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

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| **Tribunal reference** | **:** | **CAM/33UH/LDC/2022/0014** |
| **Property** | **:** | **Westlegate Tower**<br>**14-18 Westlegate**<br>**Norwich**<br>**Norfolk NR1 3LJ** |
| **Applicant** | **:** | **Adriatic Land 7 Limited (incorporated in Guernsey)** |
| **Representative** | **:** | **James Castle, instructed by J B Leitch Limited** |
| **Respondents** | **:** | **All leaseholders of dwellings at the Property** |
| **Proceedings** | **:** | **Dispensation with consultation requirements** |
| **Tribunal members** | **:** | **Judge David Wyatt**<br>**Mr G F Smith MRICS FAAV REV** |
| **Date of decision** | **:** | **1 June 2023** |

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**DECISION**

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**Direction for service**

By **16 June 2023** the Applicant shall send a copy of this decision to all Respondents.

**Decision (please see explanatory note below)**

(1) The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 (the "**1985 Act**") to dispense with all the consultation requirements in relation to the works identified in paragraph 4 of the CHPK report dated 15 December 2022 (the "**Works**"), subject to the following conditions.

(2) The dispensation above is conditional on:

a) the Applicant providing the Respondents with a copy of the full specification of the Works as soon as reasonably practicable after this has been produced by the contractor to be selected under the proposed design and build procurement arrangements;

b) if or to the extent this is not confirmed in the full specification, the Applicant informing the Respondents as soon as reasonably practicable whether any of the glazed curtain wall(s) need to be replaced as part of the Works;

c) if or to the extent this is not confirmed in the full specification, the Applicant informing the Respondents as soon as reasonably practicable whether it is proposed that any of the residential occupiers be decanted (asked to vacate their flat temporarily to enable the Works to be carried out) and, if so, the arrangements proposed to be made for this; and

d) when complying with (2)(a), (b) and/or (c), whether together or separately:

i. specifying a date (not less than 14 days after provision of the relevant specification or information) by which observations may be made; and

ii. having regard to any observations made by any of the Respondents during the relevant period (from provision of the specification or information until that date); and

e) by 30 June 2023 and at reasonable junctures thereafter (not later than every six weeks), the Applicant providing leaseholders with:

i. updates in respect of the progress of the Building Safety Fund ("**BSF**") application, contractors, costs and the Works, up to and including the time of completion of the relevant Works; and

ii. an overview in respect of the progress of any third party recovery investigations (to the extent that the same are not subject to legal privilege), up to and including the period of 12 months which follows the date of completion of the relevant Works; and

f) by 30 June 2023, paying £4,000 to the Group Leaseholders (defined below) as a reasonable contribution towards the legal costs they incurred in challenging the application.

(3) The tribunal orders under section 20C of the 1985 Act that all the costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining

the amount of any service charge payable by the Group Leaseholders or the Wignalls (each as defined below).

(4) The tribunal makes no other order in respect of costs.

**Explanatory note**

**This decision relates solely to the statutory consultation requirements, as explained below.**

**It does not concern the issue of whether any service charge costs for the relevant works will be reasonable or payable. Any such issue might be the subject of an application by the landlord or leaseholders in future under section 27A of the 1985 Act.**

**Reasons for the decision**

**Westlegate Tower**

1. The Property is (at over 37 metres) particularly tall relative to the number and sizes of residential units in it. It has basement, ground and 11 upper storeys. It was said to have been constructed around 1959 and in 2013 converted from an office building. It accommodates two commercial units on the ground and first floors, with 14 residential flats above. It has a single staircase. The communal areas have smoke detection, automatic opening vent(s) and a water mist system. The leases were all granted in 2014 or 2015 for terms of 999 years.

2. The Applicant is the current freeholder and the holder of a head lease of the residential areas of the Property, originally granted to the management company named in the sample flat lease. It is the landlord of the Respondent leaseholders. The Applicant completed their purchase of the freehold in December 2017 and of the head lease in January 2018.

3. On 14 June 2017 the refurbished Grenfell Tower in west London caught fire, leading to the deaths of 72 people. Combustible cladding was found to be the main cause of the fire spreading at Grenfell Tower. In January 2020, the MHCLG (as it then was) issued advice for owners of multi-storey, multi-occupied residential buildings. That advice was later withdrawn and the new PAS9980 risk-assessment standard was published in early 2022.

