FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LDC/2023/0161**
Property	**:**	**110-120 (Even Numbers) Weston Street, and 175, 175A, 177, 179, 181, 181A Long Lane and 183-191 (Odd Numbers) Long Lane (known as The Taper Building)**
Applicant	**:**	**Grey GR Limited Partnership**
Representative	**:**	**DAC Beachcroft LLP** (ref: GRE244-2125054) (email: gbarton@dacbeachcroft.com and gknight@dacbeachcroft.com)
Respondents	**:**	**The long residential leaseholders of The Taper Building**
Type of application	**:**	**To dispense with the requirement to consult leaseholders about cladding works (Section 20ZA, Landlord and Tenant Act 1985)**
Tribunal	**:**	**(1) Judge Vance** **(2) Mrs S Redmond MRICS**
Date of Decision	**:**	**3 August 2023**

DECISION

Decisions

1. The Tribunal grants conditional dispensation under s.20ZA, Landlord and Tenant Act 1985 in respect of:

   (a) works identified in the Schedule of Works found at section 3 of the TFT report dated 3 August 2022; and

   (b) works identified at paragraphs 13.1 and 13.2 of the letter from DAC Beachcroft to Burges Salmon LLP dated 6 July 2023.

2. Dispensation is conditional on the following terms:

   (a) Condition One - the Applicant is to invite Hydrock to be present throughout the Works which form the subject of dispensation, including during investigatory works. The Applicant must facilitate such access as is required for Hydrock to advise the BS Respondents (defined below) on whether condition A13 of the TNT report "Practical completion of the works" has been met";

   (b) Condition Two - the Applicant will facilitate monthly site visits by leaseholders so that they can inspect the works for which dispensation has been granted, to include a Q&A session with its experts (TFT, CHPK and Miller Knight) and to ask any necessary questions. Hydrock is to be invited to attend the site visits and Q&A sessions;

   (c) Condition Three - the Applicant is to indemnify the BS Respondents for the reasonable costs of their expert, Hydrock's involvement in Conditions One and Two imposed by the tribunal, as set out above. In the event of any dispute concerning the operation of this condition, any party may make an application to the Tribunal for a determination.

   (d) Condition Four – the Applicant is to pay the BS Respondents their reasonable costs incurred in connection with the Applicant's application under section 20ZA(1), to be assessed by the tribunal by way of summary assessment if not agreed. In the absence of agreement, either party may apply to the tribunal for a determination.

3. We make orders under s.20C of Landlord and Tenant Act 1985 and Sch.11, Para.5A Commonhold, Leasehold Reform and 2002 Act as set out below.

Background

4. This is the tribunal's decision on the Applicant's application to retrospectively dispense with the requirements of the Service Charges (Consultation Requirements) (England) Regulations 2003 (the

"Consultation Regulations") pursuant to s20ZA Landlord and Tenant Act 1985 ("the 1985 Act").

5. Page numbers in square brackets and bold below refer to pages in the PDF hearing bundle prepared by the Applicant's solicitors (802 pages).

6. The Applicant, Grey GR Limited Partnership, ("Grey") is the freeholder and landlord of the premises known as the Taper Building being 110 to 120 (even numbers) Weston Street, and 175, 175A, 177, 179, 181, 181A Long Lane and 183-191 (odd numbers) Long Lane (the "Building"). It has been the registered freeholder since 12 December 2018 **[28]**. At all material times, Grey has appointed Inspired Property Management Limited ("Inspired") to manage the Building. The Respondents are the residential leaseholders of flats in the Building, each of whom is liable to pay service charges to the Applicant. Fifty-nine of them are represented in this application by Burgess Salmon LLP ("the BS Respondents").

7. The Building comprises four blocks, rising to a maximum height of eight storeys in each block, and consisting, primarily, of residential units let on long leases, together with parking at basement levels, and shared offices and a gym on the mezzanine floor. Peveril Securities Long Lane Limited ("Peveril) was the original developer of the Building, and is also the leasehold owner of flats 5, 12, 26, 38, 45, 52.

8. The application was heard, by remote video conferencing (CVP), on 10 July 2023. The Applicant was represented by Mr Stocks of counsel and the BS Respondent leaseholders were represented by Mr Bates, also of counsel. Several leaseholders were also in attendance. Ms Perks, from Mills & Reeves LLP, solicitors for Peveril, was also present. Immediately following the hearing, the tribunal held a case management hearing in case LON/00BE/HYI/2023/0003, an ongoing application for a Remediation Order under section 123(2) of the Building Safety Act 2022, brought by the 59 leaseholders represented by Burgess Salmon LLP, and issued on 17 February 2013.

