FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LDC/2020/0174**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Applicant	**:**	**Radnor Residential Management Limited**
Represented by	**:**	**Mr Sam Laughton** (Counsel) Instructed by Lester Dominic Solicitors (Mr Mohaned Salah)
Respondent	**:**	**(1) Radnor House Residents Association** (on behalf of 53 named leaseholders) **(2) Places for People** **(3) The leaseholders of Radnor House**
Represented by	**:**	**(1) Mr Ashley Pratt** (Counsel) Instructed by Ringley Law (Mr Lee Harle) **(2) Ms Jennifer Smurthwaite** (Solictor) Bond Womble Dickinson **(3) None**
Property	**:**	**Radnor House, 1272 London Road, Norbury, London SW16 4EB**
Type of Application	**:**	**Dispensation from consultation requirements** section 20ZA Landlord and Tenant Act 1985
Tribunal	**:**	**Deputy Regional Judge N Carr** **Mr C Gowman BSc MCIEH**
Date of Decision	**:**	**29 October 2021**

DECISION AND REASONS

DECISION

(1) The Applicant is hereby granted dispensation from the consultation requirements in respect of (i) the appointment of JSG Design and Build

and (ii) the additional works as identified in its email circular of 11 June 2021 reproduced in paragraph 26 below, on the following conditions:

(a) The costs of, in and incidental to the RICS Arbitration (decision dated 23 March 2021, Mr Jonathan Cope) between the Applicant and JSG Design and Build must not be recharged to Respondents whether through the service charge or as an administration charge or otherwise;

(b) The costs of, in and incidental to this dispensation application are to be borne by the Applicant, and they must not be taken into account when determining the amount of any service charge or administration charge to be paid by the Respondents or otherwise recharged to them;

(c) The Applicant must pay the reasonable costs of Radnor House Residents Association and Places for People in connection with this application, to be subject to summary assessment if not agreed. In the event of the parties being unable to agree, the following directions must be followed:

(i) By **22 November 2021** Places for People, and Radnor House Residents Association, must file with the Tribunal and send to the Applicant schedules of costs sufficient for summary assessment;

(ii) By **29 November 2021** the Applicant must file with the Tribunal and serve on the Places for People and on Radnor House Residents Association any costs submissions, identifying what items it considers unreasonably incurred and/or unreasonable in amount, giving reasons;

(iii) By **6 December 2021** Places for People, and Radnor House Residents Association, may file with the Tribunal and serve on the Applicant any costs submissions in reply;

(iv) The Tribunal will summarily assess the reasonable costs to be paid by the Applicant to Places for People, and to Radnor House Residents Association, on the basis of the papers provided in the week commencing **20 December 2021**.

(2) In granting dispensation in the application, the Tribunal makes no determination as to whether any service charge costs associated with the additional works are reasonable or payable.

REASONS

Procedural History

1. This has been a remote hearing by video conferencing (CVP) with the consent of the parties. The form of remote hearing was V:CVPREMOTE. A face-to-face hearing was not held because it was not practicable nor necessary given the pandemic, and no one requested the same. All of the issues could be determined at a remote hearing.

2. By Application dated 12 October 2020, the Applicant seeks a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 ('the Act'), for dispensation from the requirements to consult in advance of qualifying works, as set out in section 20 of the Act.

3. The documents that the Tribunal were referred to are in a bundle of 419 pages, the contents of which have been noted. References to the bundle appear herein in bold square brackets, indicating the page number e.g. **[1]**. The Tribunal has also received skeleton arguments on behalf of the Applicant, Places for People ('PFP'), and Radnor House Residents Association ('RHRA') on behalf of 53 named participating leaseholders.

4. Directions were initially given on 16 October 2020. In response to those directions, the Tribunal received fifty-five responses from leaseholders, RHRA (which was at that time unofficial) on its own account, and from PFP as the landlord of shared ownership leases at the property **[248 – 293]**. There was a common response from the leaseholders as exemplified at **[239-247]**. There was also a statement provided by several leaseholders, seemingly prepared by a solicitor, named 'Statement in Response to the Application for Dispensation'. Various different leaseholders also included further attachments, including the (then) chair of RHRA Ms Hilary Ennos. A number of those documents, including the 'Statement in Response' have not been included in the bundle. The parties were given the opportunity to agree the bundle in later Directions on 17 September 2021, and the Tribunal has therefore had no regard to their contents.

5. A separate response was filed on behalf of the leaseholder of Flat 79, by Messrs Fortis Rose. That response does not appear to have been sent to the Applicant at the time (though the Tribunal provided it to the Applicant later), and Messrs Fortis Rose subsequently notified the Tribunal that they were no longer acting. There has been no further separate participation by the leaseholder of Flat 79, nor from any leaseholder not represented by RHRA. Those documents have also not been included in the bundle, and the Tribunal has had no regard to their contents.

6. A case management hearing was convened on 18 February 2021. At that case management hearing the parties agreed that the Application should be stayed, pending various outstanding unresolved funding applications, including to the government's Building Safety Fund, and an ongoing fast-track RICS arbitration in relation to supply and fix of rockwool mineral felt and carrier boards, between the Applicant and the contractors delivering the project, JSG Design and Build ('JSG'). It was hoped that the outcome of those funding applications/arbitration would resolve any issue of prejudice to the leaseholders.