**Application**

4. On 24 March 2022, the Applicant applied under section 20ZA of the 1985 Act for a determination dispensing with the statutory consultation requirements in respect of qualifying works described at paragraph 15

of their original statement of case, as set out in a notice of intention which had been sent to leaseholders on 30 July 2021:

"*a. Remediation works to the external wall system to include all necessary fire features i.e. cavity barriers, compartmentation, cladding, insulation and other materials and attachments, including balconies and all other works identified at survey or whilst on site (including where identified the costs of any decantation for remediation purposes) to ensure that all components on and within the external walling system are of limited combustibility, or better, so as to safe guard the occupants of the building and in accordance with the current guidelines issued by MHCLG;*

*b. Costs required for access equipment and professional fees in association with the above work plus those in relation to the west elevation cladding remediation works which are currently being planned.*"

5. By sections 20 and 20ZA of the 1985 Act, any relevant contributions of the Respondents through the service charge towards the costs of these works would be limited to a fixed sum (currently £250) unless the statutory consultation requirements, prescribed by the Service Charges (Consultation etc) (England) Regulations 2003 (the "**Regulations**") are: (a) complied with; or (b) dispensed with by the tribunal.

**Background**

6. With their application, the Applicant produced a report from FRC consultants, who had inspected in June 2021 following the government advice from 2020. Initially, the Applicant said the proposed works were urgent because those consultants had identified certain test sites (apparently those described in the report as areas 2, 5-7, 12 and 15) containing combustible insulation and advised this be removed and replaced.

7. The Applicant said an application had been submitted to the BSF for a grant towards the cost of the works but it was aware full funding may not be granted. The BSF e-mail dated 4 November 2021 in the first bundle appeared to indicate that only works to glazed curtain walling spandrel panels with 30mm PIR rigid insulation (Celotex) might be eligible for BSF funding. The Applicant said a consultant had been instructed to attend site and review the ineligible items of proposed work. The Applicant indicated it was proceeding with the instruction of "*CHPK*" using a design and build procurement approach so that a contractor will be available to start work at short notice to seek to comply with BSF funding requirements.

8. On 1 April 2022, the Judge gave initial case management directions. The Applicant was directed to provide further information when they served the application documents on the respondents by 20 April 2022. They produced a supplemental statement of case which estimated total costs of over £7.8 million, suggesting that about 83% of this was "*capable*" of being BSF funded. Any leaseholder who opposed the application was directed to respond by 25 May 2022. All the leaseholders except those of Apartment 10 (who died and whose personal representatives have not responded to these proceedings) responded and are active parties to these proceedings.

9. The leaseholders of 12 of the Apartments (1a, 1b, 1c, 1d, 2-5, 7-9 and 11), previously represented by Nicholsons Solicitors (the "**Group Leaseholders**"), responded on 19 May 2022 to oppose the application. They include Dr John Williams, who is a leaseholder and Chairman of the Westlegate Tower Residents Association. They noted the FRC report advised preparation of an action plan for remedial works to be carried out in a timely manner and that interim measures such as a waking watch were not required because of the AOV and water mist systems. They said the report and the Applicant's conduct (with about eight months between the survey and the application) indicated the works were not urgent. They were concerned that the full anticipated costs (at about £0.5m per flat) had been demanded from leaseholders, albeit with a covering letter indicating the demand was made to satisfy BSF requirements and would not be enforced for the time being.

10. The Group Leaseholders said the description of the proposed work was too vague. They wanted to be able to comment on what is to be done, who is to do it, and at what cost. They referred to the relevant provisions of the Building Safety Act 2022 provisions (the "**2022 Act**", which came into force on 28 June 2022) and said this would not limit relevant service charges unless the costs actually related to fire safety or cladding remediation (asking whether the BSF rejection of most of the items claimed indicated they did not). They said the Applicant had not shown that BSF funding would be jeopardised if a contractor was not prepared and ready to carry out the works at short notice under a design and build procurement. They pointed out that it was difficult to understand why it was being suggested that 83% of the proposed works were capable of being BSF funded when it appeared the initial BSF application in respect of all but one of the FRC area types had been unsuccessful. They applied for an order under section 20C of the 1985 Act and for costs under Rule 13.

11. The leaseholders of Apartment 6, Louisa and David Wignall (the "**Wignalls**"), responded to oppose unconditional dispensation. They represented themselves throughout. Amongst other things, they said they had already pointed out to the managing agents (on 8 March 2022, before the application was made) that the MHCLG advice note from January 2020, on which the 2021 survey was based, had been

withdrawn and replaced by PAS9980, questioning whether the works would now be considered necessary. They also applied for an order under section 20C of the 1985 Act, arguing (amongst other things) that the revised BSF criteria had been published in January 2022 before they were issued in April 2022 and the dispensation application should not have been made.

