12651

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00DA/LDC/2017/0008**
Property	:	**Cartier House (Block H), The Boulevard, Clarence Dock, Leeds, LS10 1JT**
Applicant	:	**Pemberstone Reversions (5) Limited**
Representative	:	**Mr A Carr, Counsel JB Leitch Ltd, Solicitors**
Respondents	:	**See Annex A**
Representative	:	**N/A**
Type of Applications	:	**Landlord and Tenant Act 1985 - section 20ZA & section 20(C)**
Tribunal Members	:	**Deputy Regional Valuer N. Walsh Judge M. Simpson**
Date and venue of Hearing	:	**30 & 31 January 2018, Leeds**
Date of Decision	:	**26 February 2018**

DECISION

DECISION

Compliance with the consultation requirements of section 20 of the Landlord and Tenant Act 1985 is dispensed with in relation to the removal and re-attachment of the external cladding to the Property, subject to the following conditions and directions:

1) **That the amount dispensed with is reduced to the extent that the contributions from sub lessees who exchanged contracts to purchase their apartments between 12.6.16 and 11.11.16 are limited to £250.00.**

2) **That the Applicant reimburses Mr Scott for the legal costs that he has reasonably incurred in opposing this application. These will be assessed by the Tribunal in the absence of agreement between the parties.**

Order

By virtue of section 20C (3), the Tribunal orders that the Applicant may not recover the costs it has incurred in these proceedings by means of future service charges.

REASONS

The Application and proceedings

1. On 11 May 2017, an application was made to the First-tier Tribunal (Property Chamber) ("the Tribunal") under section 20ZA of the Landlord and Tenant Act 1985 ("the Act") for a determination to retrospectively dispense with the consultation requirements of section 20 of the Act. Those requirements ("the consultation requirements") are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations").

2. The application was made on behalf of Pemberstone Reversions (5) Ltd, formerly known as Crosby Fourteen Ltd ("Pemberstone"), the current immediate Landlord of the residential apartments at Cartier House (Block H), The Boulevard, Clarence Dock, Leeds, LS10 1JT ("the Property"). The Respondents to the application are the long sub-leaseholders of those apartments.

3. The principal issue for the Tribunal to determine is whether or not it is reasonable to dispense with the consultation requirements in respect of the works connected with replacing the external cladding to the Property. The Tribunal has also received a number of subsequent S20C applications from participating Respondents and we will also determine

whether the Applicant's costs of dealing with these proceedings shall be added to a future service charge. **These applications do not concern the issue of whether any service charge costs are reasonable or payable. The leaseholders will continue to enjoy the protection of section 27A of the Act.**

4. Directions were issued on 31 May and a reply form was attached to the directions to be completed by the sub-leaseholders who oppose the application, and these comprise the participating Respondents (being those named above). The Tribunal notified the parties that we would determine the application on the basis of written representations unless any party requested an oral hearing. There was a request from the Applicant for an oral hearing and this was granted.

5. Subsequent directions were issued on 18 October and 27 November 2017 for the conduct of the proceedings, in response to which bundles of written submissions, supplementary submissions, skeleton arguments and other documentary evidence were provided. Following an inspection of the Property, a two-day hearing was held in Leeds on 30 and 31 January 2018. The Applicant was represented at the hearing by Mr Carr, Counsel, who was also assisted on factual matters by Mr Reynolds, a director of Pemberstone. Four of the participating Respondents, Mr Scott, Ms Nunez, Ms Cawthorne and Mr Anelay attended the hearing and spoke on their own behalf.

Inspection and description of the Property

6. The Tribunal made an external inspection of the Property on the morning of the hearing. We were accompanied during the inspection by Mr Carr, Messrs Matthews and Dickenson from the management agents, Liv, and one of the Respondents, Mr Anelay.

7. The Premises are a purpose built 9 storey block, with commercial premises on the ground and first floors and 121 apartments situated above the commercial space on the remaining seven upper floors. The block was originally constructed in or around 2008 and appears to be either of steel or concrete frame construction. The exterior of the upper floors is a mix of glass and a lightly coloured composite stone cladding. The Property known as Cartier House (Block H), The Boulevard, Clarence Dock, Leeds, LS10 1JT excludes the Commercial accommodation.