7. The arbitration concluded in March 2021 resulting in a reduced price from £110 per square metre to £87.50 per square metre in relation to the insulation **[211-225]**.

8. On 13 May 2021 the Tribunal received from (the now legally recognised) RHRA a section 27A application said to be in respect of final demands

issued by the Applicant in respect of the works identified in this Application. On the basis of the assertions in that application, it was joined with these proceedings.

9. On 15 June 2021, on the basis of the request of the Applicant, agreed by PFP and opposed by RHRA, the stay was extended to 31 August 2021, on the basis that the BSF application remained to be considered.

10. By that date, the Applicant had received notification from the BSF that its application was being treated as invalid, due to the works commencing at the property a matter of days before entitlement to the fund was announced in the budget (which is the designated earliest permitted date for a valid application under the BSF's qualifying conditions). Leading counsel's advice was subsequently obtained, but appeal or judicial review of that decision were considered to have no prospect of success **[201]**.

11. A further case management hearing was therefore arranged for the parties' first mutually convenient date, 17 September 2021, to establish what remained to be done in this matter, and to consider whether to hold a hearing, and whether updating statements should be permitted in light of the now different circumstances regarding the arbitration and BSF application.

12. In the days before and morning of the case management hearing, the parties set out their respective positions. It was agreed that the previously joined section 27A application should be severed for separate consideration, as that application was, contrary to the statement on its face, not in fact in relation to the works with which this Application is concerned save in respect of the Applicant's entry into finance arrangements for the additional works (which can be dealt with properly separately). Final directions were given to bring this matter to today's hearing, including a renewed agreed hearing bundle. Ms Smurthwaite was released from the case management hearing, and the directions pertaining to the section 27A matter separately addressed and considered with the parties to it.

13. The hearing was attended by Mr Sam Laughton, Counsel for the Applicant. Mr Mohaned Salah, his instructing solicitor, and Mr Qalab Ali, Director of Westcolt Surveyors (the Applicant's managing agents) ('Westcolt') also attended. Ms Jennifer Smurthwaite appeared for and on behalf of Places for People. Mr Ashley Pratt, Counsel, appeared for RHRA, accompanied by his instructing solicitor Mr Lee Hurle. A number of leaseholders and shared owners also attended as observers.

The Background to the Application

14. Radnor House is a six/seven storey former office block, converted in around 2005 into 113 one- and two-bedroomed flats, 40 of which are demised on a headlease to PFP and are in shared ownership between PFP and its sublessees. It was, prior to these works, partially clad with larch timber cladding on balconies, flank walls and external fire escapes.

15. In the summer of 2019, a report was commissioned by the Applicant from Bernadette Barker of Barker Consultants, a registered fire risk assessor and architect **[74 – 107]**. It is clearly identified in that report that the larch cladding did not meet combustion standards set out by government guidance, and raised concerns over the risk of the spread of fire from balcony to balcony and generally at Radnor House. It recommended an intrusive survey.

16. On 19 August 2019 in consultation with the London Fire Brigade, a temporary evacuation policy was put in place **[135 – 137]**, and a waking watch was retained for the building at a cost of approximately £20,000 per month **[139]**.

17. An application for dispensation in respect of urgent remedial works to the cladding was made in October 2019 ('the First Application'). The works to which that First Application applied were for the removal of the larch cladding and it's replacement with a non-combustible alternative, in accordance with a specification created by Westcolt and Barker Consultants **[109 - 134]** ('the original works'). A start date was initially planned for November 2019. It is common grounds that no intrusive survey had been made in the preparation of that specification.

18. No response was made by the leaseholders or PFP to the First Application.

19. Despite expressing hesitation in allowing dispensation from the requirement on the Landlord to select the lowest quote or give an Advice Notice, on 9 December 2019 the Tribunal (Judge P Korn and Mr T Sennett MA FCIEH) unconditionally dispensed with '*the consultation requirements in respect of the qualifying works which are subject of this application to the extent they have not already been complied with*' **[25]** ('the first dispensation').

20. In advance of the first dispensation, tenders had been sought from a number of companies for the works. The Applicant had, at the date of the first dispensation, been intending to retain Acumen, the company providing the second lowest estimate, costed-out at £589,992.00 inclusive of VAT **[179 – 186].** However, after the first dispensation was given, JSG came forward and, after discussions with Mr Qalab Ali, property manager and director of Westcolt, JSG were invited to tender.

21. They did so on 29 January 2021, with a costed specification of works on the same basis as those previously provided by the other companies **[31 - 36]**. The estimate was £570,000 inclusive of VAT, with a 15-week programme of works.

22. Mr Ali considered that the tender offered better value for money for the leaseholders, being 5% lower than that provided by Acumen, with a 10-week faster programme which would result in both safety benefits and the earlier termination of the services of the waking watch. It was therefore decided to enter into an abbreviated consultation with the leaseholders regarding the appointment of JSG, who were given 14 days from 20 February 2020 to comment or make observations **[40]**.

23. Two responses were received, the first seemingly raising issues regarding funds for the works/payment plans and the perceived reputation of JSG, and the second apparently challenging the scope of the original works already subject of the first dispensation, and which also included an allegation against JSG. These were provided with replies **[47 - 49]** and **[50-54]**.