12. In their reply, the Applicant indicated they were prepared to limit the scope of works for which dispensation was sought to those set out in a budget document dated 8 March 2022 (i.e. the same estimated costs of over £7.8m) and if the scope of work was reduced following PAS9980 leaseholders would be notified. They also invited the tribunal to, if not minded to give unconditional dispensation, give dispensation subject to conditions requiring the Applicant to provide updates for leaseholders. They said the Applicant was working on a potential appeal to the BSF in respect of eligible items and that if consultation was required the delay that would cause might prejudice funding from the BSF under any grant funding agreement entered into or otherwise. The Applicant produced their first bundle for the determination.

13. On and following 20 July 2022, the tribunal directed that a hearing would be necessary and gave further directions for the parties to discuss matters to seek to narrow issues and agree the wording of any proposed conditions and prepare for the hearing, with provisions for any witness statements of fact and for the applicant to confirm: (a) the scope of work for which the applicant was seeking dispensation; and (b) any matters/proposed wording agreed with the active Respondents. The Applicant was directed to prepare a supplemental bundle of the further documents exchanged pursuant to these further directions.

14. The substantive hearing was fixed for 26 October 2022. On 19 August 2022, because of review work described by the Applicant following production of a PAS9980 assessment (saying it might be possible to reduce or even remove the remediation requirements by way of risk management measures), the tribunal granted extensions of time for the Applicant to confirm the position and produce any witness statements, the active respondents to send produce any witness statements and the applicant to deliver the supplemental bundle.

15. On 8 September 2022, the Applicant requested a six-month stay of proceedings, to February 2023, asking that the hearing be vacated. It said it was unable to confirm what remediation work was required and so what dispensation was sought because it was reviewing the scope of works against the PAS9980 assessment, was waiting for updates on the BSF application and grant funding agreement, and under the 2022 Act needed to establish which leaseholders held qualifying leases and to what extent leaseholder contributions might be capped. It anticipated withdrawal of the application if it became clear that no contributions would be required from leaseholders.

16. On 20 September 2022, the tribunal directed that the substantive hearing be converted to a case management hearing (CMH) to consider whether to strike out the application or give other directions, noting that it was not clear why the original application should be continued in the circumstances. The Applicant produced a supplemental bundle (205 pages) for the CMH. On 20 October 2022, Nicholsons produced an updated statement of costs of £31,871.72.

17. At the telephone CMH on 26 October 2022, the Applicant was represented by Simon Allison of counsel. Emily Ransome-Farmer (head of block and estate management at of Watsons Property, the managing agent instructed by the Applicant) and Lauren Walker of JB Leitch (trainee solicitor) also attended. The Wignalls attended and represented themselves. The Group Leaseholders were represented by Paul de la Piquerie of counsel.

18. At the CMH, Ms Ransome-Farmer said there is still a "stay put" evacuation policy at the building. She explained that the reference in the original proposed scope of works to costs relating to "*west elevation cladding remediation works*" was now irrelevant because after the notice of intention had been given the original building contractor had returned to repair a defect in cladding to the stair tower, which had fallen off, and had completed that work "*on a without prejudice basis*" at its own cost. She understood the intended design and build contractor had been instructed by the landlord for development of the specification for the proposed remedial works, but a full contract had not yet been entered into. Shortly before the CMH, the Applicant had sent to the respondents (but not the tribunal) copies of two PAS9980 assessments, one dated August and one dated 28 September 2022. Ms Ransome-Farmer said that because the BSF fund requires such assessments to give an overall risk rating for the building, and the first version had not, the 28 September 2022 report was an amended version to give that overall risk rating and had been submitted to the BSF. After hearing from the parties, the Judge decided not to strike out the application and gave further directions, for the reasons given in the recitals to those directions dated 26 October 2022.

19. The Group Leaseholders said they then decided to dis-instruct their solicitors and be represented by Dr Williams and Nicholas Backhouse (another leaseholder), given the legal costs they had already incurred and the provisions in the 2022 Act for the protection of leaseholders of dwellings in this type of building. The further directions from the Judge provided for an updated statement from the Applicant, statements from the Respondents in response, witness statements and a second supplemental bundle (264 pages). Subsequently, the Group Leaseholders produced an updated/replacement application for costs. Pursuant to further directions, the Applicant produced their submissions in response and the Group Leaseholders produced bundles of the documents in relation to their costs application (172 pages).