Background

8. Mr Carr set out a very thorough chronology in his skeleton arguments, which helpfully mostly restricted itself to providing a factual account of the key events. The Tribunal is grateful to the Respondents present at the hearing for confirming that they had no objection to this being reproduced in the decision for background purposes, subject to the removal of the non-factual statements contained at paragraph 33 of the

skeleton arguments and the Tribunal making reference to the fact that there were issues identified with the cladding before 2015.

9. The first time that any issues in respect of the Building's cladding were noted was on the 12 May 2010. We understand that repairs were effected but we do not have specific details as to the works undertaken. There is some conflict in the evidence as to whether there were any further problems with the cladding after this date but prior to October 2015. We do note however that in initiating the claim under the New Home Building Guarantee policy provided by Zurich Insurance, the Applicant's own management agents (then trading as Eddisons Residential) stated:

"This is the 3rd or 4th incident over the course of 5/6 years".

10. The Tribunal sets out in italics below an extract from Mr Carr's helpful skeleton arguments, omitting references to non-factual statements, which is reproduced only for the purposes of providing a factual account of events from within his helpful chronology.

"The major works:

11. *The elevations of the building are covered by stone cladding panels ("the Cladding"). The Cladding is hung on brackets which are attached to a metal subframe secured to the main structure of the Building.*

12. *On or around the 12.10.15, a section of the cladding fell from the 7th floor of the Building onto the walkway at ground level. Fortunately, no one was injured.*

13. *LIV immediately instructed Crowther Turnbull and Booth chartered building surveyors ("CTB") to inspect the elevations of the building from which the cladding fell and to advise. CTB advised by a letter addressed to LIV and dated the 15.10.15. CTB recommended that a cordoned-off walkway running parallel to the eastern and western elevations of the building be introduced and the crash deck be installed to facilitate access to the ground floor commercial units until repair works were completed.*

14. *On the 14.10.15, LIV made a claim against the new home building guarantee ("the Policy") provided by Zurich. Note that no claim was made against the building's insurance policy because LIV took the view that the cause of the loss was a latent building defect.*

15. *Zurich then conducted its own investigations into the Cladding. Pemberstone did not carry out any investigation into the Cladding for itself.*

16. *Zurich appointed Cunningham Lindsey as its loss adjustor. Either Zurich or Cunningham Lindsey asked the contractor which originally installed the Cladding, Prater, to inspect the Building and to devise a scheme to repair the Cladding. Upon inspection, Prater found that the sub-frame brackets supporting the Cladding were not correctly fixed. In January 2016, Prater came up with a repair scheme. This scheme was rejected by or on behalf of Zurich.*

17. *Upon further inspection on or around 20.5.16, Prater found that the top and bottom brackets supporting the vertical rail behind the Cladding had been attached using incorrect brackets. Following that inspection, Prater prepared calculations dated 23.5.16 in relation to the structure.*

18. *Cunningham Lindsey appointed A P Williamson Consultants Ltd, cladding consultant ("APW"), to inspect the Building and check the calculations prepared by Prater.*

19. *In its report dated 5.6.16, APW advised that the Prater calculations were incorrect and the Cladding needed to be entirely removed, the sub-frame strengthened and the Cladding properly re-attached.*

20. *Zurich instructed APW to design and specify a scheme for the repair of the Cladding.*

21. *APW's specification for the repair works to the Cladding ("the Works") was dated June 2016.*

22. *On 4.7.16, APW (on the instructions of Zurich) put the Works out to tender originally to 4 contractors. When APW was informed that only 2 contractors intended to submit tenders for the Works, on 13.7.16 APW asked a third contractor to tender for the Works. APW received tenders from 3 contractors on 22.7.16.*

23. *In APW's Tender Analysis dated 29.7.16, it recommended that the contract be awarded to Clear Line Maintenance Ltd ("Clear line"), whose tender was £225,270.03. Clear Line's tender was the lowest of the 3 tenders APW received.*

24. *In a letter dated 3.8.16 from Zurich's solicitors, DAC Beachcroft Claim Ltd, to LIV, Zurich stated that:*

    (a) The interest of Pemberstone was not covered by the Policy. Therefore, Pemberstone could not make a claim against the Policy.
    (b) The policy was given by Zurich to the leaseholders of 109 of the 121 Flats in the Building. Therefore, some of the Flats (Flats 101 – 107 and Flats 109 -113) and their Leaseholders did not have – and never had – the right to claim under the policy.
    (c) Zurich raised the potential limitation defence to any claim against the policy, on the basis that the Cladding had failed in 2010 and Zurich had not been notified of a claim then.