24. JSG were engaged, and the works commenced on 23 March 2020. They were then halted briefly due to the first covid-19 national lockdown on or around 30 March 2020 and resumed on 13 April 2020 **[21]**.

25. Unfortunately, when the cladding was stripped back, the building control officer identified that additional remedial works were necessary ('the additional works'), requiring further stripping back on all elevations and installation of fire rated insulation, as set out in Mr Ali's second witness statement ('QAWS2') at paragraph 22 **[21]**. In order to avoid any further delay, the Applicant instructed JSG to carry out those works on a 'fair and reasonable cost' basis. Mr Paul Madden (Westcolt's Surveyor, of SM Surveyors) explains the reasoning behind that decision as follows **[338]**:

… contract instruction 2 was formally issued as an unpriced instruction at the time as we had to get the contractor to proceed in good faith in advance of agreeing the costings, which I know is not ideal but it might have meant them leaving site for period of time and that would have delayed progress and continuity, plus not to mention extending the time for the waking watch.

26. In its '*Week 8 – progression*' email newsletter on 11 June 2020, the Applicant announced the issue to the leaseholders thus **[307]**:

"*Additional Works – Specification*

The following list is the extra works identified after the works had commenced and not part of the initial specification:

1) *Removal of backgroudn* [sic] *structure behind timber cladding, timber batten, fabric sheathing, plywood and Kingspan Insulation and dispose of*
2) *90mm Rockwool mineral felt insulation into build up behind render, mounted to carrier boards, as per manufacturers installation recommendations*
3) *Removal of timber stud frame to sixth floor level to stair 3 and replace with galvanized metal C stud frame to match the existing depth and line the inside with 12.5mm plasterboard. Overboard inside face of external wall to landing fifth floor level with layer of 12.5mm plasterboard*
4) *Clear out section of pebble ballast to edge of sixth floor, behind parapet adjacent to stair 3, remove soil and debris and reinstate pebbles. Install lead sheet flashing over threshold to fire escape door and dress down into pebble channel*
5) *Insulated render system instead of metal cladding to staircase 2 and 4*

JSG has estimated the additional cost for the above will be £285,000 (Excluding VAT) this has been reviewed and scrutinised by the project surveyor, who has approved this as justified."

27. Changes in the specification of the balconies were also made, but at no additional cost to the leaseholder – QAWS2 paragraph 24 **[21]** and **[56]**.

28. The works substantially completed in around August 2020, and the waking watch were discharged.

29. By its second Application ('the second Application') for dispensation dated 12 October 2020, the Applicant seeks dispensation in respect of: (i) the decision to engage the new contractor; and (ii) the additional works, on the basis that whilst strictly part of the same scheme, the additional works were not incorporated in the original works in respect of which dispensation has already been given.

30. In the second Application, the Applicant describes the additional works as a 'minor change' to the original specification of works. No final demands have yet been served in respect of the works generally. However, as can be seen above, it is estimated by the Applicant that the additional works will result in an additional sum due for the works in the region of £336,000 inclusive of VAT, on top of the original tender estimate **[306 – 309]**. It remains unidentified by the Applicant whether there will, and what might, be the additional management charges on top of that sum.

The Law

31. The provisions of section 20 of the Act set out the consequences for a landlord who does not comply with the requirement to consult, set out in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003, when it proposes to carry out qualifying works in respect of a property. If it fails to consult as prescribed, or fails to obtain dispensation, it is limited to recovery of a statutory sum of £250 from the any relevant leaseholder.

32. Section 20ZA of the Act states that the Tribunal may determine that there should be dispensation from the consultation requirements set out in section 20 of the Act in respect of any qualifying works or qualifying long term agreement when '*it is satisfied it is reasonable to do so*'.

33. In *Daejan Investments Ltd v Benson* [2013] UKSC 14, the Supreme Court set out the following factors to be taken into account:

    a) The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

    b) The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

c) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

d) The Tribunal has power to grant a dispensation as it thinks fit, including on terms, provided that any terms are appropriate.

e) The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA(1).

f) The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

g) The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

h) The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

i) Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

34. In *Aster Communities v Chapman* [2021] EWCA Civ 660; [2021] 4 WLR 74 per Lord Justice Newey giving the unanimous judgment of their lordships, relevant prejudice, if established even by only one leaseholder, inures for the benefit of all leaseholders (though not necessarily in equal proportions, depending on the material terms of the lease):

44. The consultation for which the 2003 Regulations provide is a group process in which a landlord must supply every tenant with notice of their intention to carry out works and a paragraph (b) statement including, among other things, a summary of observations made by other tenants. More than that, a landlord seeks dispensation against tenants generally. If all tenants suffer prejudice because a defect in the consultation process meant that one of their number did not persuade the landlord to limit the scope or cost of works in some respect, I cannot see why the FTT should be unable to make dispensation conditional on every tenant being compensated. The reduction in the scope or cost of works would have accrued to the benefit of each of them, and so, if dispensation is to be granted against them all, the totality of the prejudice should be addressed.