20. At the hearing on 16 May 2023, the Applicant was represented by James Castle of counsel and Ms Ransome-Farmer gave evidence. Ms Walker from J B Leitch and Jo-Ann Deeks from Homeground, the asset manager for the Applicant, also attended. The Group Leaseholders were represented by Dr Williams and Mr Backhouse. Mr and Mrs Wignall represented themselves.

**Updated position based on PAS9980/FRAEW report**

21. The Applicant's updated statement of case refers to the scope of potential works described in paragraph 4 of a report from CHPK dated 15 December 2022. Amongst other things, this refers to site set-up and access works and, for each elevation, removal and replacement of "*powder coated mesh cladding system*" with a new "*mesh rainscreen cladding system*", removal and replacement of "*glazed curtain walling system*" with "*all necessary cavity barriers*", removing and reinstating windows, and related works. It also includes removal and replacement of "*insulated render cladding system*" on the north, east and west elevations.

22. The Applicant said this scope was based on the findings and recommendations in a Fire Risk Appraisal External Wall ("**FRAEW**") report by CHPK dated 12 December 2022, said to be the most recent report prepared under the PAS9980 methodology. The report had been revised from earlier versions to accommodate further requests from Homes England. The Applicant produced an updated cost estimate which totals over £5.65 million. On 6 March 2023, the managing agents had written to the Respondents to explain that the BSF claim had: "*…passed the technical eligibility checks and can proceed to the next stage based on the PAS9980/FRAEW recommendations*". The extract shown to us appears to indicate that works to the wall types described as 1, 3 and 4 in the report (all those above "*medium but tolerable*" risk) are eligible for BSF funding, which appears consistent with the potential scope of work described in paragraph 4 of the CHPK report dated 15 December 2022.

23. The Applicant again described in general terms the design and build procurement route it had proposed and the reasons why this did not readily fit with the statutory consultation requirements. The Applicant said throughout that the proposed procurement method was intended to seek to ensure that all BSF requirements can be complied with, to avoid prejudicing the BSF funding application. The Applicant said that once the BSF provided pre-tender support to fund initial investigations and more substantive work, the tendering process could start. The programme produced by CHPK outlines their proposed next steps in the procurement, funding and construction process. As we understand it, this includes any further opening-up and a stage 1 tender for design and build contractors, for the selected contractor to produce a full specification under a pre-construction services agreement ("**PCSA**"),

for a stage 2 tender (which seems likely to be more in the nature of a negotiation with the same selected contractor), submissions to the BSF to negotiate a grant funding agreement, and then arrangements to drawdown funding and carry out the works. The programme anticipated production of the full specification (at the end of the PCSA period) in August 2023, with works starting in November 2023 and completing in April 2025. That now appears optimistic. We were told the programme is already late by about four months (it anticipated pre-tender support in January 2023, which has not yet been provided following the various changes to and ultimate acceptance of the FRAEW report).

**General law on consultation and dispensation**

24. The relevant consultation requirements (for procurement of qualifying works for which public notice was not required) are set out in Part 2 of Schedule 4 to the Regulations. These requirements are summarised in Daejan Investments Limited v Benson and Ors [2013] UKSC 14 at [12]. As discussed at the hearing, it is important to keep in mind the relatively limited nature of the relevant parts of the consultation requirements. These include a description "*in general terms*" of the proposed works, reasons, seeking an estimate from any nominated contractor and a summary of at least two estimates, with all estimates made available for inspection.

25. Under section 20ZA of the 1985 Act, the tribunal has jurisdiction to dispense with all or any of the consultation requirements in relation to any qualifying works "*…if satisfied that it is reasonable…*" to dispense with the requirements. In Daejan, Lord Neuberger for the majority observed [at 40-41] that it would be inappropriate to interpret this as imposing any fetter on the exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself and any other relevant admissible material. The circumstances in which applications for dispensation are made: "*…could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.*" He confirmed [at 54] that the tribunal: "*…has power to grant a dispensation on such terms as it thinks fit - provided, of course, that any such terms are appropriate in their nature and their effect.*"

26. By reference to sections 19 to 20ZA of the 1985 Act, Lord Neuberger said [at 43] that: "*…the obligation to consult the tenants in advance about proposed works goes to the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works.*" Given that purpose, it was indicated [at 44] that the issue on which the tribunal should focus when entertaining an application for dispensation: "*…must be the extent, if any, to which the tenants were prejudiced … by the failure … to comply …*" and [at 45]: "*…in a case where it was common ground that the extent, quality and cost of the*

*works were in no way affected by … failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason)…*"

27. Lord Neuberger referred [at 65] to *relevant* prejudice, saying the only disadvantage of which 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*." He noted [at 67] that, while the factual burden of identifying some relevant prejudice would be on the tenants: "*…the landlord can scarcely complain if the LVT views the tenants arguments sympathetically, for instance by resolving in their favour any doubts whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points*." Further guidance on terms of dispensation is at [68] onwards.

**Review**

28. Generally, there was no dispute that the type of work being proposed needed to be done. The first issues were whether the works were urgent and whether the BSF was likely to require work to start quickly when funding was provided. Dr Williams referred to the risk mitigation measures in the building, the time since the first report almost two years ago and the lack of detailed evidence of the BSF funding requirements, amongst other things.

29. We consider the debate between the parties about urgency is not entirely helpful. As Mr Castle pointed out, given the warnings from the experts about these fire safety works, they need to be carried out without unnecessary delay. But everyone agrees that because the potential costs are so high it was appropriate to use the change in standards to obtain a PAS9980 assessment and apply to the BSF on that basis, to seek to secure the maximum possible grant funding for the proposed works. We accept the Applicant's contention that the BSF is likely to require works to start quickly when funding has been agreed, not wait for a process of seeking to obtain competing estimates of the type expected under the second stage of the consultation requirements.

30. Even apart from the fact that some standard procurement routes may not be appropriate if some of the detail of work cannot be specified before the existing cladding is removed, the proposed design and build contract appears to be a reasonable approach to seek to improve the likelihood that proposals can be developed in co-operation with Homes England and any requirements imposed by the BSF can be complied with. Given the overwhelming importance to all the parties of seeking to maximise BSF funding, we are satisfied that it would be reasonable

to dispense with the consultation requirements if any prejudice can adequately be addressed by conditions.

31. The parties had agreed the substance of conditions for general updates on the progress of the BSF application, contractors, costs and the works and (subject to legal professional privilege) any third party recovery investigations. Our condition (2)(e) follows this, with the details discussed at the hearing. Although at least updates in relation to third party recovery may extend beyond relevant prejudice, they were offered by the Applicant and together they help to mitigate the general prejudice described below. Neither party proposed an end date for such updates, so we have adopted the period up to 12 months after completion of the works to balance this against the need to minimise the risk of disproportionate disputes in future about compliance with conditions. Leaseholders should be realistic about how much detail should be expected under this condition in each update about third party recovery (as opposed to updates on the BSF funding application and the works, where it is reasonable to expect more regular substantive information). Although Dr Williams was unhappy about Mr Castle's suggestion that in some of the six-week updates there may be nothing to report about third party recovery, this seemed to us to be realistic. Any third party recovery action, which may also be required under the grant funding agreement with the BSF, is indeed likely to take time. For the purposes of the dispensation application and on the information provided, a dispensation condition requiring more detail would not be justified.

32. In our assessment, the Group Leaseholders and the Wignalls had in substance identified general prejudice likely to be caused by non-compliance with these requirements. They emphasised the huge potential costs involved, similar to the likely value of most of the flats. They said dispensation would stop them being informed about the detail of the works and the opportunity to be listened to when they identified problems with how and when the works are proposed to be carried out. During the hearing, the opposing parties each accused the other of relying too much on hypotheticals. As Mr Castle rightly acknowledged, lack of the type of information/estimates expected under the consultation requirements can prejudice leaseholders if it means they cannot realistically be expected to identify any relevant prejudice in advance. To an extent, that is the case here. The updated potential scope of work for which we have been asked to give dispensation does cut down some of the uncertainty. As discussed at the hearing, it is for work to external elevations, including any cavity barriers – not for internal compartmentation work, for example, which as Mr Backhouse observed would not be eligible for BSF funding.

33. However, because more substantial investigations and specifications have not yet been funded by the Applicant itself or the BSF, the Applicant is in effect asking for dispensation for potential categories of work (such as the curtain walling) which might be unnecessary.

Leaseholders would not have the opportunity to compare at least two estimates to enable them to compare these and make observations on the types of proposals generally to be expected in competing estimates. If they had, even given the specialist nature of these works, they would be likely to be able to make potentially significant observations. It appears at least most of the Respondents are the original leaseholders, live in their flats and have experience of problems from the original conversion and more recent works. Dr Williams said and it was not disputed that their suggestions during the more recent set of works had helped make those works successful.