9. On 30 May 2023, Grey commenced works in relation to internal compartmentation at the Building. Grey's case is that breaches in fire compartmentation had been identified in a report it commissioned from Tenos Limited, dated 9 August 2021, following which it instructed Tuffin Ferraby Taylor LLP ("TFT"), its technical advisor, to produce a specification of works dated 3 August 2022 (the "Works") **[249-357**].

10. The Works comprise making good breaches in fire compartmentation within the communal areas, means of escape routes and service risers, the key elements being:

    (a) fire stopping and fire sealing;

    (b) replacement of non-compliant fire doors;

    (c) disconnection and reinstatement of existing M+E fittings to works areas as required; and

(d) redecoration works.

11. Grey instructed TFT to oversee a tendering process for the Works, which resulted in TFT preparing a Tender Report dated 30 September 2022 **[361 – 403]**. Two tenders were received, one from Inco Contracts which quoted a price of £364,666.75, with a contract period of 22 weeks, and the other from Miller Knight Resource Management Limited ("Miller Knight") who quoted £310,018.58, with a contract period of 16 weeks, figures revised after the tender query and review process to 23 weeks for Inco and £341,432.75 for Miller Knight . On TFT's recommendation, Grey instructed Miller Knight to proceed with the Works, which commenced on 30 May 2023. They are due to complete in or around November 2023.

12. Grey accepts that the provisions of s.20 of the 1985 Act, and the Consultation Regulations, required it to consult with the Respondents before commencing the Works because each Respondent's contribution to the works will exceed £250. Its case is that it was unable to do so because of the urgent need to instruct a contractor to proceed. It therefore requests that the tribunal grant it retrospective and unconditional dispensation from the Consultation Regulations in accordance with s.20ZA of the 1985 Act.

13. The only leaseholders who have made substantive representations in respect of the dispensation application are the BS Respondents who filed a statement of case dated 27 June 2023 **[422-428],** supported by a witness statement of Natalie Chopra dated 27 June 2023 **[429-439]**. Their position is that whilst unsatisfied with what they consider to be the very slow rate of progress in remedying the dangerous condition of the Building, they do not oppose the grant of dispensation. They do, however, contend that the scope of dispensation should be closely defined, and that the grant of dispensation should be made subject to conditions.

14. Peveril's position as conveyed in a letter to the tribunal dated 5 July 2023 **[799-800**] was that they were neutral in respect of the application, until such time as: (a) it had been demonstrated to it what works are necessary; (b) why the Works were said to be urgent; and (c) it had been provided with details of the application for a Remediation Order, to which it is not a party.

15. At the hearing, Ms Perks stated that Peveril was not objecting to the tribunal proceeding to determine the dispensation application. Its position was that it did not know if the Works were, in fact, required and that it had not had sufficient time to consider its position on the application, given the short timeframe between the date of issue of the tribunal's directions (29 June 2023) and the date of the tribunal hearing. The tribunal considered whether to delay the issue of its determination to allow Peveril to put in written representations but were persuaded by Mr Bates' objections on grounds that there was potential prejudice to their clients because one of the conditions the BS Respondents sought (Condition One) was for the involvement of Hydrock and delay in the issue of this decision would result in delay in that occurring.

The legal framework

16. Section 19 of the 1985 Act imposes a requirement of reasonableness in respect of service charges, with s.19(1) providing that "relevant costs" are to be taken into account in determining the amount of a service charge payable for a period:

> " (a) only to the extent that they are reasonably incurred, and
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard".

17. Section 19(2) provides that, where a service charge is payable before relevant costs are incurred, "no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction of subsequent charges or otherwise".

18. Section 20(1) provides for the "relevant contributions of tenants" to be limited in accordance unless the consultation requirements have been either been complied with, or dispensed with, by this tribunal. Under section 20(7) and regulation 6 of the Consultation Regulations, a tenant's "relevant contribution" is limited to £250.

19. Section 20ZA(1) of the 1985 Act provides that this tribunal may dispense with "all or any of the consultation requirements" if satisfied that it is reasonable to do so. The consultation requirements relevant to this case are found in part 2 of schedule 4 to the 2003 Regulations

20. The leading authority in relation to s.20ZA dispensation requests is *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 ("*Daejan*") in which the Supreme Court set out guidance as to the approach to be taken by a tribunal when considering such applications. This was to focus on the extent, if any, to which the lessees were prejudiced in either paying for inappropriate works or paying more than would be appropriate, because of the failure of the landlord to comply with the consultation requirements. In his judgment, Lord Neuberger said as follows:

> "44. Given that the purpose of the 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.
>
> 45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's 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): in such a case the tenants would be in precisely the

position that the legislation intended them to be – ie as if the Requirements had been complied with."