45 That is not to say that the positions of individual tenants will be irrelevant. Thus, there could be no question of all tenants in a block having their service charges cut by the same figure if they shared the

relevant service charges in differing proportions. If, say, one tenant bore 10% of service charges and another just 5%, a reduction in recoverable service charges should benefit the two tenants in the ratio 2:1, in line with the order which the Supreme Court made in Daejan *(see para 15 above).*

The narrowed issues

35. In short, from an initial position on all parts that dispensation at all was a matter of contention, by the time of the hearing the parties' mutual position was that that dispensation should be granted. No Respondent maintained any point as regards the circumstances surrounding the appointment of JSG. On behalf of the Respondents, Ms Smurthwaite and Mr Pratt also conceded that the part of the Application that related to the additional works should be granted, but each contended it should be on terms.

36. In an adjournment granted for the purpose, the parties agreed that the material terms for consideration by us are those set out in paragraphs (a), (c) and (d) of the skeleton argument of PFP, reordered and relabelled as follows:

    (a) That the Applicant should not be permitted to charge any cost associated with the RICS arbitration to the Respondents, whether through the service charge or in any other way;

    (b) That the Applicant should pay the reasonable costs incurred by the Respondents in respect of the Application;

    (c) That we should make an order pursuant to section 20C of the Act, providing that the costs incurred by the Applicant in connection with the Application are not to be regarded as relevant costs to be taken into account in determining the amount of any service or other charge payable by the Respondents to the Applicants.

37. The Respondents jointly sought the imposition of all three terms for the benefit of all Respondents.

38. In respect of conditions that had initially been sought in connection with limiting the additional cost of any management fee that might be associated with the additional works, sensibly the Respondents collectively recognised that we were not in a position in today's application to deal with such costs. The final demands remain to be served, and we have insufficient information in the circumstances to make any sensible assessment of what those fees might be and in connection with what. The Respondents reserved their position to the anticipated section 27A application that seems likely to be made in respect of the additional works.

39. The Respondents similarly reserved their position to any section 27A application that might be pursued, in respect any finding that a lower sum that that fixed in the arbitration would have been incurred in relation to

the supply and installation of the insulation materials, had the Applicant properly engaged, and involved PFP's Quantity Surveyor, in the arbitration proceedings. Again, it was sensibly recognised that we have insufficient information to make any detailed enquiry into that position in the current Application.

40. The Applicant's position is that term (a) should not be granted, and that terms (b) and (c) should be granted only in respect of PFP, with a more limited term imposed in each case as regards RHRA.

(a) Arbitration costs

The Applicant's case

41. The Applicant's position is that as there is no evidence that the Respondents have sustained material prejudice. No responses were made to the first dispensation application, and only two observations were received in response to the foreshortened consultation in respect of engaging JSG.

42. Even if the Respondents can demonstrate that they would have made the objections now taken in respect of the additional works, they cannot demonstrate that those objections would have made any difference to the outcome; the Applicant's obligation would have been no more than to 'have regard' to the observations. The observations, it is suggested, would have made no difference to the Applicant's decision to contract on a 'fair and reasonable cost' basis – given the circumstances in which the additional works were identified, it was entirely reasonable to proceed on the basis that the Applicant had.

43. While costs were incurred in the arbitration proceedings, these are at a remove from the consequences of any failure to consult. It is '*equally likely that costs have been saved by the arbitration*'. Therefore, there is no relevant prejudice arising, to which the Tribunal should have regard.

44. The want of an intrusive survey is water under the bridge. It was clear that all responses from the Respondents had been put in front of the arbitrator, and JSG had fought the arbitration tooth and nail. There is no reasonable basis on which it could be said that JSG would have agreed a lower price if consultation had been entered into.

Places for People's case

45. PFP asserts that it has sustained relevant prejudice which would not have been suffered had the consultation requirements been complied with, in three respects: (i) failure by the Applicant to test the market in respect of the Second Works, or obtain alternative quotes; (ii) failure by A to seek any input from the Rs so as to enable them to "*make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works*" (*Daejan* para 67); (iii) failure by A to engage JSG in an acceptable manner in respect of the additional works with the cost properly agreed prior to commencement of those additional works. It is those failures that

led directly to the arbitration proceedings, in which again the Applicant failed properly to engage. Even a rudimentary attempt at consultation would have led PFP to step in.

46. On 11 June 2020, the Applicant sent to PFP the document at **[306 – 309]** in which for the first time the Applicant set out that the additional works were required, and the estimated additional cost would be £285,000 excluding VAT. This was simply in a mail circular named '*week 8 progression*', and stated that the estimated costs of the works *"has been reviewed and scrutinised by the project surveyor, who has approved this as justified"* **[307]**. That is the material date for notification of the additional works.

47. PFP (Ms Wendy Botteril, Place Team Manager, London) had immediately attempted to contact the Applicant by telephone, and had followed up by email on 1 July 2021 to attempt to engage the Applicant in a conversation regarding those additional costs, of which PFP's estimated share would be £95,324, and which it considered excessive **[311-316]**.

48. On 24 July 2020 Ms Smurthwaite further sent out a detailed letter to the Applicant's former solicitors (who had, it seems, directed in January 2020 that correspondence be sent to them regarding the works) **[318-321]**. The legality of the decision to incur these additional costs without consultation or dispensation was challenged from the outset.

49. PFP's Quantity Surveyor, Mr Scott Fairhurst, had by then become involved, and engaged on his own part with Mr Paul Madden (the Applicant's Surveyor) by telephone and as shown in email correspondence from 30 July 2020 onwards **[327 – 342]**. Detailed queries were raised, initially on the basis of the limited information that had been provided, and increasingly on the basis of Mr Fairhurst's expertise.