34. The key areas of potential general prejudice identified during the hearing were:

a. whether the curtain walling system(s) need to be replaced on all elevations. There is a query about this in some of the documents from CHPK and it appears this is something that would have to be confirmed, following the further investigations, in a full specification. As the Group Leaseholders observed, this is likely to make a significant difference to the potential costs and disruption, including whether the works can be carried out with all leaseholders in situ (as CHPK hope);

b. whether arrangements can be made to minimise the risk or potential cost of decanting occupiers. This would obviously involve significant disruption for them and it is understood that any costs of decanting will not be funded by the BSF. Ms Ransome-Farmer said in her statement that CHPK anticipated residents could remain in situ; they opined a "full decant" was unlikely and said they would work with the contractor, once appointed, to minimise the need for decanting, with at least three months' notice normally provided if there was a need for leaseholders to move out temporarily. CHPK indicated that apartments would be kept weathertight (when windows and the like are removed) by monarflex sheeting around the scaffolding and potentially a temporary roof.

   It may be that CHPK already plan to do everything possible in and after their tender invitation documents to minimise the risk of or any need for decanting and, from the beginning, incentivise potential contractors to avoid this even if that makes the actual works less profitable for the contractors, without jeopardising BSF funding. However, when more information is available, the Respondents may well be in a position to make further observations to help enable decantation to be avoided or minimised; and

c. particular features of this building which should be considered in the planning and management of the works. Again, it may be

that CHPK already have firmly in mind the need to ensure that the air source heat pumps used by each flat are not adversely affected by the works. Similarly, as discussed at the hearing, they would probably provide for schedules of condition and a retention for any damage caused by scaffolding or the like to the waterproof membrane on the flat roof, which Dr Williams said had been damaged when previous works were carried out and then repaired. However, given the potentially substantial scaffolding costs of dealing with any such problems if they are not avoided or minimised while the work is carried out or at least caught for remedy by the contractor before their scaffold is struck, there is again a likelihood that these leaseholders may be able to make significant observations when they see the full scope of works.

35. Following discussion at the hearing, the parties were content with the substance of the conditions we proposed to address this prejudice (or potential prejudice). Our conditions at paragraphs (2)(a)-(d) are based on those discussions.

36. Save for the condition and order described below in relation to costs, we are not satisfied that any of the other matters raised by the active Respondents would justify any further conditions of dispensation in this case. The Group Leaseholders had sought warranties, guarantees or insurance to make it easier for them to claim for the costs of any damage caused by contractors when they carried out the works. They and the Wignalls had been alarmed by a response from CHPK that additional protection would come at additional cost and would not be BSF funded, but they all appear to have misunderstood what was being said. The Applicant confirmed that the usual arrangements would be made to require the contractors to have appropriate insurance cover for claims for damage to flats and third party claims, and contractors would have the usual responsibility for making good any damage directly caused by them.

37. Further, the Group Leaseholders had sought conditions to the effect that the works should only include those fully funded by the BSF or those which would at least be capped under the 2022 Act, but could not show how such matters related to any relevant prejudice. Mr Castle said that based on the leaseholder certificates provided the Applicant understood these were all qualifying leases. He said it was unlikely that unfunded elements would be payable through the service charge, since the 2022 Act would prevent recovery of cladding remediation costs. Even if they were, the Applicant understood that any contribution from 13 of the 14 flats would be capped at £10,000 each and any contribution from Dr Williams, whose flat has a higher value, would be capped at £50,000 (£180,000 in total). Those are still substantial sums. However, if costs are not reasonably incurred, or any of the works are not of a reasonable standard, or grant funding should have been obtained but was not, dispensation will not preclude the leaseholders

from seeking to challenge any relevant service charge made to them with an application to the tribunal under section 27A of the 1985 Act.

**Costs**

38. To seek to avoid repetition, we explain below our reasons for our decisions on the three elements relating to costs. Mr and Mrs Wignall had not incurred any legal costs so far and did not propose to incur any.

39. As to the application by the Group Leaseholders in relation to the legal costs they incurred in the earlier stages, we are not satisfied that the Applicant acted unreasonably in bringing or conducting these proceedings. Accordingly, we cannot make an order in respect of costs under Rule 13. This is a relatively high bar, as explained in Willow Court Management Company 1985 Ltd v Alexander [2016] UKUT 0290.

