FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

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Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

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c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

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32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

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b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

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32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CN/LDC/2023/0026**
Property	**: Galbraith House, 141 Great Charles Street, Queensway, Birmingham B3 3LG**
Applicant	**: Grey GR Limited Partnership**
Representative	**: JB Leitch Limited (81/LW/J0286616)**
Respondents	**: The leaseholders of Galbraith House**
Type of Application	**: An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying Works.**
Tribunal Members	**: Judge T N Jackson** **R P Cammidge FRICS**
Date and venue of Hearing	**: 14 August 2024** **Midland Residential Property Tribunal** **Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**
Date of Decision	**: 17 October 2024**

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works set out in the specification of Works attached at "Annex D" of the Applicant's bundle. The dispensation is conditional on the Applicant providing to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 4 September 2023, the Applicant seeks retrospective dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all or some of the consultation requirements provided for by section 20 of the same Act.

2. The application relates to the need to carry out compartmentalization works to one of the ground floor commercial units and lobby in front of the same and which were completed in August 2023.

3. Directions were issued to the parties. Direction 6 required any Respondents who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.

4. The Tribunal has received objections to the application. The Applicant has provided a reply to the objections.

5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property and Leases

6. The Applicant has been the registered freeholder of the Property held under Title number WK58233 since 4 July 2018. Principle Estate Management LLP ("Principle") are the Applicant's managing agent.

7. The Property is a nine-storey mixed-use residential building with a basement level below and commercial units on the ground floor level. The height of the topmost habitable floor is above 18m - circa 29m. The Property was constructed in the 1960s and was converted from commercial use to a residential centred, mixed occupancy building in 2016/2017. The Property is served by a single staircase.

8. The apartments located within the Property are subject to long residential leases demised to the Respondents. The residential leases were granted on similar terms. A copy of a residential Lease has been provided to the Tribunal (but not a copy of any commercial lease. The Services to be provided by the Applicant to the residential leaseholders are contained in the Sixth Schedule of the Lease.

Background and need for the proposed Works

9. The Applicant received an Enforcement Notice from West Midlands Fire Service dated 26 October 2022 for failure to comply with the provisions of the Regulatory Reform (Fire Safety) Order 2005 (the "Enforcement Notice") because people were unsafe in case of fire. The Enforcement Notice required that by 19 December 2022, the Applicant undertake compartmentation works detailed within a compartmentation survey undertaken by Ignis Global Limited dated 22 and 23 April 2022.The reason for the Enforcement Notice was that 'a fire could spread from the commercial unit affecting the residential apartments and means of escape putting people at risk of death or serious injury'.

10. On 15 May 2023, an extension of time until 7 August 2023 was granted for the Applicant to comply with the Enforcement Notice. The works required to be undertaken relate to commercial unit B, Galbraith House, 141 Great Charles Street, Birmingham, B3 3LG (the "commercial unit"), which was vacant.

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("TFT") to project manage and produce a scope of works in relation to the works required by the Enforcement Notice. This scope of works is attached at "Annex D" of the Applicant's bundle (the "Works") and is detailed in paragraph 15 below.

12. As part of their instructed role, TFT sought a quote from Miller Knight Resources Management Limited ("Miller Knight") to carry out the Works. TFT are familiar with Miller Knight having worked with the contractor company on different projects.

13. Given the fire safety risk and timescales imposed by the Enforcement Notice, the Applicant received a single tender for the Works from Miller Knight in the sum of £100,234.60 plus VAT. The Applicant provided Miller Knight with a letter of intent on 4 May 2023 to instruct them to carry out the Works urgently to remediate the compartmentation issues as soon as possible to safeguard the Property and residents from the risk of fire and to comply with the Enforcement Notice. The Works began on 26 June 2023. The JCT building contract was signed on 30 June 2023.

14. Considering the above, the Applicant was unable to comply with the consultation process required by section 20 of the 1985 Act.

Proposed Works

15. The Applicant proposes to carry out the following qualifying Works to the Property as more particularly described in the specification of Works which is attached at "Annex D" of the Applicant's bundle. The Works entail undertaking fire stopping repairs to the commercial unit, and are summarised as follows:

a) Removal and disposal of the existing ceilings and lighting;
b) Removal of the fire alarm detectors from the ceilings (and temporarily leave safe in readiness for reinstallation);
c) Removal of asbestos debris (as identified in a report by Search Environment Limited attached at "Annex E" of the Applicant's bundle) and undertake an asbestos clean air test;
d) Undertake a fire compartmentation survey to the shell of the commercial unit and undertake associated remedial Works to remedy breaches in compartmentation;
e) Reinstate ceilings with a plasterboard ceiling to the retail area and suspended ceilings to the back of house areas;
f) Reinstate lighting to the ceilings with LED fittings;
g) Reinstate existing fire alarm detectors to the ceilings where removed;
h) Removal of commercial extract systems; and
i) Removal of false wall under the shop front glazing to expose the plastered walls and radiators.