50. On 30 July 2021 Mr Madden wrote to Mr Fairhurst thus:

Since we last spoke we have been in contact with the contractor to obtain further supporting documents relating to the variation items. 1 enclose the breakdown for the £1 10 rate and a selection of indicative timesheets in connection with the timber background stripping works.

I can confirm that upon receipt of the CVI's from JSG, I did formally email back with comments to challenge what they were trying to claim for, in particular the £ 110 rate and requested a breakdown at the time, as like you, I considered that this appeared high. I also questioned the labour amounts for the stripping work. *Lou Bhandari did provide a reply explanation following my email. This can be made available if you wish. We also wanted to check the quantities and undertook a check take off and site measure to check these. This has revealed that there were some inaccuracies with the quantities that JSG had supplied and accordingly we have adjusted the totals down to reflect this.*

Just to be clear, contract instruction 2 was formally issued as an unpriced instruction at the time as we had to get the contractor to proceed in good faith in advance of agreeing the costings, which I know is not ideal but it might have meant them leaving site for period of time and that would have delayed progress and continuity, plus not to mention extending the time for the waking watch. The priced instructions 2 and 3, that have been passed to you are currently in draft form and had not been formally issued under the contract, we were trying to identify a projected contract sum for ascertaining the additional funding and used these to identify this. These will be subject to altering following the quantity checking exercise. As an additional exercise, we have been back through the original tendered prices in connection with the rendering works and the four submitted tendered quotes are as follows:

The total original rendering area that these relate to equates to 1070 m2.

These prices include for taking off and disposing of the existing larch cladding as well as applying the new render system.
JSG - £255,600
Lenval - £263,765
Acumen - £233,000
Cornerstone - £212.016.18

This would mean that the rate for stripping and installing the new render would be £239/m2 for JSG. Whilst JSG were the second highest for this element of the priced works they were overall the lowest tender submitted, as they had priced the other parts of the job lower than the other. ***This rate would suggest that the £110 is comparable with what was tendered***. [emphasis added]

51. On 31 July 2020 Mr Fairhurst sent a lengthy and detailed an email to Mr Madden querying presence on site, time/number of workman it took to undertake removal, the costs of installation and pricing of insulation, as follows **[336-337]**:

I still think there are issues with the provided supporting information, first of all the timesheets provided are should be supported by signing in and out sheets from site. The document provided is a excel print off that could have been developed at anytime and hours/personnel added to this to make up the number of hours required, hardcopy signing in/ out register from site (which the contractor should have under there CDM requirements) would should support the electronic version so I would ask for this.

I still have serious concerns with the time/ number of person's it has took to do the removal, have you referred to SPONS or other Estimating guides (RIGS) to ascertain typical minute values for this activity, this than can be used to find out a reasonable time scale for the removal of the m2 done. Secondly, again the new mineral wool placing doesn't provide value for money, from the PDF provided, I gather the below information:

1258m2 of new insulation was placed

It took 5.66 weeks to do this work, which equates to 222.26m2 per week

They have stated 8 men on site per week, which would mean 1 man is only placing 27m2 of insulation a week or 5.55m2 per day! I would expect that amount to be place per hour, not for a full 10 hour day.

I still also hold major reservation regard the material pricing, a pack of 90mm Rockwool Flexi Acoustic Slab runs at £22.00 per pack (4.32m2 coverage), according to the contractors submission we are being charged £17.20 for 1 m2 3/ times more than I think it should be, other small materials items done add up metal disks for fixing the insulation cost about £8 for a bag of 100 (8p per disk) the contractor is claiming this is £2.70 per m2 that's 30+disc per m2, usually this would be 6-10 per m2 dependant on system.

All rates seem to have been inflated and scrutiny of this is required, if this cannot be agreed feel ultimately you may need to go through RICS to act as an impartial adjudicator to review and ascertain creditability of the variations and rates." [emphasis added]

52. PFP then points to an email between Mr Madden and Mr Fairhurst dated 30 September 2020 (the first after the email from Mr Madden on 31 July 2020 above) in which Mr Madden states agent states "*It also appears we may be going to arbitration regarding the costings of additional works**, because of your objection regarding the cost**, however before we can do either dispensation or arbitration as part of our preparation for the documentation to submit to the tribunal, we would be **grateful if you could advise what cost you believe is fair and reasonable for the additional work**"* [emphasis added].

53. PFP relies on this evidence as illustrative of what might have happened had consultation been entered into. Had consultation taken place, there is sufficient evidence here to demonstrate that PFP's views would have been taken into account, and the outcome would not have been a 'fair and reasonable price' instruction. The Applicant had already itself seen that the rates seemed too high, and had accepted the merit in the points raised by PFP, as it referred the matter to arbitration on the strength of Mr Fairhurst's objections.

54. In the end (and reserving its position on the rights and wrongs of it), the resulting arbitral award reduced the costs in respect of the insulation and carrier boards to £87.50. The arbitration would have been unnecessary had consultation occurred and a proper price fixed in the first place, or even informal approach made to PFP prior to the 11 June 2020. All of that provides credible evidence that, had the Applicant engaged in any consultation exercise, arbitration (and the associated costs) would have been unnecessary and would not have been incurred.