21. Lord Neuberger's conclusion was that the factual burden of identifying some relevant prejudice is on the leaseholders. They need to show that they have been prejudiced by the failure of the landlord to comply with the statutory consultation procedure. If a credible case of prejudice is established, then the burden is on the landlord to rebut that case.

22. At [54], he said that this tribunal had the power to grant a dispensation on such terms as it thinks fit, provided that "any such terms are appropriate in their nature and effect." He also concluded that dispensation from consultation requirements can be granted on terms, such as the landlord agreeing to reduce the recoverable costs of the works [57-58], and that the tribunal had the power to impose a condition as to costs, such as a requirement that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1) [59]. Such a condition, said Lord Neuberger, would be a term on which the tribunal "granted the statutory indulgence of a dispensation to the landlord" [61]. He expressly contemplated the imposition of a condition requiring the landlord to recompense the tenants for the costs of an expert surveyor [69].

23. At [72], Lord Neuberger referred to what he believed to be the significant disadvantages that a landlord who failed to comply with the requirements would face. He said as follows:

> " I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the [tribunal] for a section 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the [tribunal] will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue."

24. At [41] he said that "the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be described should not be regarded as representing rigid rules".

25. In *Daejan* the Supreme Court granted the landlord dispensation subject to conditions that it paid the leaseholders "reasonable costs … incurred in respect of the proceedings in the [tribunal] in reasonably investigating and establishing non-compliance with the Regulations, investigating, or seeking to establish prejudice and investigating and challenging the [landlord's] application for dispensation". Another condition provided for the leaseholder's liability to pay service charges to be reduced by £50,000 in aggregate.

26. The circumstances in which it would be appropriate for this tribunal to impose conditions on the grant of dispensation from the service charge consultation requirements was subsequently considered by the Court of

Appeal in *Aster Communities v Chapman & Others* [2021] EWCA Civ 660 ("*Aster*").

27. In earlier proceedings brought under s.27A of the 1985 Act Aster sought a determination of the service charge payable by lessees following major repair works. In its decision, the tribunal found that the replacement of balcony asphalt had not been included in Aster's section 20 consultation exercise. Aster therefore applied for dispensation from the statutory consultation requirements in respect of the replacement of the balcony asphalt under s.20ZA.

28. The tribunal determined that it was appropriate to grant dispensation, but subject to certain conditions. It concluded that a "credible case of relevant prejudice" had been made out, finding that had the balcony asphalt been included in the notified works, one of the tenants, Miss Motovilova, would have acted differently. As the tribunal considered it unclear as to whether the leaseholders were being asked to pay for inappropriate works, the terms on which it granted dispensation included a condition that Aster pay: (i) the reasonable costs of an expert to consider and advise the lessees on the necessity of replacing all the balcony asphalt at the main blocks; and (ii) the lessees' reasonable costs of the dispensation application. The tribunal's decision was upheld by the Upper Tribunal and Aster appealed to the Court of Appeal.

29. The Court held that on the facts of the case, the conditions imposed could not be faulted. In his judgment, Newey LJ said that in *Daejan* Lord Neuberger spoke of dispensation being conditional on the landlord paying the tenants' reasonable costs "incurred in connection with the landlord's application under section 20ZA(1)" [59] and "in connection of investigating and challenging that application" [73]. He said that taken in isolation, those passages lent weight to Aster's submission that it should not have been required to bear costs to be incurred only after the dispensation application had been determined. However, on the other hand, Lord Neuberger also referred in more general terms to tenants being "likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord" [69] and to the tribunal "not [being] too ready to deprive the tenants of the costs of investigating relevant prejudice or seeking to establish that they would suffer such prejudice" [68]. He said that importantly, in this case, the tribunal was in effect proceeding on the basis that the potential prejudice to the tenants remained to be addressed, with any future section 27A application providing a forum for the investigation into prejudice which might otherwise have been undertaken – at Aster's expense – in the context of the dispensation application. Given, moreover, Lord Neuberger's recognition that "the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, any principles that can be described should not be regarded as representing rigid rules" and 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" .

Should dispensation be granted?

