mr Downs provided detailed comments upon the draft tender documents in his email to LMW of 1st May 2018 at SB [245-248] (annex 10). His questions and comments were the subject of a detailed response (in red) by email of 21st May 2018 from LMW who had obtained comments from FG. This is found at SB [249-251]. Peter Jordan, at that time a director of the Applicant and a qualified engineer, presumably retired, was also copied into that email.

58. The gist of much of the evidence of Mr Downs and Mrs Bloom was that the selection of CBG and the use of a pre-contract services agreement, a design and build contract gave rise to the defective workmanship, poor design, shortfall in funding, improper narrowing of the scope of the works and/or misuse of reserve funds. A similar point is made in paragraph 40.4 of Mr Southon's witness statement of 3rd December 2020 at [342] where he says that Mr Downs drew attention to the appointment of a main contractor for the first design phase of the works, the absence of provision for access systems, power or water in the CBG tender meant that the cost of the works would overrun the estimates and the budget. The Tribunal has been unable to assess the accuracy of those concerns in these dispensation proceedings and has not had the benefit of expert evidence which might have reconstructed the sequence of events leading to the cost overrun in the external refurbishment. Whether appointment of main contractor to the design phase was a key cause of later design problems also remains open to debate. This is not to cast doubt on Mr Downs' helpful comments. The Tribunal does not at this stage have the relevant documents or information to reach a finding on this issue.

59. At this stage, the Tribunal has not been shown evidence that the concerns of Mr Downs and Mrs Bloom in May 2018 prompted (or should have prompted) the Applicant or FG to take a different course or provide different advice, or that it was the failure to have regard to them which was a material factor in the problems which arose later.

60. In addition, the Respondents have been unable to demonstrate that the outstanding defects or funding problems were prejudice of the kind which might have been avoided or minimised if Mr Downs or Mrs Bloom had been given access to the statement of estimates on 24th April 2018. No other estimates or similar evidence has been made available.

61. Mr Southon makes this point in a similar way in paragraph 40.5 of his statement of December 2020 where he says that lessees been provided with copies of the two tenders themselves (from CBG and Ellis), they would have been able to comment on the terms which were to be included in any contracts (such as warranties or penalties for delay), on proposed timescales, and on quality control. The Tribunal has not seen the tenders themselves but has had access to the JCT Design and Build contract entered into with CBG and the collateral warranty with the nominated sub-contractor in 2019 at SB [60-176]. With some minor amendments and variations, these are standard form contracts of the kind that were often used in major works of this kind. Making all allowances for the fact that Mr Southon no longer has the benefit of legal representation, the argument that Mr Downs' comments if taken into account would have led to different penalties or warranties, is difficult to accept in the context of these standard form contracts. The Tribunal has not seen the project manager's recommendations but suspects that many construction professionals would have recommended some form of standard form JCT contract, even if it was not a design and build.

62. The other point raised by Mr Southon in paragraph 40.4 of his statement

of December 2020 is that Mr Downs' comments about "Design & Build" model adopted by FG, resulting in the appointment of a main contractor in respect of the first "Design" phase who was then in pole position to secure the second "Build" phase of the contract should have been listened to, was the kind of prejudice which led to the cost overrun. Looking at that argument sympathetically, does not overcome the large evidential gap between showing that if a traditional form of contract had been adopted (separate design team giving the opportunity to ask a wider range of contractors), the risk of cost overrun and defects would have minimised. All the more so as the 2018 consultation exercise was largely superseded by the 2019 consultation exercise.

63. Mr Downs pointed to the FG presentation document at [195-201] to support his contention that the two stage tender process adopted would typically give rise to a 10-15% premium compared to a single stage tender process which he suggested would have been adopted if his concerns had been taken into account: see [201]. As Mr Jacob mentioned, there were other advantages to the two stage process mentioned in that presentation which the Board of the Applicant at that stage could legitimately have thought outweighed the premium. As the thought processes of the Applicant's Board have not been in evidence, it is difficult for the Tribunal to speculate whether, assuming Mr Downs' views were taken into account, they would have made a difference to the Board's ultimate decision.

64. The evidence available to the Tribunal does not enable a finding to be made that the Applicant's failure to take into account Mr Downs' comments in his email of 1st May 2018 gave rise to the defective works or poor decisions about the method of work. Mr Downs and Mrs Bloom contend that the selection of CBG was one of the causes of the problems as well as the design and build contract. The Tribunal cannot reach findings about this. Even if the premise to their argument is accepted, the Respondents have not shown that if their recommendations had been followed, there was a significant chance of the refurbishment project being completed without the outstanding defects, cost overrun or some of them. The evidence necessary to reach that conclusion is not available to the Tribunal. Cost overruns, inaccurate budgets and defective works in the context of cladding repairs are sadly all too common and may have multiple causes.