55. PFP accept to a certain extent that the Applicant found itself in a position that if it entered into consultation, it would incur further costs and delay. However, the Applicant had simply pressed ahead without *any* opportunity for participation. What would have happened if there had been even notional compliance is evidenced in the outcome of the arbitration.

56. PFP rely on paragraph 44 of *Daejan* in which Lord Neuberger states:

> "*Given that the purpose of the* [consultation] *Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1)* must be the extent, if any, to which the tenants were prejudiced *in either respect by the failure of the landlord to comply with the Requirements."*
>
> And paragraphs 67-68:
>
> *"... given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving any doubt in their favour that the work 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 show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord...*
>
> *68. The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord dispensation. Such an approach is also justified because the LVT 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.... Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it."*

RHRA's case

57. RHRA adopted PFP's submissions in this regard. Mr Pratt submits that the Applicant have been the authors of their own misfortune in failing to undertake the intrusive survey, though he accepts that this matter could and ought properly to have been raised in respect of the first dispensation. Had the Applicant done even basic research on the rates to be ascribed to the insulation, it is RHRA's case that the Applicant's response would have been different from a factual perspective. RHRA too relied on the emails passing between Mr Madden and Mr Fairhurst. Had any part of the consultation process occurred, even just initial notices, the Applicant would plainly have had the information to barter JSG down.

58. Mr Pratt further relies on *Aster*, that the prejudice established by one leaseholder inures for the benefit of all. This is a group process, and the totality of the prejudice should be addressed.

(b) The Respondents' costs of these proceedings

The Applicant's case

59. The Applicant concedes that a condition should be made for payment of PFP's costs in the application.

60. Mr Laughton argues that the position in respect of RHRA is different, though his submission is limited to those costs incurred in relation to the two case management hearings.

61. Mr Laughton states that the two case management hearings were convened only because of the way in which these proceedings have been conducted by RHRA (or, before it was official, those 53 leaseholders whom it now formally represents). There would have been no reason to hold the first case management conference if the leaseholders had provided their case statements in a '*chaotic*' way. In any ordinary case, this matter would have come to paper determination in the usual way as anticipated in the October 2020 Directions.

62. As for the second case management conference, it too would not have been required if RHRA had not misled the Tribunal into believing that the section 27A application was in respect of the same matters with which we are now concerned. The Tribunal had had to unravel what had happened due to that.

63. His submission is that that behaviour is tantamount to unreasonable behaviour, such that RHRA should not have the benefit of a costs order in relation to that work. *Daejan* makes clear (by analogy with forfeiture cases, at paragraph 62 of the decision) that where a Respondent opposes a dispensation application unreasonably it may be deprived of its costs, and indeed may see itself paying the costs of the Applicant. The limitation on costs is to those that have been reasonably incurred, as set out in paragraph 64:

> *64. Like a party seeking a dispensation under section 20(1)(b), a party seeking relief from forfeiture is claiming what can be characterised as an indulgence from a tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence.*

64. The costs of the two case management hearings had not been reasonably incurred by RHRA, and therefore it should not be a condition of dispensation that the Applicant should have to pay those costs.

RHRA's case

65. Mr Pratt fairly points out that he was not at the case management hearings concerned, and so is at a disadvantage. There were a large number of leaseholders required to be brought together. No litigation is, he says, perfect, and clearly the conduct leading to the first case management hearing was not perfect on either side.

66. In any event, he places reliance on *Aster*, suggesting that we should be slow to move away from the principle that what is good for one is good for all.

(c) The Applicant's costs of these proceedings

The Applicant's case

67. The Applicant concedes that a condition should be made that the Applicant should not be able to recover through the service charge or otherwise its costs incurred in the application in respect of PFP.

68. Mr Laughton makes the same argument as above when it comes to recovery of the Applicant's costs of the two case management conferences against RHRA. The Applicant should not have to foot the bill for its costs incurred in the two case management conferences due to RHRA's unreasonable behaviour.

RHRA's case

69. Mr Pratt repeats his above submissions. He further relies on *Aster*.

Decision

70. The nub of the principles to be applied to the consideration of conditions to be prescribed in a dispensation application is encapsulated in paragraphs 68 and 69 of *Daejan*:

> *68. The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT 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 LVT 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 LVT 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 LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.*

69. Apart from the fact that the LVT should be sympathetic to any points they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord.

(a) Arbitration costs

71. We are satisfied that PFP has established a credible case of prejudice. The immediate correspondence it entered into, on receiving Westcolt's email circular on 11 June 2020 in which it was presented with presented with what we agree was a *fait accompli*, demonstrates that it would have engaged in any consultation, and the points that it would have made. This is not simply a matter of hindsight as envisaged in paragraph 69 of *Daejan* above, but real-time challenge to the Applicant's failure to consult and terms on which it engaged JSG from the very outset of the additional works being notified.

72. The purpose behind the statutory provisions is to ensure that leaseholders are not required to pay for unnecessary services, or to pay more than they should for necessary services. The end to which the consultation requirements are directed is the protection of leaseholders to that extent. Usually, the sole question to be decided is whether there is any 'real prejudice' to the leaseholder flowing from the landlord's breach of those requirements. The question is not whether the breach of the landlord is serious, or merely technical, though those might have a part to play in the question of whether the leaseholder has sustained any real prejudice.