(d) Leaseholders with a claim against the policy would only be indemnified for their proportion of the building service charge expenditure spent on the repairs, less an excess of £1,760 per Leaseholder.

25. *In a further letter dated 5.8.16 from DAC Beachcroft to the solicitors then acting for Pemberstone, FBC Manly Bowdler LLP, Zurich stated that it would not be instructing contractors to undertake the Works, but would instead make a payment to the insured leaseholders for the cost of the Works.*

26. *It was only on receipt of this letter that Pemberstone first considered entering into a contract with Clear line.*

<u>*The Allied Claim*</u>

27. *Meanwhile, on 8.4.15, Allied (the head lessee of the Building) revoked its permission to Pemberstone to cordon off the walkways below the Building and to erect the crash deck on its land.*

28. *On 24.4.16 solicitors acting for Allied wrote a letter before claim to Pemberstone, in which they gave Pemberstone further notice to remove the fencing and the crash deck from its land and to secure the Cladding by no later than 10.5.16 and stated that failed to do so, Allied would issue proceedings without further notice.*

29. *On 13.5.16, Allied issued proceedings ("the Allied Claim") in the Manchester District Registry of the Chancery Division under Claim no. C30MA528, claiming:*

(a) possession of its land
(b) an injunction requiring Pemberstone to remove barriers and crash deck from its land;
(c) an injunction restraining Pemberstone from placing any obstructions on its land; and
(d) mandatory injunctions compelling Pemberstone to deal with the Cladding

30. *The Court considered the claim at hearings on 27.7.16, 8.8.16 and 16.8.16. At the hearing on 16.8.16, the Court ordered Pemberstone to use its best endeavours to carry out permanent repair works to the Cladding 9.12.16.*

31. *In a letter of intent dated 23.8.16, Pemberstone notified Clear Line of its intention to enter into a contract with Clear Line to carry out the Works.*

32. *On 19.9.16 Pemberstone contracted with Clear Line to effect the Works.*

33. *Clear Line commenced the Works on or around 28.9.16.*

34. *Due to a number of technical difficulties and access complications encountered by Clear Line, the Works took longer than expected to complete. The Works to the western elevation were completed on or around 18.2.17. The remainder of the Works were completed on 13 April 2017.*

The issues in the present dispute

35. The Applicant contends that no prejudice has been caused to the Respondents and that dispensation should be granted because:

- No one has suggested that the works should not have been done.
- The works were completed to a good standard and a reasonable cost, the lowest tender being accepted.
- No evidence of real prejudice has been advanced by the Respondents.

36. The Respondents argue that they have suffered real and significant prejudice, and that dispensation should be refused for the following principal reasons:

- They will suffer financial loss if dispensation is granted.
- The defects with the cladding should have been properly identified and addressed when they first occurred back in 2010. This would have resulted in the defective cladding being replaced prior to many of the Respondents purchasing their apartments, the insurers would have been liable to meet each apartment owner's apportioned costs and the policy excess applied would also have been significantly less.
- Had a consultation exercise been undertaken then, or subsequently, many of the Respondents would have been aware of the true extent and nature of the works, and would not have relied upon the misleading or ambiguous statements provided in response to the enquiries raised by their conveyancers.

37. The Respondents have also raised separate applications concerning costs;

a) applications for an order under S20C of the 1985 Act for the costs incurred in connection with these proceedings not to be recoverable by the Applicant through the service charge, and additionally

b) Mr Scott is seeking his costs incurred in responding to this application.

38. The Tribunal will deal with the substantive issues in dispute first before addressing these matters relating to costs.

Law

39. Section 18 of the Act defines what is meant by "service charge". It also defines the expression "relevant costs" as:

> *the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

40. Section 19 of the Act limits the amount of any relevant costs which may be included in a service charge to costs which are reasonably incurred, and section 20(1) provides:

> *Where this section applies to any qualifying works ... the relevant contributions of tenants are limited ... unless the consultation requirements have been either–*
> *(a) complied with in relation to the works ... or*
> *(b) dispensed with in relation to the works ... by the appropriate tribunal.*

41. "Qualifying works" for this purpose are works on a building or any other premises (section 20ZA(2) of the Act), and section 20 applies to qualifying works if relevant costs incurred on carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.00 (section 20(3) of the Act and regulation 6 of the Regulations).