30. We accept, as stated in para. 18 of Grey's statement of case, that there is an urgent need to remediate the compartmentation issues as soon as possible to safeguard the Building and its occupants. Evidence supporting that urgency can be found at para. 2.5 and 2.12 of the Fire Engineering and Technical Note for the Building prepared by CHPK Fire Engineering ("CHPK) dated 9 March 2023 **[142-146]**. The urgent need to address defects in compartmentation was also identified in the conclusion of a report from Tenos dated 11 April 2023 **[158]**. No leaseholder has objected to the grant of dispensation, and, in our determination, it is reasonable to grant dispensation in the terms, and subject to the conditions, referred to below.

Scope of Dispensation

31. The BS Respondents propose that the wording of dispensation should be as follows: "The Tribunal grants dispensation under s.20ZA, Landlord and Tenant Act 1985 in respect of the Schedule of Works found at section 3 of the TFT report dated 3 August 2022." Mr Bates submitted that this was important as the Applicant has already changed the scope of the works once, as identified in a letter from the Applicant's solicitors, DAC Beachcroft, to Burges Salmon LLP dated 6 July 2023 in which it was said:

> "13. By way of any update on the progress of these works, the scope of the works has evolved to include more extensive works than originally envisaged. Our client has agreed to a variation for Miller Knight to carry out these more extensive works which relate to:
>
> 13.1. Corridor partition deflection heads; and
> 13.2. Riser cupboard doors and enclosures to each core.
>
> 14. As a result of these more extensive works being added to the existing works package, the projected program will need to be extended. These works are now expected to be completed by the end of November 2023."

32. Mr Stocks argued that such wording would be unduly restrictive, and that it could cause significant difficulties in the event it was discovered that additional, or alternative, works were required which are not specified in the Schedule of Works. He pointed out that additional unanticipated works to riser cupboard enclosures are now required, the need for which was only identified after the Works had commenced, and ceilings removed. It would not, in his submission, be reasonable for Grey to have to come back to the tribunal and seek further dispensation if further unanticipated works are identified.

33. We agree with Mr Bates that where the tribunal grants an applicant dispensation from the Consultation Regulations, it is important that the

tribunal identify, with sufficient particularity, the scope of the works for which dispensation is granted. It is entirely appropriate for the grant of dispensation to refer to the specification of works in the Schedule at section 3 of the TFT report, given that that in its application, the Applicant itself sought dispensation in respect of "the Works", which are defined, at para. 19 of its statement of case **[19]** as being the works described in that same Schedule.

34. However, we also consider that the additional works set out in para. 13 of DAC Beachcroft's letter of 6 July should also be included within scope of dispensation. This is because no objection has been raised by leaseholders to the additional works, and because we accept Mr Stocks' submission that the works fall within the same "set" of works identified in the Schedule. They appear to us to be works relating to compartmentation that fit into the description at para. 10 above.

35. In our determination, the scope of dispensation should be as follows:

> "The Tribunal grants dispensation under s.20ZA, Landlord and Tenant Act 1985 in respect of:
>
> (a) works identified in the Schedule of Works found at section 3 of the TFT report dated 3 August 2022; and
>
> (b) the works identified at paragraphs 13.1 and 13.2 of the letter from DAC Beachcroft to Burges Salmon LLP dated 6 July 2023",

36. If it turns out that additional unexpected works are required, and consultation is not practical, then Grey will have to decide whether such works fall within the same "set" of qualifying works for which dispensation has been granted, or whether to apply to the tribunal for further dispensation.

Should conditions be imposed on the grant of dispensation?

37. Mr Bates submitted that the grant of dispensation should be made subject to the conditions set out below. Mr Stocks accepted that the tribunal had the power to impose such conditions as it thinks fit, provided that those conditions are appropriate in their nature and effect. However, in his submission, to meet the criteria in *Daejan*, the BS Respondents needed to first identify a credible case of real prejudice which those conditions are said to address. He contended that there needed to be a causal link between the prejudice experienced, and any conditions imposed. Conditions should not, he said, be imposed in respect of matters that the Respondents would otherwise have no right to obtain. He accepted that the BS Respondents had experienced prejudice, but in his view the conditions proposed went beyond addressing that prejudice.

38. As recognised in *Daejan*, where a landlord seeks dispensation, leaseholders will often be entitled to recover their costs incurred in investigating the

prejudice flowing from the failure to consult. Such costs will usually be incurred by leaseholders within the dispensation application. However, as occurred in *Aster*, where dispensation was not sought until after works had been undertaken, the costs of investigating that prejudice might not be decided in the dispensation application but left instead to be determined in potential future s.27A proceedings.