65. The Respondents have been unable to demonstrate that the outstanding defects are the result of any prejudice caused by these failures to comply with the Consultation Regulations.

Breach 4 failure to comply with the requirement to make available the estimates referred to in the Statement of Estimates dated 12 April 2019 (the 2019 Statement of Estimates) to Reginald Downs and Andrea Bloom as lessees

66. The Notice of intention for the revised scope of works was dated 12th February 2019: see SB [243-244].

67. Mr Downs helpfully recorded the sequence of events in his comments upon LMW's statement of 11 11 2020. The Applicant and/or Southdown Surveyors refused to allow him and Mrs Bloom sight of the statement of estimates by the deadline of 9th May 2019 stipulated in the stage 2 notice. Eventually on 14th June 2019 he and Mrs Bloom received copies of documents some of which had previously been made available for inspection to other lessees: see [166]. This followed a formal complaint by him to Southdown Surveyors Limited.

68. It transpired that CBG started work on site on 1st April 2019 before the section 20 notice had been served: see [166]. This was also Mr Southon's evidence in his statement of 3rd December 2020 at [344]. None of this was challenged by the Applicant's Counsel, doubtless because it was not the issue which the Tribunal had to decide.

69. Mr Giddings was also in position whereby he did not receive the statement of estimates and challenged the accuracy of the minutes of 18th May 2019 at paragraph 5.7 [92] which said the copies were posted to him.

70. LMW's evidence was that there were multiple questions raised by lessees including Mr Downs, Mrs Bloom, Mr Jenkyns, Marian Simpson and Mr Southon which were put to CBG and FG to answer and comment. The response to those questions are produced at LMW 4 [72-88]. The electronic copy of that part of the bundle shows that the comments/response to the questions were in red.

71. Mr Southon's first witness statement (7th August 2020) said the following about this aspect of the 2019 consultation process in paragraphs 28-29 and 31.

> "…, the point of using a PCSA [precontract service agreement] in a two-stage "design and build" tender process was to secure CBG's involvement (effectively in a consultancy role) at the design stage. Indeed, as the 2019 Notice itself stated in terms, "it is the responsibility of the main contractor [under a design and build contract] to design the scope of works". The Consultation Requirements are, however, deprived of any real bite if the Project Manager and Main Contractor can then proceed directly to the build stage without first referring that "scope of works" to the tenants who will be footing the bill. Again, the 2019 Notice appeared to recognise this position, because it stated that "more information on [the scope of works] and the full specification will be available to view at a later stage in the consultation in line with Section 20 of the Landlord and Tenant Act (1985) as amended". Here, however, we were being presented with a fait accompli.
>
> 29. …..[Southdown] continued to pay surreal lip-service to the Consultation Requirements: on 12 April 2019, a briefing from [the Applicant's] Chairman confirmed that the Project was underway, whilst Southdown also served tenants with a s.20 Statement of Estimates ("the 2019 Statement") and invited

observations on those estimates [pp.60-62]."

and at paragraph 31

> "[the Applicant] "failed to comply with the Consultation Requirements in respect of the Project. The Project Manager was appointed without any consultation whatsoever; the Main Contractor was appointed on a PCSA (for, effectively, both phases of a "design and build" contract) without the lessees being able to inspect estimates and without [the Applicant] paying any obvious regard to the written observations submitted by the tenants; and the scope of construction works was settled on by [the Applicant] without tenants being able to inspect the proposed specification or the various estimates arising out of that specification provided by the Main Contractor. At no stage, therefore, was it realistically possible for the lessees (during the course of the truncated consultation exercises) to determine whether the proposed works were necessary and appropriate."

72. Mr Southon contends that the failure to consult properly in 2019 "has potentially led to the undertaking of works which were unnecessary …./or which fell below the requisite standard" in paragraph 40.10 of his statement of 3rd December 2020 at [344]. He has unfortunately been unable to provide a more detailed analysis to support this proposition by reference to alternative specifications, estimates or expert evidence. The context to this is the assertion by LMW that some of the works such as changes to boilers and lightening protection were unknown before works started.

73. Mr Downs, Mrs Bloom and Mr Giddings assert that to this day they still have not received all the estimates, tenders and specifications. In the course of the dispensation hearings they indicated this had hampered their ability to be specific about prejudice caused by the breaches of the consultation requirements in April 2019.

74. Mr Downs in particular contended that he would have persuaded the Board of Directors to adopt a different course, and cheaper single traditional single stage contract which would have been cheaper for all lessees.