42. Section 20ZA(1) of the Act provides:

> *Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

43. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to:

43.1 give written notice of its intention to carry out qualifying works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought;

43.2 obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least two of those estimates, the amount specified as the estimated cost of the proposed works, together with a summary of any initial observations made by leaseholders;

43.3 make all the estimates available for inspection; invite leaseholders to make observations about them; and then to have regard to those observations;

43.4 give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder if that is not the person who submitted the lowest estimate.

44. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following:

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

44.2 the financial consequences to the Landlord of not granting dispensation is not a relevant factor. The nature of the Landlord is not a relevant factor.

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

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

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

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

44.7 The more serious and/or deliberate the Landlord's failure, the more readily a tribunal would be likely to accept that the tenants had suffered prejudice.

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

The relevant Leases

45. The Applicant holds title as the under lessee of the residential part of the Premises by a lease dated 22 December 2006 demised by The Clarence Dock Company Limited to Pemberstone (formerly known as Crosby Fourteen Limited) for a term of 150 years (less 7 days) from 26 March 2002.

46. By paragraph 4 of Schedule 5 of this lease, the Applicant covenants:

"To repair the Premises and the Building and to keep them in good and substantial repair and condition".

47. The Applicant also supplied a specimen copy of a tri-partite lease, relating to apartment 8, made between The Clarence Dock Company Limited (1) and Crosby Group Nominees Limited (2) and Martin Scott (3). The lease which is dated 4 April 2008, is for a term of 150 years (less 10 days) from 26 March 2002 and subject to an initial yearly ground rent of £250. All parties at the hearing confirmed and agreed that this specimen lease is, in all material respects, a mirror of the other sub leases granted at the Property and can be taken as such for the purposes of this hearing.

48. Under clause 4.7 of this lease the tenant is required to:

"Pay to the Landlord the Building Service Charge ....."

49. By clause 6.7 the Landlord of the underlease covenants to:

"To carry out or provide the Building Services as outlined in the Seventh Schedule ...."

50. Paragraph 2 of Schedule 7 includes:

"to keep in good and substantial repair reinstate replace and renew the Building Common Parts".

51. There is no dispute between the parties that the Applicant was responsible for undertaking the works to the cladding and also entitled to levy a service in respect of the Building Service Charge.

52. As this application does not concern the issue of whether any service charge costs will be reasonable or indeed payable in respect of the recladding of the of the Premises, there is no need to comment on these leases further.

Hearing and submissions

53. There is no dispute between the parties that the Applicant did not comply with the consultation procedures or indeed make any efforts to do so. This retrospective application seeking a dispensation was submitted only after all the works were completed on 13 April 2017.

54. It was also accepted by all the parties present at the hearing that these works were necessary and that the responsibility for undertaking these works fell to the Applicant under the terms of the Leases.

55. Mr Carr explained that the first that the Applicant knew about a significant problem with the cladding was when a section of cladding fell from the 7th floor of the Building on 12.10.15. As per the actions detailed in the chronology reproduced from Mr Carr's skeleton arguments, his clients then took immediate action to instigate interim protective and safety measures, and initiated a claim under Home Building Guarantee policy.

56. After instigating the claim and prior to 3.08.16, the Applicant believed that Zurich would be the party contracting and paying for the works. While Zurich never formally accepted liability for the claim during this period, their actions, engaging the consultants APW, completing a tender exercise and incurring costs on protective measures, reinforced this belief with the Applicant. Consequently, the Applicant was of the opinion that it was not in a position to undertake the consultation exercise because the insurers, Zurich, through its appointed consultants APW, controlled the tender process. Further, the Applicant contended that undertaking a consultation process would have incurred unnecessary and duplicate expense for the Respondents.

57. The Respondents were critical of the Applicant for not studying the terms of the policy more closely, and for mistakenly assuming that Zurich would remedy the issues and meet the costs in full. They questioned why the Applicant did not consider from the outset that a significant amount of the costs would not be covered by the policy excess and inevitably would fall to the sub-lessees of the apartments to meet. Mr Carr explained that the Applicant was unsure at the outset whether there would be one excess applied in respect of one overall claim or not.

58. The Respondents contended that the defective nature of the cladding's fixings and brackets should have been identified, consulted upon and remedied back in 2010 when the first problems were noticed. This would have meant that the issue was resolved prior to many of the participating Respondents purchasing their apartments. For those who were either original purchasers or acquired their apartments before the first instance of disrepair to the cladding arose on 12 May 2010, this would have at the very least resulted in a substantially lower policy excess being applied, £1,000 as opposed to £1,760.

59. Mr Carr stated that the increase in the cost of the excess, merely reflected indexing for inflation over the intervening period. He averred that it would be wrong to suggest this has financially disadvantaged anyone because it merely adjusted for inflation and so was not a 'real' increase in actual costs. He also contended that questions as to what works should or should not have been done, and when they should have been done were not relevant considerations for the purposes of this application. The pertinent works are the works which were undertaken and these were only established and known about at a much later date.

60. Mr Carr contended that it not reasonable to have expected Pemberstone to have complied with the statutory consultation requirements on receipt of the letters of 3.08.16 and 5.08.16 from Zurich's solicitors, DAC Beachcroft Claim Ltd. For it was only then that Pemberstone first became aware that it would be responsible for undertaking these works and then, less than two weeks later, the court order, issued on the at the hearing on 16.8.16 in the Manchester District Registry of the Chancery Division, required Pemberstone to use its best endeavours to carry out permanent repairs to the cladding by 9.12.16.

61. The Respondents disputed this and expressed the view that, at the very least, an abridged consultation could have been undertaken. The Applicant contended that this was simply not possible and Mr Carr took the Tribunal through the consultation requirements contained within the Regulations, and their associated timings, which he contended would take a minimum of 3 months to complete in full and even an abridged consultation exercise would have taken many weeks if not months. He emphasised that in order to comply with the Court order and its requested date for completing the works, a 'letter of intent' to contract was issued dated 23.8.16 and this was simply too tight a time period to allow for any meaningful consultation, even if an abridged approach was adopted.

62. Both parties made reference to the various correspondence concerning the cladding from March 2016 through to November 2017 between LIV and the Respondents, some additional copies of which were submitted by the Applicant on the second day of the hearing. The Respondents contended that there was a lack of communication and clarity throughout as to the implications for them, which lasted until they received an estimate for the costs of the works, and other associated costs, on 11.11.2016. It was only then that they were notified that it would be up to each sub lessee to pursue the recovery of these costs directly from the insurers individually.

63. The Applicant refutes the suggestion that any misleading statements were provided to any parties when responding to enquiries from the conveyancing solicitors of prospective purchasers. Mr Carr stated that the management agents were simply relaying their genuine belief, at the time of providing those assurances, that any costs associated with the cladding were 'expected' to be met by the Zurich policy. In any event, he contended that the legal principle of 'caveat emptor' applied.

64. Mr Carr helpfully took the Tribunal through the total costs being considered in this application, clarified where costs had changed and why, and provided the following breakdown:

1.	Protection costs	£12,558.60	Relating to scaffolding, crash deck and fencing costs not meet by Zurich.
2.	Contractor costs	£280,000	Final figure agreed with Clear Line.
3.	Surveyor	£25,125.50	Project management & design fees
4.	Legal Costs	£77,302.04	Legal costs incurred in respect of the Allied Claim.
5.	Legal Costs	£25,000	Legal costs incurred in respect of the S20ZA application.
Total		**£419,986.14**	

65. Mr Carr emphasised the fact that the tender exercise was run by APW for and on behalf of the insurers, Zurich, who were completely independent of the Applicant and motived to secure the most cost-effective remedy possible. He contended that the cost of these works was reasonable and the Respondents did not suffer any financial prejudice by virtue of the fact that the Applicant proceeded with the contractor who had submitted the lowest tender price.

66. When asked about the cost of the works the Respondents did not feel able to challenge the contractor's costs or specification for the works. They freely admitted that they would not have been in position to obtain quotations from cladding contractors, even if a consultation exercise had been undertaken at the time, or challenge the nature of the works proposed.

67. Both parties, but in particular the Respondents, touched upon whether these costs were reasonably incurred in determining the service charge having regard to S19 of the Landlord and Tenant Act 1985. The Respondents also questioned given the nature of the building defect whether the provisions of the leases enable the landlord to recover the cost of this service through the service charge. While the Tribunal allowed these points to be raised, and noted the authorities cited [Ravenseft Properties Ltd v Davestone (Holdings) Ltd (1979) and Post Office v Acquarius Properties Ltd (1987)], we were clear that these were not pertinent to the consideration of this application. The Tribunal's jurisdiction is limited solely to matters relevant in determining and arising from the S20ZA application. As advised at the hearing, this does not preclude either party from making a S27A application to determine issues as to liability and whether or not these costs have been reasonably incurred for the purposes of the Act.

68. Questions were also raised concerning negligence and the liability of other parties. It is not the function of this Tribunal to consider any claim that the lessees might have against the original developers, the insurers or a third party. This Tribunal does not express any view on these matters, which would fall to be determined by another court.

69. Mr Carr cited the Supreme Court case of Daejan Investments v Benson and referred extensively to the passages contained between paragraphs 40 and 69. Mr Carr emphasised many of the points which the Tribunal has already set out in paragraph 44 of this decision, within the section headed 'Law'. Mr Carr distilled the relevant findings in Daejan, for the purposes of this case, to three key principals:

1. Firstly, S20ZA augments and supports the statutory protection contained within section 19, which is there to ensure that tenants do not pay for unnecessary works or more than they should do for appropriate works provided to a good standard.

2. The main focus, and indeed the key question, is whether dispensation would cause real prejudice to the tenants or not, and

3. Had the tenants had the opportunity to have their say through a process compliant with the consultation requirements, would this have made any real or meaningful difference?

Discussions and conclusions

70. In the present case, there can be no doubt that the works undertaken were necessary to ensure the safety of the occupiers of the Property, the occupiers of adjoining properties and members of the public. The key questions that need to be answered in determining this application are:

- What are the relevant works that we should be looking at?

- When should or could the consultation exercise have been undertaken?

- Who was responsible for undertaking these works?

- What is the correct approach for the Tribunal to adopt in determining whether or not to grant a dispensation?

71. There is no dispute between the parties that the responsibility for undertaking these works lay with the Applicant under the provisions of the Leases. What is in dispute is when the latent or inherent deficiencies with the original cladding should have been identified, acted upon and the necessary works of replacement completed. The Respondents contend that this should have been at or shortly after the first problems were noticed with the cladding in May 2010. Whereas the Applicant argues that appropriate works of repair were effected in 2010 and no

other issues arose until 2015, but in any event that this is not relevant for the purposes of this application for a dispensation.

72. The Tribunal finds that the relevance point is apt because we are constrained here to examining the actual works undertaken. It would not be appropriate for us to consider any other hypothetical works, namely those which could potentially have predated those undertaken. The works in question for the purposes of this application must be those for which a dispensation is being sought. These works were only identified as being necessary after a section of the cladding dislodged itself and fell from the Property in October 2015, and on completion of APW's report dated 5.6.16.

73. Having clarified the works to be considered and with whom the ultimate responsibility rested for effecting these works, the Tribunal does not see particular relevance in the fact that the Applicant mistakenly assumed or hoped that a third party, Zurich, would undertake these works.

74. Reviewing the chronology of events, it was only following the findings contained in APW's report, dated 5.6.16, that it became apparent that the cladding needed to be completely removed, the sub-framed strengthened and the cladding re-attached. Mr Reynold's a director of Pemberstone, confirmed to the Tribunal that while APW worked for Zurich, it kept Pemberstone very closely informed of progress throughout this period and of its findings. The Tribunal considers that given the seriousness of the issues identified with the cladding there was no reason why the Applicant could not have commenced a consultation exercise within say one week (12.6.16) of the completion of this report, if it had wished to do so. The fact that Zurich was controlling the exercise, or rather allowed to by the Applicant, is not directly relevant but in any case, did not preclude the Applicant from engaging with the sub-lessees and conducting the necessary consultations steps; such as inviting them to nominate a contractor, seeking observations, responding to those observations, etc.

74. It therefore also follows that the Applicant would not reasonably have been able to commence the consultation requirements before say the 12.6.16, allowing for one week to digest the findings of the APW report and to prepare an urgent consultation exercise. The Tribunal considers that it must be correct that we are examining the prejudice to the Respondents, which flowed directly as a result of the Applicant's failure to comply with the consultation requirements from this date onwards, 12.6.16.

75. The approach that Tribunals should adopt in considering S20ZA applications is set out in detail in the Supreme Court case of Daejan Investments v Benson. In this leading authority Lord Neuberger states at paragraphs 44, 45 and 46:

"Given the purposes of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying

more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any to which tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.

Thus in the case where it is was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with.

I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end to a means in themselves, ..."