39. That was the position in *Aster* where the tribunal found that leaseholders had not had the opportunity to consider and respond to the landlord's evidence in support of the appropriateness of works. Had that evidence been provided with the landlord's dispensation application, the leaseholders would, said the tribunal, have had the opportunity to obtain expert evidence to investigate prejudice, the costs of which would have been payable by Aster. The tribunal considered that it was therefore appropriate for a condition of dispensation to be that Aster pay the costs of the leaseholders obtaining a surveyor's report to show whether the works proposed by the landlord were unnecessary or inappropriate.

40. In both *Daejan* and *Aster* the Courts referred to the need for conditions on the grant of dispensation to be appropriate in their nature and effect. We consider that for a condition to be appropriate, it should seek to address relevant prejudice that the tribunal has identified leaseholders have experienced because of the failure to consult. Thus, in *Aster*, it was appropriate for the Aster to pay the costs of the surveyor's report because it was necessary for their investigation into the potential prejudice that the tribunal had identified.

41. In both *Daejan* and *Aster* the Courts referred to the need for conditions on the grant of dispensation to be appropriate in their nature and effect. In our view, for a condition to be appropriate it should seek to address and remedy relevant prejudice, or potential prejudice, that the tribunal has identified leaseholders have experienced, or may have experienced because of the failure to consult. To that extent, we agree with Mr Stocks that there needs to be a link between the prejudice experienced (or which may be experienced), and any conditions imposed. We now turn to the proposed conditions.

Condition 1: Involvement of Hydrock

42. The proposed condition is that:

> "The Applicant is to invite Hydrock to participate in all investigatory works relating to the works which form the subject of the dispensation. Moreover, Hydrock is to be asked to confirm that condition A13 of the TFT report "Practical completion of the works" has been met."

43. At paras. 29-30 of her witness statement **[435]**, Ms Chopra requested that Hydrock be involved, and have oversight of, every stage of the ongoing compartmentation works. She said that if leaseholders had been consulted about the proposed works, they could have opened up a dialogue between

their expert, Hydrock, and Grey's expert, which would have benefitted both sides. She also requested that the works be "signed off" by Hydrock.

44. In Mr Bates' submission, had there been full consultation, it would have been inevitable that the BS Respondents, a very able group of leaseholders, would have asked Hydrock to advise them on the works, including on an ongoing basis, and on the quality of the final works. They would, for example, have been able to nominate a contractor and to examine underlying material such as the tender analysis. Hydrock's advice would have allowed the BS Respondents to make meaningful and informed observations which the landlord would have been required to take into account and respond to. Instead, because of the lack of consultation, they had lost all of those rights, and thereby suffered relevant prejudice.

45. Mr Bates also contended that the condition is necessary, to enable the Respondents to understand whether they have any viable challenge under s.19 Landlord and Tenant Act 1985, for example as to whether works are appropriate in scope and price. Until the work was complete they would not know if a s.19 challenge was appropriate, for example whether the quality of the works was reasonable.

46. Mr Stocks' position was that Grey had no issue with inviting Hydrock to be present throughout the Works, including any investigatory works, but that it was not reasonable to require Grey to pass oversight of the works to Hydrock, nor to pass it the power to sign off on the work. That was a matter for Grey to decide, having regard to its own expert advice.

47. In his oral submissions, Mr Bates explained that the BS Respondents were not asking for Hydrock to "sign off " on the works in the sense that they wanted a power of veto. What they wanted was for Hydrock to confirm to them whether practical completion had been met so that they were in a position to identify whether a s.19, or Building Safety Act, challenge was appropriate.

48. We are satisfied that the BS Respondents have established a case of relevant prejudice of the type identified by Mr Bates. We accept, on the balance of probabilities, Ms Chopra's evidence that if there had there been full consultation, the BS Respondents would have engaged Hydrock, who has been advising them since July 2022, to advise on the proposed Works during the consultation period, whilst the Works were ongoing, and once the Works are completed. We accept Ms Chopra's unchallenged evidence at para. 35 of her witness statement **[436]** that the BS Respondents are an active and involved group of leaseholders, and that many of them have professional expertise which would have been highly relevant had there been full consultation. Ms Chopra explains that one leaseholder is a Chartered Civil Engineer and a Fellow of the Institution of Civil Engineers who has extensive experience of design, construction and contracts, and another is a Chartered Surveyor and a Fellow of the Royal Institute of Chartered Surveyors with extensive experience in the property sector. Ms Chopra stated that she is a lawyer and there are other similarly qualified leaseholders amongst the BS Respondents.

49. As no consultation took place, the BS Respondents were deprived of the ability to make observations on the Works to Grey, which would have been made in the light of advice from Hydrock. Instead, the Works were commissioned, and are now underway, without the benefit of such observations. We agree with Mr Bates that, in the particular circumstances of this case, the loss of those rights constitutes relevant prejudice of the type identified in *Daejan*.