Consultation

16. The Applicant has updated the leaseholders in respect of the Works as follows:

a) On 21 June 2023, Principle, on behalf of the Applicant, confirmed to the Leaseholders, that the Works were required to the Commercial Unit in order to further improve the fire safety integrity of the Property. Principle advised that the Works were expected to commence on 26 June 2023 and provided a brief description of the Works. Leaseholders were invited to contact Principle should they require any further information in respect of the contents of the letter.

b) On 24 July 2023, Principle, on behalf of the Applicant, confirmed to the leaseholders, that Works were ongoing to the compartmentation of the commercial unit and would shortly progress to the lobby area in front of the commercial unit. Leaseholders were invited to contact Principle, if they had any concerns or queries.

c) On 29 August 2023, (letter dated 23 August 2023), Principle, on behalf of the Applicant, confirmed to the leaseholders that the Works were due to complete at the end of August 2023. It was also confirmed that Miller Knight would be replacing the fire doors to the unit upon completion. Leaseholders were invited to contact Principle if they had any concerns or queries in respect of the letter's contents. Copies of the above letters are annexed at "Annex F" of the Applicant's appeal bundle.

Inspection/ Hearing

17. We did not consider an inspection to be necessary. A hearing was held at which the Applicant was represented by C Stocks of Counsel who was assisted by two in house solicitors. Daniel Lambeth (Flat 18) and David Clark (Flat 10) Respondents appeared

on their own behalf but did not have authority to represent any of the other Respondents. Kuljeet Takkar, solicitor and a trainee solicitor, both of HCR Law attended as observers on a watching brief on behalf of Parcap (No 3) Ltd which held leasehold interests in the commercial units.

18. During the hearing the Respondents produced a contractor's quote that had recently been obtained. This had not previously been produced to the Applicant nor the Tribunal. Due to the late submission, the Tribunal did not admit the late evidence.

The Law

19. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee must pay by way of a contribution to 'qualifying Works' (defined under section 20Z A (2) as Works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant of more than £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.

20. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson [2013] 1 WLR 854*. In summary, the Supreme Court noted the following:

    i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

    ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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

    iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult. The relevant prejudice is one that they would not have suffered had the consultation requirements been met but would suffer if an unconditional dispensation were granted.

    v. 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.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. Any breach of the requirements must be measured as at the date of the breach of the requirements

ix. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, dispensation should be granted in the absence of some very good reason.

x. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

xi. 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 application under section 20 ZA (1).

Submissions

The Applicant

21. The Applicant accepts that it did not comply with the section 20 consultation requirements. Its submissions are as summarised below:

a) The Works have been instructed and could not be delayed further for the purposes of carrying out section 20 consultation. There were fire safety risks due to the issues with the internal compartmentation of the commercial unit, and the Applicant was required to comply with the timescales imposed by the West Midlands Fire Service within the Enforcement Notice.

b) The Applicant has instructed the Works so as not to cause any unnecessary delays to remediation.

c) The Applicant's received a single tender and has proceeded to instruct Miller Knight to carry out the Works.

d) There is no prejudice to the Respondents which might be caused by the dispensation of the requirements of consultation that the Applicant is aware of.

e) The Applicant has engaged with the leaseholders in respect of the Works.

f) If lessees have concerns or questions, Principle remain willing to attempt to address these.

g) Challenges to the reasonableness of the costs to be incurred can still be brought by lessees if dispensation is granted.

h) The Applicant was unable to consult under section 20 for the reasons set out above and the Works were required to ensure the health and safety of the residents at the Property.

The Respondents

22. The Tribunal has received one letter of support to the Works from Parcap (No 3) Ltd. It has received objections from the Respondents in Flats 1,2,3,5,7,8,10,13,14,15 16 and 18.

23. The objections are materially similar, and the Applicant's solicitor had summarized them as set out below. At the hearing, the Respondents in attendance agreed that the headings below were an accurate summary and were content to proceed under those headings.

a) The Applicant only appears to have sought a single tender for the qualifying Works, this exposing the leaseholders to prejudice.

24. In response, the Applicant submits that this statement is misguided. The Respondents have not demonstrated that they have suffered relevant financial prejudice as a direct result of the Applicant's failure to consult. There must be a causal link between the prejudice claimed to have been suffered and the lack of formal section 20 consultation.