76. While it is admitted by the Applicant that it is in breach of the consultation requirements, as per Daejan this is not a reason in itself not to grant dispensation. There is no evidence to suggest that the works would have been completed to a better standard or for less money if the Respondents had had the benefit of the consultation requirements. When questioned, the Respondents were unable to cite any examples of prejudice suffered with regard to the standard of the works or their cost. They were unable to provide an example of what could potentially have been done differently if they had had the opportunity to make observations and nominate a contractor of their choosing. Given that the works were awarded to the lowest tender and through a tender process run by a reputable and independent third party, the Tribunal can find no evidence of any prejudice suffered in this respect.

77. Accordingly, from this perspective it is hard to see why a dispensation should not be granted. Certainly, for those sub lessees already in place prior to the 12.6.16. The Tribunal is however also being asked to consider the position of those apartment owners who purchased their apartments after this date. They argue that if an open and transparent consultation exercise had been initiated this would have made their conveyancers much more aware of this potential liability and issues before the exchange of contracts for sale.

78. All of the participating Respondents highlighted that they had received very little communication from the Applicant and its agents in respect of the cladding and where enquiries were raised by conveyancing solicitors, the responses received subsequently proved to be inaccurate and misleading. While the Tribunal has no reason to doubt that the replies provided by the management agents, Liv, were given in anything other

than good faith and were based on their understanding of the position at the time they were provided, it's clear that with hindsight these replies did not prove to be correct.

79. Having examined the correspondence between Liv and the Respondents, it is apparent that there was ongoing communication with the Respondents about the cladding from March 2016. Nevertheless, this was ambiguous as to the potential liability for the sub lessees up until the letter and enclosures of 11.11.2016. A number of the participating Respondents claim that they would either not have proceeded with the purchase of their apartments or sought a price reduction had they been fully aware of the potential liability or scale of the issue beforehand.

80. Lord Neuberger sets out "the correct approach to prejudice to the tenants" in Daejan and the Tribunal particularly relies on the following passage from this decision:

"....while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether works would have cost less ....., if the tenants had been given a proper opportunity to make their points. As Lord Sumption said during the argument, if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants suffered prejudice."

81. While we are not focusing here on the cost of the work as the Daejan case was, the same principles apply and we are certainly focused on the "some other advantage" referred to in this passage. The Tribunal is minded, applying the guidance set down in Daejan, to view sympathetically the claims of prejudice by those who became legally committed, through the exchange of contracts, to purchase their apartments between the dates when the consultation requirements could first have reasonable been initiated, on 12.6.16, and the correspondence from Liv on 11.11.2016, which importantly detailed that significant costs (£367,210) were anticipated and that it would be the responsibility of individual leaseholders to pursue their own claim against Zurich. We find, on balance, that if the consultation requirements had been adhered to this would have alerted purchasers and their advisors more starkly of the potential risks during the period. It would have invited much closer scrutiny and investigation prior to parties committing to and proceeding with their purchase. We are not persuaded that the Caveat Emptor

principle is a defence for the Applicant's clear and absolute failure to comply with the consultation requirements.

82. It is clearly established in Daegan that a Tribunal may grant a dispensation on terms. Accordingly, and having established that there is no evidence of prejudice to the majority of the sub lessee owners of these apartments, we find that it is reasonable to grant a dispensation with a direction that, as a condition of the dispensation, the amount dispensed with is reduced to extent that the contributions from sub-lessees who exchanged contracts to purchase their apartments between 12.6.16 and 11.11.16 are limited to £250.00.

83. Reviewing the schedule of purchasers post May 2010 at page 38 of the Hearing bundle 1, potentially, depending upon the date when contracts were exchanged, this could apply to the following apartments:

- 7, 40, 47, 48, and 112.

84. The Tribunal considers that this is something that the Applicant can readily establish with the relevant parties directly and by using its own record of completions to cross check and verify that no other potentially qualifying apartments are omitted.

85. We would however again emphasise the fact that the Tribunal has solely determined the matter of whether or not it is reasonable to grant dispensation from the consultation requirements. This decision should not be taken as an indication that we consider that the amount of the anticipated service charges resulting from the works is likely to be reasonable; or, indeed, that such charges will be payable by the Respondents. We make no findings in that regard.

Costs

86. Mr Scott asked that the Tribunal order the Applicant to reimburse him for the legal costs that he has incurred in opposing this application, which he estimated to total £1,500. Mr Scott cited the Daejan case in support of this request.