50. We also agree that the imposition of a condition along the lines proposed by the BS Respondents is appropriate. In fact, following Mr Bates' clarification regarding what was meant by "sign off" there does not appear to be a significant difference between the parties regarding the purpose of a condition if we were to determine the imposition of one to be required.

51. In our determination the grant of dispensation should be conditional on compliance with the following:

> The Applicant is to invite Hydrock to be present throughout the Works which form the subject of dispensation, including during investigatory works. The Applicant must facilitate such access as is required for Hydrock to advise the Respondents on whether condition A13 of the TNT report "Practical completion of the works" has been met.

Condition 2: Sharing of information

52. The proposed condition is that:

> "The Applicant must – no later than each period of 28 days from the date of this order - provide to both Hydrock and each Respondent, a summary of investigations/works carried out since the last update and a summary of information discovered arising from those investigations/works together with anything else material to the works for which dispensation was granted. Such information to be provided at no cost to any leaseholder."

53. Through this condition, the BS Respondents seek to ensure that up-to-date information is afforded to them as and when it becomes available, for example when a new problem is discovered, or a provisional sum is utilised in respect of an unanticipated defect (para 22 of Mr Bates' skeleton argument). Mr Bates' submits that the condition is necessary because understanding what is going on at any given time is critical in order to understand whether any issue arises under s.19, for example if a cost is incurred which, at the end of the process, may look like it was unreasonably incurred, but that cannot be judged without knowing how it came to be incurred.

54. Grey's position is whilst it has no objection to sharing information with the leaseholders, it would be disproportionate to require it report to them every time that anything occurs in the process of carrying out the works, and to provide detailed explanations of costs incurred, how they came to be incurred and the professional advice obtained by Grey to incur those costs.

55. It proposes an alternative, namely the provision of monthly site visits by leaseholders including a Q&A session with its experts (TFT, CHPK and Miller Knight) which will provide them with an opportunity to inspect the works first-hand and ask any necessary questions.

56. We agree with Mr Stocks that the condition proposed by the BS Respondents goes beyond what Grey would have been required to do had statutory consultation taken place. In our view, any potential prejudice to the leaseholders resulting from the failure to consult, which might form the subject matter of a future section 27A application, is likely to be identifiable by them through Grey's alternative proposals. Those proposals should provide them with enough information for them to take a decision on whether to pursue a s27A application, especially given our imposition of the first condition above, and the fact that they will have the benefit of ongoing expert advice from Hydrock.

57. We therefore make dispensation conditional on the following:

> The Applicant will facilitate monthly site visits by leaseholders so that they can inspect the works for which dispensation has been granted, to include a Q&A session with its experts (TFT, CHPK and Miller Knight) and to ask any necessary questions. Hydrock is to be invited to attend the site visits and Q&A sessions.

Condition 3: Indemnity for expert advice

58. The proposed condition is that:

> "The Applicant is to indemnify the Respondents up to a maximum sum of £25,000 (plus any applicable VAT) in respect of the professional fees they have or will incur in connection with the works which are the subject of the dispensation order".

59. At the hearing, Mr Bates' confirmed that through this condition the BS Respondents were seeking to be compensated for *prospective* costs they will incur in respect of Hydrock's ongoing involvement in reviewing and conducting site visits regarding the compartmentation works. A fee proposal from Hydrock with a fee cap of £24,400 is at pages **[728-737]** of the bundle.

60. Mr Bates contended that it is normal for a condition to be imposed on the grant of dispensation requiring a landlord to compensate leaseholders for their costs of obtaining professional advice in order to examine issues of prejudice, such as whether works are within scope, or the price of the works. He relied on para 68 of the decision in *Daejan* where it was said that a tribunal should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. He also relied upon the decision in *Aster* where the tribunal's condition requiring Aster to pay the reasonable costs of an expert to consider and advise the tenants on the necessity of replacing all balcony asphalt at the main blocks was held by the Court of Appeal to be a condition

that the tribunal was entitled to impose in the specific circumstances of the case.

61. In Mr Bates' submission, without the benefit of such advice, the leaseholders would not know whether, and to what extent, they have suffered relevant prejudice in the sense identified in *Daejan*, such as to enable them to make practical use of their rights under s.19 of the 1985 Act. In addition, if the tribunal acceded to their proposed conditions 1 and 2, it would be unfair for those conditions to result in the leaseholders being left out of pocket.