25. The objection is not evidence nor identification of relevant financial prejudice suffered by the Respondents as a result of the landlord's inability to consult. To the extent that the Respondents wished to challenge the reasonableness and payability of the costs of the Works and/ or whether the Works themselves are reasonable or appropriate, they can do so under Section 27A Landlord and Tenant Act 1985.

b) The cost of the Works is significantly above what might be expected. This shows there is likely prejudice of the Respondents paying more than appropriate.

26. The Applicant's response is the same as set out in paragraph 24 above. Further, some of the Respondents claim that had they have been consulted, they would have provided an alternative contract quotation, (which could have been cheaper). However, none of the Respondents have specifically confirmed what they would have said had consultation being carried out. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered

27. TFT, in their professional capacity as project managers, estimated that the costs of the Works would likely be circa £100,000. The quote returned by Miller Knight was that the Works would cost £100,234.60.

c) The work itself was not made available for consultation, despite it being complex with various possible remedies. This shows there is likely prejudice of the Respondents being charged for inappropriate Works.

28. The Applicant avers that this objection is not tantamount to relevant prejudice because it amounts to a complaint of mere deprivation of the opportunity to be consulted. Some of the Respondents claim that had consultation have been carried out, they would have thoroughly reviewed the proposed scope of works. However, Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003 confirms that within a Notice of Intention, a landlord is required only to describe, in general terms, the works proposed to be carried out. The Respondents should not seek to place themselves in a better position than they would have been if consultation was carried out.

d) The urgency suggested by the Applicant is based upon their own liabilities. The Works could have been completed sooner and section 20 could have been carried out.

29. The Applicant responds that on account of taking steps to comply with the Enforcement Notice and instructing the single contractor, it is not able to be able to complete consultation process with the leaseholders and therefore applies for retrospective dispensation of the consultation requirements. The Applicant obtained a single tender for the Works and proceeded to instruct the Works to comply with the Enforcement Notice and ensure that important fire safety remediation works were not delayed any further. The Applicant therefore was not able to carry out Section 20 consultation with the leaseholders, which requires a Statement of Estimates at stage 2 (requiring at least 2 estimates). The Works were instructed on a single tender basis and commenced on the 26 June 2023. The Applicant refers to the letter issued to the leaseholders by Principle in June 2023 which provided a general description of the Works and comments that none of the Respondents have produced any evidence of making any observations at the time.

e) The Applicant could have expedited the section 20 consultation process by contacting the Respondents and seeking their agreement to waive their rights under Section 20.

30. The Applicant say that this objection does not amount to evidence of a relevant financial prejudice caused as a result of the Applicants inability to consult in respect of the Works. This seems to suggest rather the opposite, that the leaseholders may, if asked, have agreed to waive their right to be consulted under Section 20. The obvious flaw with the argument is that the Applicant would have likely encountered difficulties in obtaining such agreement from all the leaseholders and in any event, a protective section 20ZA application would still most likely have been required.

f) The deprivation of the opportunity to be consulted on the Works has caused the Respondents prejudice because they have not had the

chance to ask questions about the Works, assess the Works by obtaining expert advice and comparative quotations.

31. The Applicant avers that the Respondents were given an opportunity to ask questions about the Works when provided with a general description of the Works in June 2023. In its letter dated 21 June 2023, Principal Estates invited leaseholders to contact them in the event that they had questions in respect to the content of the letter. The Applicant repeats the comments set out at para 24 above. None of the Respondents have evidenced the contractors that they would have approached or produced evidence of alternative quotations sought in respect of the Works. Accordingly, there is no evidence or identification of financial prejudice suffered.

g) The removal of commercial extract systems is for the commercial tenant to carry out and is not the Applicant's responsibility.

32. The Applicant repeats the comments set out in paragraph 24 above.

h) The Applicant has potentially hindered the leaseholders' ability to claim from the warranty company.

33. The Applicant says that nothing has been provided by the Respondents by way of particularity or evidence to substantiate this statement. In any event, this objection is not tantamount to evidence of relevant financial prejudice, nor is it relevant to whether dispensation of the consultation requirements in respect of the Works ought to be granted.

i)Leaseholders have not been kept suitably informed in relation to the Works or the dispensation application.

34. The Applicant says that updates in respect of the Works were provided to the leaseholders and a copy of the correspondence is provided at Annex F to the Applicant's Statement of Case. In accordance with the Enforcement Notice, the Works were required to be completed by August 2023 and a retrospective application for dispensation of the consultation requirements was made to the Tribunal on 4 September 2023. The objection does not give rise to evidence or identification of relevant prejudice having been suffered because of the Applicant's inability to carry out consultation.