73. In this case, we are satisfied that PFP has shown that had consultation been carried out (even incomplete consultation), or indeed any basic communication entered into by the Applicant with the Respondents prior to its decision to engage JSG on a fair and reasonable cost basis for the additional works, it is likely to have resulted in negotiations and fixing of a price with JSG for the insulation at a lower cost, which would have resulted in arbitration (and its associated costs) being avoided. It is clear to us that Mr Madden himself had doubts over the price quoted by JSG, and he accepted and relied substantially on the expertise of Mr Fairhurst, which would have benefitted the parties at an early stage. It is clearly demonstrated from the contemporaneous emails both that the Applicant accepted PFP's assertions and expertise on the question, and that it relied on that expertise both to bring, and (it appears) found its case in subsequent arbitration proceedings. We thus do not accept the submission that those costs are at a remove from the question of consultation. The question, as framed in paragraph 67 of *Daejan*, is not whether *JSG* would have accepted the point, but whether the Applicant

would have done so in the context of a consultation process, and the evidence all points only one way in that regard.

74. In the circumstances, we are satisfied that the Respondents would suffer relevant prejudice, were we not to impose a condition that the Applicant should not recover its costs of, in and associated with the arbitration proceedings. We are satisfied that in light of *Aster*, that finding inures for the benefit of all of the Respondents.

(b) The Respondents' costs of these proceedings

75. Mr Laughton's submissions regarding the first case management hearing are revisionist, as can be plainly seen from the preamble to the stay granted at that case management hearing on 16 February 2021.

76. It should be noted that initially, Westcolt acted itself as the representative for the Applicant in these proceedings, and it was not until Mr Hamilton-Stowe appeared for the Applicants at that first case management hearing that the Tribunal was aware of any legal representation on its part. Indeed, notification that Mr Salah acts for the Applicant was only received after the first case management hearing. This may explain why, up until that point, the Applicant's conduct of the litigation was itself (to adopt Mr Pratt's term) far from 'perfect'.

77. The Tribunal has actively case managed this application. At not insignificant time and effort, I prepared for the parties a tabular list of the leaseholders from whom responses had been received, the contents of those responses, and the identified representatives, which the case officer sent to the parties under cover of letter dated 30 November 2020. In that letter I also gave additional directions, including the requirement for nomination by RHRA of a single point of contact and confirmation that Mr Samuel acted for all. That was for the benefit of the parties and to assist all by imposing order on the 'chaos' (to adopt Mr Laughton's term) of the responses received, to mitigate the effect of it and enable proper compliance with the October Directions then still in force. That letter has been omitted from the bundle, despite containing (as it did) case management directions.

78. RHRA complied. There ensued an ongoing issue surrounding the Applicant's request for an extension of time to respond, into which PFP had not been copied. I reminded the parties in a letter of 14 January 2021 that all parties must be copied in any request to the Tribunal, and warned that it seemed likely that a case management conference might be necessary due to being unable to piece together who had sent what, when and to whom, such that the outstanding issues were unidentifiable. I directed a single naming convention to be adopted in email correspondence, and the use of a single tribunal mailbox. That letter has also been omitted from the bundle.

79. The full reasons for convening the case management conference are identified in paragraph (9) onwards of my preamble to the stay granted on 16 February 2021 :

(9) After the Directions were served in respect of the Application, there were 55 objections received from Leaseholders, the (unofficial) Residents' Association, and from Places for People. While there appeared initially to be solicitors on record, Messrs Ringley Law, for the Residents Association, the de facto arrangement is that Ms Ennos, the Chair of that unrecognised association, is effectively acting as the 'lead respondent' in respect of the individual responding leaseholders (all of whom are Respondents in their own right). Mr Alex Samuel agrees that he thus represents the 53 individual leaseholders who responded and who identified Ringley Law as their instructed Solicitor, albeit with Ms Ennos as the appointed contact to give instructions.

(10) Mr Samuel unfortunately did not have a firm enough hand in organising the responses made by the Leaseholders, which are in large part the same repeated document that appears to have been prepared by the (unrecognised) Residents Association, however there is a 'witness statement' appended to a number of the responses that appears to have emanated from the Solicitor.

(11) There were separate solicitors, and a separate response filed, on behalf of Mr Lallmamode of Flat 79 (Messrs Fortis Rose). The Solicitor acting, Mr Olgan Gunduz, does not appear to have sent Mr Lallmamode's response to the Applicant (not having cc'd them into the email sent to the Tribunal on 16 November 2020), and therefore Mr Lallmamode's response is absent from the Bundle prepared by the Applicant, due to the Applicant's want of knowledge of its existence.

(12) Since this issue was raised with the parties and after the conclusion of the Case Management Hearing, the Case Officer has located a document from Fortis Rose stating that they no longer act for Mr Lallmamode. Therefore, this Order has not been sent to them. I have asked the Case Officer nevertheless to forward the response provided on Mr Lallmamode's behalf to both the Applicant and the other Respondents, so that it may be included in any future Bundle.

(13) There has been somewhat unfortunate ongoing dispute between the Applicant and Solicitors acting for Places for People, Messrs Womble Bond Dickinson, as it appears the Applicant did not cc Ms Smurthwaite into its request for an extension of time for dealing with all of the responses, despite the Tribunal's directions being in the clearest terms that all correspondence with the Tribunal must be copied to all parties. Nevertheless, that extension having been granted, and (to be frank) plainly warranted given the mass of responses. Ms Smurthwaite accepted that this is now water under the bridge.