62. Mr Stocks' position was that such a condition would be outside the scope of reasonable conditions for the tribunal to impose. He accepted that the tribunal may impose a condition relating to the costs of obtaining professional advice to investigate relevant prejudice, but suggested that this would not be the purpose of the condition proposed by the BS Respondents.

63. This current situation, in his submission, differed from that in *Aster* where the tribunal found, on evidence from, Miss Motovilova, that if the landlord had complied with the Consultation Regulations, she would have questioned the necessity for the works, and would have "commissioned … an independent surveyor's report on the available options and the extent of the damage in relation to the balconies' asphalt" [36]. This might have resulted in a cheaper alternative approach of targeted repair [29].

64. In the present case, said Mr Stocks, the position is very different. Firstly, the BS Respondents were not contending that the intended works were unnecessary. On the contrary, they are actively seeking a remediation order to require Grey to carry out works to the Building. We do not accept this to be a relevant consideration. It is correct that the BS Respondents are content for the Works to proceed. However, they have not conceded that the scope of the Works is appropriate, or that the estimated costs, as per the Miller Knight's tender, are appropriate. Paragraph 19 of Mr Bates' skeleton argument indicates that these are still live issues.

65. Secondly, the BS Respondents have already obtained expert advice from Hydrock, including its "Expert Advisory Report" dated 6 February 2023 **[105-140]**. They did not need additional expert advice in order to enable them to form a view as to whether to pursue a challenge under s27A of the 1985 Act. We accept the strength of that submission given that the BS Respondents are not seeking, through this condition, to be reimbursed for the costs of Hydrock's 6 February report.

66. Mr Stocks also suggested that the BS Respondents were seeking to obtain the imposition of this condition to circumvent the fact that they are unable to recover Hydrock's costs through the Remediation Order application where recovery is not permitted in circumstances where Hydrock was instructed a number of months before this application was issued. As such, it would be wholly inappropriate therefore for them to use Grey's application to seek such costs. We do not consider the Remediation Order application to be relevant to the question under consideration in this application, which is what conditions, if any, should be imposed on the

indulgence to be accorded to Grey despite its non-compliance with the Consultation Regulations.

67. We agree that there are some differences between the situation in *Aster* and the present case. In *Aster,* dispensation was not sought until after works had been completed. In this case, dispensation was sought after commencement, but before completion In *Aster*, Newey LJ agreed that the tribunal had, in effect, proceeded on the basis that the potential prejudice to the leaseholders remained to be addressed [50].

68. We do not consider that to be the case here. In our view, the leaseholders have experienced identifiable, relevant prejudice of the type identified in para. 6 of Mr Bates' skeleton argument, rather than *potential* prejudice. Specifically, they have:

    (a) lost the opportunity to comment on (and seek to influence) the scope of the Works (which they could have done had there been a stage 1 consultation notice);

    (b) lost the right to have their comments considered by the landlord and to receive a response to those comments;

    (c) lost the opportunity to propose a contractor and

    (d) lost the opportunity to examine any of the underlying material which goes to scope, price etc

69. We accept, and agree, with Mr Bates' submission that s.20 consultation exists to support leaseholder's s.19 rights. This was the view taken at para. 42 of *Daejan* where it was said that sections 20 and 20ZA appear to be intended to reinforce, and to give practical effect to, the requirements in s.19 that tenants of flats are not required to (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.

70. We do not consider that any costs indemnity should extend to the costs of the BS Respondents obtaining Hydrock's advice as to whether the Works, once complete, were carried out to a reasonable standard. This question would obviously not have been engaged if statutory consultation had, in fact, occurred, and is therefore irrelevant to the prejudice experienced by leaseholders.

71. We are, however, persuaded that the BS Respondents should be compensated for Hydrock's costs of complying with Conditions One and Two, as set out above. Given that we have reached the conclusion that dispensation should be conditional on those terms, it is, in our determination, appropriate that that the costs involved be paid by Grey as costs of remedying the prejudice that the BS Respondents have experienced. It would be iniquitous for those Respondents to have to pay the costs themselves given that the need for the conditions arise from Grey's non-compliance with the statutory consultation requirements.

72. We do not agree with the suggestion that an indemnity should be given up to a specific sum. In our view, any condition should refer to the incurrence of reasonable costs which, if not agreed, can be referred to this tribunal for determination.

73. We impose the following condition, which we consider addresses, and seeks to remedy, the prejudice experienced by the BS Respondents;

> The Applicant is to indemnify the BS Respondents for the reasonable costs of their expert, Hydrock's involvement in Conditions One and Two imposed by the tribunal, as set out above. In the event of any dispute concerning the operation of this condition, any party may make an application to the Tribunal for a determination.