Proposed conditions

35. One objector had asked the Tribunal to impose several conditions if it is minded to grant the dispensation, such conditions as detailed below. However, at the hearing, the objector accepted that some of them had been time sensitive and were no longer relevant.

a) Require the Applicant to share details of contractors approached to tender and a copy of the Miller Knight's tender response.

36. The Applicant confirms that it sought a single quote for the Works from Miller Knight and instructed Miller Knight to proceed upon receipt. No other tenders were sought by the Applicant. A copy of Miller Knight's quotation is attached as Annex A to the Applicant's Statement in Rely dated 7 June 2024.

b) Require the Applicant to fund leaseholder's costs in obtaining expert advice, so that they can accurately assess the appropriateness, scope and price of works undertaken.

37. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have failed to identify relevant prejudice. In particular, there is no evidence whatsoever that any Respondent would have obtained, at their own cost, expert evidence on the scope and price of the proposed Works had a full consultation being carried out. By seeking this condition, it appears that the Respondents are seeking to be put in a better position than they would have been had a Section 20 consultation being carried out.

38. Whilst it is accepted that such expert advice may well assist the Respondents on any future section 27A application, that does not by itself make it an appropriate condition of dispensation. There must be some causal link between what the Respondents say they would have done differently had there been a full consultation, the asserted relevant prejudice, and the proposed condition of relief. The Applicant asserts that there is no such causal link. In any event, there is no particularization or quantification of the sum sought by the Respondent for this purpose.

c) Require the Applicant to fund leaseholder's costs in obtaining legal advice, so that they are supported in responding to the application for dispensation.

39. The Applicant says that this is not an appropriate or reasonable condition of dispensation. The Respondents have produced no evidence that they have obtained legal advice for the purpose of establishing relevant financial prejudice.

d) Prevent the Applicant from passing on any costs associated with the dispensation application to the service charge account.

40. The Applicant asserts that in order for the Tribunal to make such an order, it must be in receipt of an application under Section 20C of the Landlord and Tenant Act 1985. No such application has been made by any of the Respondents. Further, the Tribunal's Directions of April 2024 may make it clear that the application does not concern the issue of whether any service charge costs will be reasonable or payable. The Applicant refers to *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point (2023) UKUT 271* and says that it would be inappropriate for the Tribunal to impose a condition limiting the landlord's ability to recover its costs through the service charge where there had been no finding of relevant prejudice.

e) Require the Applicant to inform leaseholders of the steps it is taking to recover the cost of the Works from 3rd parties, e.g. the developer.

41. The Applicant is agreeable to providing a summary of the steps it is taking to recover the cost of the Works from third parties at reasonable intervals, as a condition to dispensation. At the hearing, Counsel for the Applicant confirmed that the Applicant was willing to provide this information at quarterly intervals.

Deliberations

42. We have had regard to the objections and the Applicant's response to those objections. We have considered the evidence and oral submissions by the two Respondents at the hearing.

43. We have some sympathy for the Respondents. We understand that a fire risk assessment had been carried out on the building in 2018 and in 2020, a compartmentation survey had been carried out which identified 126 issues. Remedial work had been carried out in the residential part of the building in 2021 and the Respondents were unaware that further works were required. We accept that the Applicant knew or ought to have known of the fire risk issues in the commercial unit before the service of the Enforcement Notice. The Applicant was given an extension of time in which to carry out the remedial work required by the Enforcement Notice. The appears to have been a significant delay between the service of the Enforcement Notice and the Applicant taking steps to carry out the required Works, which restricted the time available for a section 20 consultation exercise to be carried out, due to the expiry date of the Enforcement Notice.

44. We note from the oral evidence of the two Respondents in attendance that the Respondents have responded to previous section 20 consultations and therefore understand the process and are willing to engage in it. On a previous occasion, in relation to works affecting the lift, (approximate cost £14k), the Respondents waived the requirement for a full section 20 consultation process and agreed to an accelerated process.

45. We find that the letters from Principle in June, July and August 2023 updating the leaseholders on the Works were particularly unhelpful as they contained no reference to the fact that the cost of the Works in the commercial unit may be recovered through the service charges. Neither was there any attempt to explain the background, the need to comply with an Enforcement Notice and for an accelerated work programme. There appears to have been no attempt to comply even with the spirit of section 20 consultation

46. To compound matters, we were told by the Respondents at the hearing that the first time they had become aware of the cost of the Works was when they had received the Tribunal application in May 2024 The application had been stayed pending other matters. Although the application had been made on 4 September 2023 at the conclusion of the Works at the end of August 2023, knowing that the application had been stayed, we find it difficult to understand why the leaseholders were not made aware at an earlier stage of the cost of the Works.