(14) There appears in the witness statement apparently prepared by Mr Samuel to be an issue taken with the identification of who the Applicant is, for the purposes of the Application. That is a matter that can be tidied up in the future, as there appears to be no meritorious avenue to pursue in that regard, given it is plainly accepted that the works are being carried out on behalf of the Freeholder.

(15) The Applicant has provided a Bundle. It is unclear whether it has been put together in consultation with the Respondents (as variously represented). The Bundle is unnecessarily unwieldy; given that there is a repeated 'resident response', there is no reason for that same document to be in the Bundle 51 times.

(16) Moreover, contrary to the Directions, the Applicant failed to include in that Bundle an index. Now a separate index has been forthcoming, it is quite frankly unusable, as it fails to identify documents properly (for example, it makes no distinction between different responses simply indexing ***all*** *responses as "pages 367 – 867", with no indication whatever of where in those 500 pages to find the different materials). The responses that had additional evidence attached to them also seem to have those documents missing from the related response in the Bundle (eg the one from the Ms Ennos on behalf of the Residents Association contained additional evidence). It may be that that is because the Applicants took the view they had already been included elsewhere, but there is nothing to so indicate.*

(17) None of the parties has asked for an oral hearing, but phrases akin to 'if there is an oral hearing we will happily expand further' crop up repeatedly in the correspondence and indeed in the Applicant's reply, leaving the Tribunal in doubt as to whether a hearing was in fact being requested. It was agreed that the question of whether a hearing should be held turns much on the result of the matters referred to hereafter."

80. As regards the second case management hearing, while it is true that RHRA had led me to make an order joining the section 27A application on the basis of what was said on the face of that application, RHRA had resiled from that position in email correspondence of the morning of 17 September 2021. Nor is it true to say that there was *no* area of overlap at all between the two applications – the section 27A application involves a challenge to the Applicant's decision, also announced in the 11 June 2020 email circular, to enter into finance arrangements for the additional works, which it has charged to the leaseholders through its estimated service charge demands for the present year.

81. In any event, the section 27A application was far from the only reason the case management hearing was called. The new information about the arbitration and BSF, the state of the bundle previously provided by the Applicant, the question of whether there ought to be permission for updating statements, and the question of whether there ought to be a hearing all remained to be considered on 17 September 2021. The joinder issue took but moments of the case management hearing time in light of Mr Samuel's email. The section 27A application was then dealt with separately by the parties involved, with Ms Smurthwaite having been invited to depart.

82. We would be ready to accept as a matter of principle that, insofar as costs of a respondent in an application for dispensation are concerned, *Aster* does not apply in the same way as it does to dispensation generally. It is possible to envisage a case in which a first Respondent in an application engages in that application unreasonably, such that even though a second

Respondent obtains the benefit of a finding of relevant prejudice for all, the first Respondent has not incurred reasonable costs that should be made a condition of the dispensation, though it seems likely such a scenario would be rare.

83. This is not, in our view, such a case. Mr Laughton's submission is not founded on a position generally that it was unreasonable for RHRA (and the 53 leaseholders it represents) to respond in these proceedings (which submission, for the avoidance of doubt, we would have rejected had it been asserted). It is limited exclusively to the convening of the case management hearings, the necessity of which he lays at the door of RHRA.

84. As ought to be painfully obvious to anyone reading the preamble of the Directions of 16 February 2021, it was the conduct of all of the parties that led to the first case management hearing being convened. The second case management hearing was not convened just because of the section 27A application, but to deal with all matters contained in the preambles in the Direction on 17 September 2021 and in order to re-set in light of the Applicant's update, as more particularly set out in paragraphs (5) – (16) of the preambles to that set of Directions **[408 – 409].** The Applicant's position is therefore , in our view, unsustainable (though of course it is noted that when it comes to the *amount* of the costs incurred in relation to the case management hearing on 17 September 2021 specifically, there is to be a splitting of RHRA's costs as apply to the dispensation and to the section 27A application).

85. We consider that a condition that the Applicant pays both PFP'S and RHRA's reasonable costs of the proceedings, including of the two case management hearings, is a reasonable condition well within our discretion to impose on the grant of dispensation.

(c) The Applicant's costs of these proceedings

86. The Applicant's submissions on this matter rely on the same factual and legal matrix as set out in (b) above. For the same reasons, the Applicant's submissions are rejected. We consider that a reasonable condition of dispensation, falling within our broad discretion, is that the Applicant should not be able to recover its costs of these proceedings against any of the Respondents, in any respect inclusive of the case management hearings.

Conclusion

87. For those reasons, we grant to the Applicant dispensation from the consultation requirements as applied to (1) engaging JSG to carry out the original works; and (2) in respect of the additional works, on condition that the Applicant should not recover its costs of, in or associated with the arbitration proceedings between it and JSG, or of and in the application, and on condition that it pays to both PFP and RHRA their reasonable costs in this application. The form of order appears above, into which is embedded a set of directions for a summary costs assessment should the parties be unable to agree PFP and RHRA's reasonable costs, though it is

hoped that with the resolution of this application the parties might be more inclined to set aside mistrust and cooperate in that regard.

Judge N Carr
29 October 2021

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).