40. The Applicant has a reasonable explanation for having made the application without prior warning, describing it as urgent, and all the delays, minimal compliance with directions, changes, requests for extensions of time and other relevant matters complained of. The demands which naturally alarmed leaseholders were made in early March 2022 (apparently following earlier correspondence). That was not conduct in the proceedings. Even if it was relevant because the application was made soon afterwards (on 24 March 2022), it does not appear to us to have been unreasonable in the Willow Court sense for the Applicant to have taken the cautious (or over-cautious) approach of making these demands to avoid any risk of disqualification from BSF funding, given the attempts in the covering letter to explain why they had been made and the uncertainties at that time.

41. As Mr Castle said, even under the old standards, it appeared the identified wall types needed to be replaced and would qualify at least in part for BSF funding. Given the findings we have made above, it was not unreasonable to apply for dispensation to seek to improve the prospect that any BSF requirements could be complied with, even knowing of the new standard. Following the changes in standards and BSF requirements and the 2022 Act coming into force, it was not unreasonable for the Applicant to seek to continue the same application even when this changed substantially, particularly when in the lead up to the hearing in October 2022 the Group Leaseholders had taken a robust line through their solicitors and objected to withdrawal of the application unless their costs were paid. Nor, given the greater uncertainties about BSF requirements in the earlier stages and the changing standards, were the mixed messages given by the Applicant unreasonable in the Willow Court sense. Ultimately, the scope of works sought in the updated statement of case was significantly narrower than the original proposed scope - without references to balconies, for example.

42. Mr Backhouse argued that the Applicant could have avoided the need for the hearing by giving more reassuring responses to questions from leaseholders, along the lines of those given at the hearing that the works would be carried out with the usual insurances and contractual provisions under any normal construction project. There is some force in that (as explained below), but in the latter stages the leaseholders were taking a rather extreme interpretation of what had been said in response to their earlier questions (which did sound as if they were asking for a bond, or the like, of the type which would only be available at additional cost and CHPK were explaining would not be BSF funded). In any event, as Mr Castle pointed out, these matters were all long after the relevant costs were incurred. We are not satisfied that any of the matters complained of by the Group Leaseholders were unreasonable conduct in bringing or conducting the proceedings.

43. For those and the following reasons, we are satisfied that we should make it a condition of dispensation that the Applicant make a relatively small contribution towards the legal costs incurred by the Group Leaseholders and that it is just and equitable to make an order under section 20C of the 1985 Act to prevent the Applicant from recovering any of the costs of these proceedings through the service charge. We recognise that such order would deprive the landlord of any contractual entitlement to recover such costs through the service charge. We are not satisfied that any greater contribution or further conditions in respect of costs would be justified.

44. When we asked at the hearing, Dr Williams thought it might be helpful to have provision for costs of future independent expert advice in connection with the question about decantation, but the Group Leaseholders had not sought any such advice so far. Nor had they sought any such contribution in advance of the hearing. There was no evidence of what costs might be incurred or to indicate that expert advice for the leaseholders on this is likely to make a significant difference for relevant purposes. The Applicant already appears to have every incentive to avoid or minimise decantation and advisers who say they will be seeking to do so. Even if such costs could otherwise be recovered through the service charge under the terms of the leases, it expects them to be capped at a relatively low level. Further, the leaseholders could use an application under s.27A to challenge any decantation costs which are not reasonably incurred.

45. It may be tempting to start looking at whether with expert advice any other work could be arranged for the benefit of leaseholders using the scaffolding erected for the remedial works (such as replacement of the flat roof if that does turn out to need replacement, whatever arguments there are between the parties about whether this should have been better repaired or replaced when it was damaged by those carrying out previous works and what leaseholders may have been told about those repairs), but that appears to be taking things too far. There is no dispute that the overriding priority is to seek to maximise BSF funding

for the relevant fire safety works. As was put to the parties at the hearing, the BSF is likely to be alert to ensure that they do not pay for costs to the extent that they are used for other purposes.

46. Mr Castle acknowledged that it was expressly contemplated in Daejan that an applicant landlord should usually bear their own costs of making a dispensation application and pay the tenants' reasonable costs of investigating and challenging the application [73]. However, he argued this was based on the reasoning that the landlord was in default of the duty to consult, when here the application was necessitated by the BSF process. Here, he said, the application was being made in the best interests of the tenants, to facilitate as much of the overall cost of the works as possible being funded by the BSF. When we asked, Mr Castle conceded this was partly in the interests of leaseholders and partly an indulgence for the landlord as described in Aster Communities v Chapman & Ors [2021] EWCA Civ 660 [47-50], referring to Daejan. While there may be some potential benefit to leaseholders we consider the application has been largely for the benefit of the Applicant, which needs to maximise BSF funding when it expects to be unable to recover the relevant costs through the service charge (as explained above). The Applicant acquired the Property after the Grenfell tragedy. They accepted that when they made their application they knew the 2022 Act would be coming into force. There was no detailed evidence of the actual BSF requirements, only that these did not readily fit with the consultation requirements and a design and build contract was a reasonable choice in the circumstances, as described above.