75. The Tribunal has anxiously considered whether a credible case of factual prejudice caused by the failure to provide the statement of estimates to Mr Downs and Mrs Bloom in April 2019 has been made out. The Tribunal concurs with the conclusion expressed by Mr Giddings in his oral evidence and repeated in his written evidence (at [241]) that some members of the Applicant's Board were acting in a dysfunctional way in relation to sharing information and documents, and decision making in 2019. Although there were extensive attempts

to answer lessees' questions in March and April 2019 by reference to FG and CBG which are set out at pages [76-88] (colour version in the electronic bundle use in the March 2021 hearing at pages 107-115), the Applicant's Board had reached the decision to appoint CBG as main contractor to carry out the second stage tender by the date of the April 2019 statement of estimates.

76. The Tribunal does not reach this conclusion lightly, but certain members of the Applicant's Board by April 2019, and LMW seem to have regarded consultation as an exercise which would not influence their decision making but rather something to be endured. If someone of the obvious calibre and integrity of Mr Giddings could not influence the Board to act in a compliant way, the Tribunal doubts if anything said or done by any of the other Respondents would have influenced the Board of the Applicant to change its view in 2019 in relation to this issue. The example given by LMW in paragraph 13 of her witness statement of 20th November 2020 of a substantive change in the works as result of Mr Jenkyns, was actually quite minor and an issue of method rather than the kind of issues relating to the scope of works or design which Mr Downs canvassed with this Tribunal.

77. Entirely separately, the Respondents have not shown that had Mr Downs and Mrs Bloom seen the statement of estimates in 2019, the defects and cost overruns might or would have been avoided, however sympathetically one regards their evidence. Cost overruns, delays, unexpected additional works on opening up and additional works are, sadly very common issues in construction works of this kind and can be attributed to a number of different causes.

Legal and other costs of these proceedings

78. Mr and Mrs Southon's Counsel made submissions on 18th September 2020 in CHI/21UC/LIS/2020/0016 drawing attention to the following provisions in the Lease:

> Clause 1(C): "the Service Charge" shall mean the amount from time to time expended by or on behalf of the Lessor … in performing the obligations specified in the Third Schedule hereto and such other amounts as the Lessor shall be entitled to charge or set aside for the administration maintenance and upkeep of the Building and its appurtenances in accordance with the provisions contained in Clause 4 hereof".
>
> Third Schedule, Paragraph 12: "The Lessor will provide for the payment of all legal accountancy managing agency surveying and other costs incurred by the Lessor in the running and management of the Building and in the enforcement of the covenants conditions and regulations

contained in or affecting the leases granted of flats in the Building or in complying with covenants affecting the freehold title to the Building"

79. Counsel for Mr and Mrs Southon was unable to identify a provision in the Lease which would allow the Applicant to recover its legal costs deriving from a section 27A application to the First-tier Tribunal under the 1985 Act directly from an individual lessee. Those costs submissions were made on the basis that that the Applicant would attempt to recover such costs by way of the service charge mechanism in the Lease. The Applicant has not provided submissions on costs as the Tribunal's directions of 23rd June 2020 required, but Mr Wicks in his capacity as a director of the Applicant indicated in paragraph 13 of his statement of 18th November 2020 at [15] the intention was to rely upon those provisions to recover the costs of these proceedings. The Tribunal has not heard argument upon whether the provisions of the Lease entitle the Applicant to charge the legal or other costs of these proceedings to service charge and does not determine that issue in this Decision. The remainder of this decision proceeds on the assumption that there is such an entitlement.

80. By s.20C(1) of the 1985 Act, a lessee may apply for an order that "all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before ... the First-tier Tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant".

Section 20C(3) of the 1985 Act, provides "the ... Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

81. These provisions were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at [25]), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at [27]).

82. *In Conway v Jam Factory Freehold Ltd,* [2014] 1 E.G.L.R. 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make". One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service

charge income: see *Bretby Hall Management Company Limited v Christopher Pratt* LRX/112/2016. That is similar to the position here. The Applicant's primary source of income is service charges. It is possible those lessees who are shareholders could also be required to make payment under the terms of the Applicant's articles of association which are not in evidence.

83. The Tribunal bears in mind most of the breaches of the Consultation requirements found in the Decision of 5th March 2021 took place in the context of arrangements made by Southdown Surveyors Limited (not Southdown Estates Limited), albeit that LMW says that they delayed providing a statement of estimates to Mr Downs and Mrs Bloom to seek legal advice from the Applicant's solicitors. LMW's attempt to distance Southdown Surveyors Limited from responsibility for the omission to consult about the QLTA or to provide advice about that is not for this Tribunal to investigate, but reinforces the impression which the Tribunal Judge referred to in directions given on 19th October 2020 that there is an actual or potential conflict of interest between the managing agent (whether it be Southdown Surveyors Limited or Southdown Estates Limited) and the Applicant in relation to the issues referred to in these proceedings.