87. The Daejan case specifically addresses the question of the tenants' costs in paragraph 60 and 61 as follows:

"it is true that the powers of the LVT to make an actual order costs are very limited. The effect of para 10 of Schedule 12 to the 2002 Act is that the LVT can only award costs (in a limited amount) (i) where an application is dismissed on the grounds that it is frivolous, vexatious or an abuse of process, or (ii) where the applicant has "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

However, in my view, that does not preclude the LVT from imposing, as a condition for dispensing with all or any of the Respondents under section 20(10(b), a term that the landlord pays the costs incurred by the tenants in resisting the landlord's application for such dispensation.....To put it another way, the LVT would require the landlord to pay the tenants' costs on the grounds that it would not consider it "reasonable" to dispense with the Requirements unless such a term was imposed".

88. The Tribunal finds that this approach should apply here, in respect of Mr Scott's legal costs. For not only has the Applicant not complied with the consultation requirements, no attempt was made to bring an urgent application for a dispensation to the Tribunal, the position as to who would ultimately be paying for these works was also unclear for a considerable period of time, and initially and for a long time the Respondents were informed that the costs were expected to be meet by the insurers Zurich. In the circumstances and given this uncertainty, the Tribunal does not consider that it would be reasonable to grant a dispensation without a term allowing for the recovery of Mr Scott's legal costs. These will be assessed by the Tribunal in the absence of agreement between the parties.

<u>The applications under section 20C of the 1985 Act</u>

89. Section 20C(1) of the 1985 Act enables a tenant to apply for an order that all or any of the costs incurred, or to be incurred, in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in the application. By virtue of section 20C(3), the Tribunal may then make such order as it considers just and equitable in the circumstances.

90. In the present circumstances, we do consider it to be just and equitable to make an order preventing the Applicant from recovering the costs it has incurred in these proceedings by means of future service charges. Some of the Respondents have been successful in opposing this application and for the reasons set out above under paragraph 88, the Tribunal can understand why the Respondents felt it necessary to oppose this application. Given the conflicting information that they have received, as to who would be required to meet the cost of the cladding, it is understandable why the Respondents felt the need to oppose this application if only to establish and clarify certain facts with certainty.

91. The application was for a dispensation for a failure by the Applicant. It may be that it arose because they did not appreciate the true position vis a vis the insurers, but on any basis, that was a misunderstanding in which the Respondents had no involvement. It would be unjust for them to have to pay to rectify that situation. Dispensation on this scale is not granted as a matter of course even if not opposed. Much of the preparatory paperwork would have had to be undertaken in any event.

Annex A

Mr E Okhoigbe
Mr & Mrs D & J Akigbogun
Mr P Shah
Mr TW Davies
Mr RW Anelay
Mr DK Patel
Ms LE McDonald
Mr MF Lavery
Mr B Pender
Mr P Markey
Miss AE Colligan
Mr D Shah
Mr S Chaddah
Home Group Limited
Mr S Khatri
Mr AV Patel
Mr PT Jariwala
Miss Flavia De Santis
Mrs PV Shah
Mr VH Shah
Mr T Ives
Mr M Belardinelli
Dr EJD Webb
Mr & Mrs S Mistry
Mr & Mrs B Colman
Mr K Chauhan
Mr B Majithia
Mr & Mrs Effendi
Miss J Walker
Mr & Mrs Kamath
Dr S Sengupta
Mr C Egan
Mrs M Egan
Mr M O'Carroll
Miss J Squire
Mr J Egan
Dr Selby
Mr B Shah
Mr RJ Moriarty
Mr E Gulc
Mr T Connell
Miss EA Reeves
Mr P O'Shea
Mr C Haria
Prestigious Commercial Properties LLP
Mr J Parmar
Mrs I Velani
Mr JJ Falconer
Mr JP Murray

Mr G Davey
Mr PJ Tattersall
Mr H Shah
Mr V Dixit
Mr BC Anele
Ms J Priest
Mr M Mower
Mr MKM Raithatha
Ms SL Wright
Mr & Mrs V Dixit
Mr & Mrs N Traynor
Mr & Mrs D Chapaneri
Mr & Mrs R Chauhan
Mr IN Chauhan
Ms CA Gyles
Messer's A & V Trivedi & H & D Shah
Mr DA Akigbogun
Ms JC Parkes
Ms R Samani
Mr A Shingdia
Mr U Patel
Mr IHW Riley
Ms GN Sanchez
Mr & Mrs S Shah
Ms AL Cawthorne
Mr R Ramji
Mr P Khimji
Mr R Ramji
Mr S Khimji
Mr R Ramji