47. Any benefit to leaseholders is offset by the negative factors in relation to the way the Applicant communicated with the Respondents and dealt with these proceedings, as summarised below. We are careful not to be unduly demanding with the benefit of hindsight. We recognise all the uncertainties and concerns about BSF requirements when this application was made and the changes since. However, the Applicant was not proposing something in the normal range of major works here. It needed to communicate very carefully and clearly, but did not, causing fears and misunderstandings which ought to have been avoided or minimised. It may be that the Applicant has been seeking to incur only minimal costs by leaving much to the managing agents to deal with. If so, that has been a false economy.

48. As Mr Backhouse said, the demands in early March 2022 for £500,000 or more from each leaseholder were bound to be alarming, even with the oddly-worded explanation in the accompanying letter that the total of over £7.8m included in the budget was a "*contingency*" to ensure the requirements of the BSF were met and would not be "*credit controlled or collected*", but also indicated that BSF funding would be credited "*less any sums deemed recoverable by service charge payment as being non eligible for the fund*". We accept the Respondents' evidence that they feared they could lose their homes. Ms Ransome-Farmer said

a huge amount of correspondence was received about this and leaseholders were not satisfied with the answers they were given, but that does not seem surprising.

49. When the dispensation application was made later that month, it inevitably caused more concern because it raised obvious doubts, including whether these matters of vital importance to the leaseholders were being planned and pursued adequately. It appeared to seek dispensation for a scope of works which included items said in the accompanying 2021 report not to need remedial work (such as the balconies). It referred to the BSF eligibility decision based on that report which appeared to indicate that works to deal with only one of the wall types, or only part of that one wall type, would be funded, but indicated no appeal had yet been made against that decision. It made no reference to the new standards, despite the Wignalls having on 8 March 2022 pointed out that the advice note from 2020 had been withdrawn and replaced by PAS9980.

50. This rather vague and unresponsive or reactive approach continued through the proceedings, with updates and changes produced following prompts from the active Respondents or directions from the tribunal. After the new specification was produced and leaseholders had (perhaps less justifiably) obviously misunderstood and reacted to was being said in response to their enquiries about what those carrying out BSF funded work would be responsible for, reassurance does not appear to have been given until the hearing. Moreover, despite the vagueness and uncertainties in what the Applicant was proposing and all the prompts given in case management directions, there was no effort to propose sensible conditions to address relevant prejudice of the type explored at the hearing, only proposed updates.

51. However, we accept Mr Castle's submission that the costs claimed by the Group Leaseholders had wholly or mainly been incurred in challenging and seeking to block the application, not investigating relevant prejudice or proposing workable conditions to seek to address unknown factors. An aggressive approach had been taken in correspondence and in seeking strike out of the application. Adequate details of most of the actual costs (totalling £32,810.24 in the costs bundle from the Group Leaseholders) had not been provided. Counsel's fees make up £5,330 of this and the balance is for the fees of the solicitors. It appears likely that a substantial part of the costs were for wider work, not confined to the dispensation application; the invoices from the solicitors are headed "*Liability for Service Charges relating to Fire Safety Works*".

52. As discussed at the hearing, the bundle did include a fee note from counsel which amongst other costs includes £2,550 for time spent in April 2022 reading the papers, advising in conference and further follow-up advice (8.5 hours in total) and £2,100 for time spent in May 2022 drafting the first statement of case (8 hours), corresponding to

between £250 and £300 per hour. In our assessment, the total contribution which should in the circumstances be made by the Applicant as a condition of dispensation towards the relevant reasonable legal costs incurred by the Group Leaseholders in considering and challenging the application is £4,000, equating to about 15 hours at the range of rates described.

53. We consider that, with the balance we have struck in the various conditions, it is reasonable to dispense with all the consultation requirements in respect of the proposed works. We cannot make an order under section 20C of the 1985 Act in favour of the non-active Respondent leaseholder of Apartment 10, but this decision does not preclude them from making their own application under section 20C.

**Name:** Judge David Wyatt **Date:** 1 June 2023

## Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).