84. In terms of success and costs, the Applicant's Counsel formerly instructed belatedly accepted on Instructions that the FG agreement was a QLTA. As against Mr and Mrs Southon, the Applicant initially presented its case as if it was an open and shut case of debt collection when it should have been apparent that there were more complex issues to be addressed. Whilst the Applicant and Mr and Mrs Southon lay the blame for failure to mediate this case with the other party, the Applicant has had the benefit of professional legal representation at the dispensation hearings. The Applicant's omission to produce any evidence to support its unsubstantiated assertion that Mr and Mrs Southon imposed unreasonable preconditions for mediation, or any submissions upon costs as the directions of June 2020 required, is not consistent with the overriding objective. This was a case where the costs incurred in 3 hearings and further case management conferences might have been minimised or reduced had mediation been pursued. The Applicant has not produced any evidence that serious consideration had been given to conceding one or more of the issues which it failed upon, in order to save all parties the costs of litigating these issues.

85. Mr and Mrs Southon have incurred very substantial legal costs of establishing the breaches of the Consultation Regulations occurred even if they have not succeeded in showing that dispensation should be refused. It is not just and equitable that they should be required to contribute to the Applicant's costs when there are real questions about the Applicant's conduct of these proceedings and the Applicant's ability to recover some of the costs incurred from its advisers, agents or others responsible for taking decisions which have prolonged and complicated

these proceedings. The Applicant's decision to withhold documents which had been sought by lessees for some time and to produce relevant documents at the last few weeks before the second dispensation hearing contributed to the prolonging of the hearings, increase of costs and the feeling of distrust which are inconsistent with the overriding objective.

86. Similar considerations apply to the other Respondents, although they did not incur costs within these proceedings. Mr Downs incurred some costs in seeking legal advice about his service charge account and it would not be just and equitable that he (and Mrs Bloom whose position was aligned with him) should also be required to contribute to the Applicant's legal or management costs of these proceedings by way of service charge.

87. It would be unfair and unjust if the Applicant was to be able to circumvent the intended effect of the above orders by seeking any of the costs of these proceedings or the proceedings leading to the order of 5th March 2021 as an administration charge under the Lease of any of the Respondents. The Tribunal accordingly orders that no legal, management or other costs of the application to determine whether there was a breach of the consultation requirements in the 2003 Regulations leading to the decision of 5th March 2021 (CHI/21UC/LIS/2020/0016) or this application (CHI/21UC/LDC/2020/0110) should be payable by any of the Respondents under paragraph 5A of Schedule 11 to the 2002 Act.

88. The Tribunal is very far from satisfied that the Applicant's legal and management costs of the proceedings will necessarily be payable by the Applicant because of the various potential conflicts of interest identified above. The Tribunal makes no decision upon whether any legal costs payable by the Applicant as service charges would be regarded as reasonably incurred for the purpose of section 19 of the 1985 Act assuming they fell within the terms of the Lease.

89. For the same reasons it is just and equitable that the Applicant pays the hearing and application fees incurred by Mr and Mrs Southon in the 5th March 2021 decision.

90. There are no grounds for ordering the Applicant to pay costs on the basis of unreasonable conduct within the meaning of the *Willow Court* decision. The Applicant's conduct in defending these proceedings does not reach the high hurdle which would justify such an order under r.13(1)(b) of the Tribunal Procedure Rules. The Respondents have not been able to show that a reasonable person in the position of the Applicant would not have conducted themselves as the Applicant did in either defending the consultation or the dispensation proceedings or that there was no reasonable explanation for the conduct complained of in these proceedings. Although the Tribunal may have expressed views as to the decision to defend particular issues these proceedings, or its the decision to limit documents available to the hearing, the Tribunal does

not know what advice the Applicant or its agents may have received and whether, for example, there were other issues which needed to be taken into account in making decisions about the conduct of these proceedings.

91. Complaint was made by Mr Southon and other Respondents (such as Mr Downs in his skeleton argument of 15th February 2022) about the Applicant's failure to comply with directions of 29th April 2019 to send a copy of the dispensation application to other lessees immediately and confirm to the Tribunal this had been done or the directions on 13th January 2022 to consult as to the contents of the hearing bundle. Assuming without deciding that these assertions of breach of directions were established, this conduct, is not such as would give rise to an award of costs, under the unreasonable conduct jurisdiction of this Tribunal. Any disruption or prejudice caused has been mitigated or addressed during the course of the various hearings and case management conference.

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.