Condition 4: Third party recovery

74. The condition proposed is as follows:

> "The Applicant must provide to the Respondents, within 28 days of this order, an explanation of what steps it has taken or is proposing to take to require third parties to contribute to the costs associated with these works. This should cover, in particular, any claims it has or might have against the original developer. It must also, at the same time, disclose copies of any document (including, for example, letter before claim) which it has sent to any third party in connection with such a claim. That process must be repeated at least once in each subsequent period of 28 days (although a "nil returns" email is acceptable if nothing had changed). This material must be provided at no cost to any leaseholder. For the avoidance of doubt, this paragraph does not oblige the Applicant to disclose any document which is covered by any form of legal professional privilege."

75. In Mr Bates' submission, if consultation had taken place, leaseholders would have observed that the original developer, Peveril, is still a leaseholder at the Building, that no action appears to have been taken against it by the Applicant, and that this route should be pursued before seeking to pass any costs on to the leaseholders. They would have been entitled to know what the response to that proposal was, and this condition simply ensures that an answer is obtained.

76. We agree with Mr Stocks that this is not an appropriate condition to make. As he submitted, if a leaseholder had made such a comment, there would have been no binding obligation on Grey to provide an answer to a question framed in this way as part of a consultation process. A landlord is obliged to respond to observations received, but we do not consider this would extend to the sort of detailed explanation Mr Bates' proposes in this condition.

77. There is also merit in Mr Stocks' submission that given that that Peveril is a leaseholder of six flats in the Building, and a respondent to these

proceedings, the imposition of the condition would carry with it a substantial risk of inadvertent waiver of legal privilege, as well as being unwise from a tactical perspective, in that it could give a litigation advantage to a proposed defendant.

78. We note that Mr Stocks confirmed that Grey was exploring third party recovery as an option against Peveril in the form of High Court proceedings or an application for a Remediation Contribution Order and has alerted Peveril to this in open correspondence **[795]**.

79. In our determination, the proposed condition is inappropriate and does not address the prejudice experienced by the BS Respondents arising from the failure to consult.

Condition 5: costs of this application

80. The condition proposed is that:

> "The Applicant must pay £22,500 to the leaseholders represented by Burgess Salmon LLP in respect of the costs of this application."

81. This, submitted Mr Bates, is the price of the statutory indulgence, as indicated by Lord Neuberger in *Daejan* [59], [64].[69].

82. Mr Stocks accepted that the Tribunal has a power to impose conditions in respect of costs, and specifically to order a landlord to pay the tenant's reasonable costs incurred with an application under s20ZA, but contended that it would not be reasonable to do so in this case because the BS Respondents have not needed to investigate whether Grey had complied with the consultation requirements, and nor have they sought to substantively resist the application or put forward any credible case of prejudice in opposition

83. We reject those submissions. The fact that the BS Respondents did not need to investigate whether Grey had complied with the consultation requirements is not relevant. The BS Respondents have still had to incur costs in considering this application, and whilst they have not opposed the grant of dispensation, they have incurred the costs of arguing that it should only be granted on terms. We agree with Mr Bates that such a condition is entirely appropriate as a term of Grey being accorded this indulgence. However, no breakdown of the £22,500 costs said to have been incurred has been provided and we are unable to assess the reasonableness of costs in that sum.

84. In the circumstances, we impose the following condition:

> The Applicant is to pay the BS Respondents their reasonable costs incurred in connection with the Applicant's application under section 20ZA(1), to be assessed by the tribunal by way of summary assessment if not agreed. In the absence of agreement either party may apply to the tribunal for a determination.

Condition 6: No costs under the leases

85. The BS Respondents proposed the following condition:

> "Pursuant to s.20C, Landlord and Tenant Act 1985 and Sch.11, Para.5A, Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), none of the legal or professional costs incurred by the Applicant in consequence of this application can form any part of any demand for service charges or administration charges from the Respondents".

86. Mr Stocks confirmed that Grey will not be seeking to pass on the costs of this application under the service charge provisions of the Leases, and so this issue was conceded. We do not consider it appropriate to record this concession as a condition, as it requires a determination from the tribunal. Instead, in all the circumstances of the case, we determine that it is just and equitable to make orders:

    (a) under s.20C of the 1985 Act, that none of the costs incurred, or to be incurred, by the landlord in connection in connection with this application are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents; and

    (b) under Sch.11, Para.5A of the 2002 Act, extinguishing any liability on the Respondents to pay any administration charge in respect of litigation costs incurred in respect of this application

Amran Vance

3 August 2023

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

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

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.