47. We also understand the suspicion that may attach to a quote of £100,234.60 by Miller Knight after they had been advised by TFT with whom they had previously worked, that they projected the cost of the remedial works would be in the order of £100,000.

48. However, as sympathetic as we may be, we have to apply the principles set out in *Daejan*. Dispensation should not be refused solely because the landlord seriously breaches, or departs from, the consultation requirements. We have to identify the prejudice suffered by the leaseholders. What would they have not suffered if the consultation requirements had been met but would suffer if an unconditional dispensation were granted? The Respondents have to be able to provide evidence of the prejudice caused by the failure to consult rather than infer that there has been such prejudice.

49. We have reviewed each objection and the corresponding Applicant's response**.** Having regard to *Daejan*, we agree with the Applicant's responses to the Respondent's objections. The Respondents have inferred prejudice but have not provided any evidence, such as alternative quotes, or details of the contractors they would have approached at the time had consultation been carried out, to support their assertion that there was financial prejudice <u>as a direct result</u> of the Applicant's failure to consult. We accept that the Respondents wished to submit as evidence a quote that they had recently obtained, but that was not admitted into evidence for reasons previously stated. Further, the 'estimates' provided by some Respondents in the bundle based on online searches of e.g. the costs per square metre to rebuild a property; check a trade for asbestos removal and the informal opinions of leaseholders who have some professional knowledge are not sufficiently robust for these purposes.

50. There is limited evidence that the Respondents contacted Principle in response to the letters of June, July and August 2023 to raise queries or, for example, to ask to inspect the Works being carried out. The Respondents did not raise any queries with Principle once the Works had been completed. The evidence of the Respondent's in attendance was that they were waiting for a section 20 Notice to be served but it never appeared and yet there is limited evidence that they raised the issue with Principle.

51. Whilst it may be correct that the Applicant had known about the need for remedial works for some time and had also been aware of the Enforcement Notice from October 2022 and should have been able to carry out a full section 20 consultation exercise, that is missing the point. We have to consider what is the financial prejudice that has been suffered by the Respondents as a direct result of the Applicant's failure to consult and where is the evidence to substantiate it?

52. Even if consultation had taken place, the Notice of Intention required under Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the landlord is only required to describe in general terms the works proposed to be carried out.

53. Issues such as whether it is the commercial tenant's or Applicant's responsibility to remove the commercial extract system and the reasonableness and payability of the Works and/or whether the Works themselves are reasonable or appropriate under an are matters for an application under section 27A Landlord and Tenant Act 1985.

54. The Respondents have not provided evidence of either the warranty to which they refer, its terms or how Works carried out under the requirements of an Enforcement Notice will hinder the Respondents ability to claim from the warranty company. In any event, this is not relevant to the question of financial prejudice as a direct result of the failure to comply with section 20 consultation requirements.

55. Any alleged failure to keep the Respondents informed in relation to the Works or the dispensation application is not relevant to the question of whether a dispensation should be granted.

56. Having regard to the above, and in the absence of any evidence of financial prejudice as a direct result of the failure to comply with the section 20 consultation requirements, we are minded to grant a dispensation. We considered the conditions proposed by the Respondents.

57. The Miller Knight tender response document has already been provided to the Respondents in the Applicant's Statement in Reply dated 7 June 2024 and the proposed condition is no longer required.

58. The Respondents at the hearing agreed that the proposed conditions regarding funding the Respondents' costs in order to obtain both expert and legal advice regarding the dispensation application were no longer required due to the passage of time and that the hearing was taking place without such advice.

59. In a dispensation application, the Tribunal does not consider the issue of whether any service charge costs will be reasonable or payable and we therefore do not agree with the proposed condition to prevent the Applicant from passing on any costs associated with this application to the service charge account.

60. Counsel for the Applicant confirmed that the Applicant agrees to provide to the Respondents, on a quarterly basis, a summary of the steps it is taking to recover the costs of the Works from third parties. We therefore determine that this would be a condition of the dispensation.

61. We are therefore satisfied that, subject to the above condition, it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

    i. The Works relate to fire prevention measures and are required for health and safety purposes to ensure the safety of the Property, the residents and users.

    ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

62. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works, subject to the condition that the Applicant will provide to the leaseholders on a quarterly basis a summary of the steps it is taking to recover the costs of the Works from third parties.

63. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson