FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LDC/2021/0143**
HMCTS code	:	**V: CVPREMOTE**
Property	:	**Block 6 Ashley Gardens, Thirleby Road, London, SW1P 1HW**
Applicant	:	**Block 6 Ashley Gardens Limited**
Representative	:	**Adrian Carr (Counsel) instructed by Trowers & Hamlins**
Respondents	:	**The 19 leaseholders whose names are annexed to the application**
Representatives	:	**1. Stephanie Lovegrove (Counsel) instructed by Wallace LLP on behalf of David Francis (Flat 71); Simon Frances (Flat 82a); S Frances Ltd (Flat 83a) and James Ramsey (Flat 83b).** **2. Arabella Ranby-Gorewood for the Receiver of Ashley Gardens Develco Limited (Basement Flat).**
Type of application	:	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	:	**Judge Robert Latham** **Duncan Jagger FRICS**
Date and Venue of Hearing	:	**6 December 2021 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**29 December 2021**

DECISION

1. The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 without condition.

2. The Tribunal makes no order pursuant to section 20C of the Landlord and Tenant Act 1985.

3. The Tribunal makes no order for costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal has been provided with two bundles: (i) A Core Bundle of 588 pages (Reference to which will be "CB.___"); and (ii) A Supplementary Bundle of 212 pages (Reference to which will be "SB.___"). During the course of the hearing, the Tribunal were provided with a number of additional documents. These include the tribunal decision in LON/00BK/LAM/2020/0010, the Licence for Alterations to Flat 62, dated 26 April 2019, and the Contract Instruction issued by Earl Hendrick, dated 18 November 2021.

Introduction

1. Block 6 Ashley Gardens ("the Building") is a substantial eight storey mansion block (including basement) of 19 purpose built flats in Victoria which was constructed in the 1890s. The leaseholders now own the freehold of the Building, each holding one share. Seven of the leaseholders are directors. The Building is managed by Bruton Street (Management) Ltd ("BSM").

2. On 26 May 2021 (at SB.1), BSM issued an application on behalf of the Applicant seeking retrospective dispensation from the consultation requirements of section 20 of the Landlord and Tenant Act 1985 ("the Act"). The Applicant seeks dispensation in respect of the following works:

   "(i) Propping Scaffolding (period January 2020 to works completion) – estimated/projected cost: £100,000. This includes £71,435.60 already incurred for scaffolding from January 2020 to March 2021 and continued scaffolding for a further 35 weeks from 6th March 2021."

(ii) Temporary propping – estimated cost: £106,000 (including VAT)."

3. On 7 September 2021 (at CB.10), the Applicant amended its application and now seeks dispensation in respect of the following works:

"(i) External Propping Scaffolding – relating to the ongoing external propping scaffolding works at a cost of £71,435.60 already incurred for scaffolding from January 2020 to March 2021 and estimated continued scaffolding costs for a further 35 weeks from 6th March 2021; and

(ii) The remedial works set out in an attached specification for structural repairs dated 12 July 2021 (at CB.95-99) and specification of works dated 13 August 2021 (CB.100-155)." The works identified in the EDA and Earl Kendrick reports include the following: (a) Rebuilding tooth and bonding brickwork; (b) Replacement of cracked bricks; (c) Helibond and Helibar repairs (including the insertion of 4mm x 400mm bars, 35mm into the face of the wall at every fourth course over the lengths and 200mm on either side of the cracks in the return walls); (d) Stone repairs; (e) Brickwork repointing; (f) Rainwater adaptations to facilitate the above works; and (g) Adaptations to the existing scaffolding to facilitate the above works.

4. The Tribunal has given Directions on 4 June 2021 (at SB.80); 8 September 2021 (at CB.2-9) and 7 October 2021 (at CB.1). The Applicant has been directed to give notice of these applications to the leaseholders. The following leaseholders oppose the application: (i) David Francis (Flat 71); (ii) Simon Frances (Flat 82a); (iii) S Frances Ltd (Flat 83a); (iv) James Ramsey (Flat 83b) ("the Named Respondents"); and (v) The Receiver of Ashley Gardens Develco Limited ("the Receiver").

5. It is apparent that the application is supported by the seven directors and the seven leaseholders who are not directors. If the Tribunal refuses this application, the Applicant will be restricted to passing on £250 per leaseholders in respect of the cost of the works. If the company is unable to meet the shortfall, this will need to be met in equal shares by all 19 leaseholders who are the shareholders in the Applicant Company, Otherwise, it would be necessary to put the company into liquidation.

The Hearing

6. Mr Adrian Carr (Counsel) appeared for the Applicant instructed by Trowers & Hamlins. He was accompanied by Mr William Bethune from his Instructing Solicitor and by Mr Andrew Kafkaris and Ms Rachel Walker from BSM. He provided a skeleton argument and made detailed submissions.

7. Ms Stephanie Lovegrove (Counsel) appeared for Mr David Francis, Mr Simon Frances, S Frances Ltd and James Ramsey (the Named Respondents). She was accompanied by Mr Simon Serota and Ms Rhiannon Saunders from her Instructing Solicitor, Wallace LLP ("Wallace"). She provided a skeleton argument and made detailed submissions. She identifies the following issues for the Tribunal to determine:

(i) She argues that the Tribunal has no jurisdiction to grant dispensation. She refers to the terms of the lease and suggests that the liability for the repairs falls on the leaseholder(s) responsible for the damage.

(ii) It would not be reasonable for dispensation to be granted. There was no urgency. Had the leaseholders been afforded the full benefit of the statutory consultation, they could have pressed for a much-reduced schedule of works. Scaffolding has not been required to support the Building.

(iii) If dispensation is granted, this should be granted on conditions:

(a) the Applicant should be required to make a further application to this tribunal under section 27A to determine the "payability" of the works;

(b) scaffolding costs should be limited to £4,700 + VAT;

(c) more limited repairs should be executed to the chimney;

(d) the costs should be limited to £45,000 + VAT or, alternatively, such sum as this tribunal may determine to be reasonable under a separate application to this tribunal;

(e) the Applicant should pay the costs of the Named Respondents. In effect, the costs should be met by either those leaseholders who have not opposed the application or by all the shareholders of the Applicant Company;

(f) An order should be made under Section 20C so that the Applicant is unable to pass on its costs relating to this application against the Named Respondents. Again, the effect of this would be that these costs should be met by either those leaseholders who have not opposed the application or by all the shareholders of the Applicant Company.

(iv) An order should be made under Section 20C in any event, so that the Applicant is unable to pass on its costs relating to this application

against the Named Respondents. The argument seems to be that this application should not have been made. Again, the effect of this would be that these costs should be met by either those leaseholders who have not opposed the application or by all the shareholders of the Applicant Company.

(v) The Named Respondents seek an order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in respect of the first application. Ms Lovegrove argues that it was manifestly unreasonable to bring this application. The grounds for making this application are set out in their letter dated 11 August 2021 at SB.172.

8. Ms Arabella Ranby-Gorwood appeared for the Receiver. She has filed a witness statement (at CB.436). She supports the position adopted by the Named Respondents. In her statement dated 7 October 2021 ([15] at CB.438), she argues that the application for dispensation is premature. The Applicant should rather have made further investigations as to the cause of the damage and look to those leaseholders responsible for the structural damage to pay for the works.

The Leases

9. The Tribunal has been provided with a copy of the lease to Flat 83a which is dated 29 November 1984 (at CB.167). We understand that the other leases are in a similar form. The lease is for a term of 125 years. The lease was granted by National Provident Institution to Mr and Mrs E Tennenbaum. The landlord interest is now held by the Applicant Company. The leasehold interest is held by S Frances Limited. We consider the relevant terms of the lease at [59] below.

The Law

10. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. A summary of those requirements is set out in *Daejan Investments Ltd v Benson* ("*Daejan*") [2013] UKSC 14; [2013] 1 WLR 854, the leading authority on dispensation:

> Stage 1: Notice of Intention to do the Works: Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates: The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notice about Estimates: The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

4: Notification of reasons: Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

11. 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 or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

12. The Tribunal highlights the following passages from the speech of Lord Neuberger in *Daejan*:

> (i) Sections 19 to 20ZA of the Act are directed towards ensuring that tenants are not required to (a) pay for unnecessary services or services which are provided to a defective standard (section 19(1)(b)) and (b) pay more than they should for services which are necessary and are provided to an acceptable standard (section 19(1)(b). Sections 20 and 20ZA are intended to reinforce and give practical effect to these two purposes.
>
> (ii) A tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
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> (iii) If prejudice is established, a tribunal can impose conditions on the grant of dispensation under section 20(1)(b). It is permissible to make a condition that the landlord pays the costs incurred by the tenant in resisting the application including the costs of investigating or seeking to establish prejudice. Save where the expenditure is self-evidently unreasonable, it would

be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

13. The current application is somewhat different from the facts in *Daejan* in that the stated reason for the landlord's failure to comply with the statutory consultation requirements is the urgency of the works. Whilst the urgency of works may make the statutory consultation timetable impractical, a landlord should still seek to follow the spirit behind the statutory provisions. The landlord should consult any relevant tenants about the scope of the urgent works that are required. The landlord should also seek to test the market to ensure that best value is secured.

14. *Daejan* was applied by the Court of Appeal in *Aster Communities v Chapman* [2021] EWCA Civ 660; 4 WLR 74. The landlord was the freehold owner of a development comprising 160 flats. The requisite Notice of Intention listed the proposed works, but it was not suggested that the works would involve replacement of the balcony asphalt. Subsequently, the landlord brought an application before the First-tier Tribunal ("FTT"), pursuant to Section 27A. The FTT found that full replacement of all balcony asphalt was unnecessary, that the replacement of the balcony asphalt had not been part of the consultation and that even if the landlord could eventually justify the balcony asphalt replacement, an application for dispensation from consultation would be required. Accordingly, the landlord brought an application before the FTT for dispensation under Section 20ZA . The FTT held that it was appropriate to grant dispensation, but that a credible case of relevant prejudice had been made out in relation to the balcony asphalt. Accordingly, dispensation was granted on conditions removing prejudice, including a direction that the landlord was to pay the reasonable costs of an expert nominated by the tenants to advise them on the necessity of replacing all the balcony asphalt. The Court of Appeal upheld this decision.

The Background

15. Block 6 Ashley Gardens is a substantial eight story mansion block consisting of 19 purpose built flats in Victoria which was constructed in the 1890s. It is common ground that the chimney stack is in a state of substantial disrepair with structural cracking (see photos at CB.25-30). There are two issues: (i) what is the cause of this damage and (ii) what works are required to put the chimney breast in a proper state of repair? The Named Respondents contend that the damage was caused by the leaseholder of Flat 72 and that he should be responsible for any works.

16. It is apparent that over the years, many of the leaseholders have carried out significant works to their flats which have included structural alterations. In 2009, Mr Richard Jackson, a structural engineer

instructed by the then managing agents, inspected the chimney breast and noted cracking. Apparently, the repairs which were recommended were not executed (see CB.93). Some of the Named Respondents were directors of the Applicant company at this time.

17. On 5 January 2018, Mr Nasar Al Nassar acquired Flat 72 for £4,285m. This is a substantial five bedroom flat on the ground floor of the Building. He applied to the landlord for consent to carry out significant alterations to the flat. Detailed plans were provided. These were approved by Kevin Jones of Day Associates (New Forest) Limited ("Day Associates") on behalf of the landlord. On 26 April 2019, the landlord consented to the proposed works. These included works to enlarge the kitchen. The block was being managed by Warwick Estates. Mr Nasar Al Nassar has assured Mr Jackson did not include any structural alterations to the niche in the chimney breast (CB.93). Tiles were removed from the original opening. Mr Jackson considered that some of the impacts arising from this work could have disturbed the brickwork. On 28 September 2020, Day Associates signed off these works on behalf of the landlord.

18. On 3 January 2020, Mr Michael Chung, a civil engineer with Pierce & Malcolm ("HPM") took a photo of the chimney breast (at CB.32). On 23 September 2021, Mr Antino took some further photos for the Named Respondents (at CB.406). These do not suggest that any structural works were executed to the chimney breast. The opening may have been enlarged to accommodate a large American fridge which was placed in what was originally the fire place. The fridge was not in place when Mr Chung took his photo on 3 January 2020; it had been installed by 23 September 2021.

19. On 29 November 2019, BSM took over the management of the Building from Warwick Estates. This was a time of some dissent over the management of both the Applicant Company and the Building. In October 2017, HML Hawksworth had been managing the Building. It seems that BSM were the fifth firm to manage the Building over recent years. On 23 July 2018, Mr Ramsay, one of the Named Respondents, had been removed as a director, having lost the confidence of a majority of the shareholders.

20. In December 2019, the cracking to the chimney breast was reported to BSM. On 19 December, BSM arranged a site inspection. On 3 January 2020, Mr Chung inspected and prepared a report dated, 6 January 2020 (at CB.28-35). He found that the chimney breast had suffered significant cracking, generally at the ground floor and first floor levels. At [12] to [13], he discusses the cause of the cracking, namely (a) overstressing of the chimney breast; (b) snapped headers; (c) presence of flues; and (d) the works in Flat 72. At [16] he recommended that temporary restraint was provided to the chimney breast in the

"immediate future". On 4 January, scaffolding was erected to provide that support.

21. On 4 January 2020 (at SB.104), Jane Frances, the leaseholder of Flat 76a, suggested that a second opinion be obtained. She noted that over the last 3 years, the block engineer (Day Associates) had approved multiple structural changes. Cracks were also appearing in the common parts on the third floor. She suggested that the cracking must "be due to the relentless structural changes which have taken place in a number of properties". She urged the immediate cessation of any structural and building works in the Building.

22. On 8 January 2020 (at CB84-85), BSM served a Stage 1: Notice of Intention. Responses were invited within 30 days. The material parts of the Notice read:

"1. It is the intention of Block 6 Ashley Gardens Limited to enter into an agreement to carry out works in respect of which we are required to consult leaseholders (see Note 1)

2. The proposed works to be carried out under the agreement are repairs to the northern elevation to include:

- Temporary restraints and propping of the structure
- Investigations into the cause of the cracking and distortion
- Repairs to external face of elevation to include reconstructing the face of the chimney breast.
- Preliminaries, Professional Fees, VAT, Contingency and Health and Safety Compliance

3. We consider it necessary to carry out the works, in order to fulfil the Landlords repairing obligations under the terms of the lease, following the appearance of cracking and distortion on this elevation.

4. We invite you to make written observations in relation to the proposed works by sending them to Bruton Street (Management) Ltd, Suite 8, 121 Sloane Street, London, SW1X 9BW. Observations must be made within the consultation period of 30 days from the date of this notice. The consultation period will end on 12th February 2020 (Note 3)."

5. We also invite you to propose, within 30 days from the date of this notice, the name of a person from whom we should try to obtain an estimate for the carrying out of the proposed works described in paragraph 2 above (see Note 4)".

23. The Named Respondents do not suggest that they responded to this Notice by the specified date of 12 February. They did not make any

observations on the approach that the landlord proposed to adopt. They did not nominate any person from whom an estimate should be sought. Neither did they suggest an expert from whom a second opinion might be sought. Their response was rather to initiate the procedure for the appointment of a manager by this tribunal. At this stage, HPM had only been responsible for managing the Building for a period of three months.

24. On 28 January 2020, the Nominated Respondents served a Preliminary Notice pursuant to Section 22 of the Landlord and Tenant Act 1987. On 12 February, they issued an application to this tribunal. The application was heard over three days between 1 and 3 March 2021 by Judge Dutton and Mrs Redmond MRICS ("the FTT"). Both parties were represented by Counsel. The Receiver also supported the application. The Tribunal was required to consider a bundle of over 1,500 pages. A number of witnesses were called. The FTT's decision is dated 18 May 2021. The FTT was satisfied that it was not "just and convenient" to appoint a manager. The FTT considered the troubled background to the management of the Building and the past involvement of some of the Named Respondents as directors. There had been separate proceedings in the High Court between Mr Ramsay and the Applicant. The FTT noted that there had been a history of neglect during the period that some of the Named Respondents had been directors. In July 2018, the shareholders had removed Mr Ramsay as a director. HPM had prepared a Planned Maintenance Programme. Ms Mooney, the manager proposed by the Named Respondents, had not been asked to consider this. There were arrears of service charges of £372k; £260.5k of which was owed by the Named Respondents. None of the seven directors were in arrears. The FTT found Ms Walker, from BSM, to be "a very competent and helpful witness". She had not had an easy start. The FTT was satisfied that BSM had not been given an adequate opportunity to fulfil their responsibilities. The FTT considered the cracking to the chimney breast The FTT noted that Mr McAllister, the expert who had been called by the Named Respondents, had made no more than a limited inspection of the Building, but had felt able "to disparage the reports of both HMP and Pole who had carried out detailed inspections and had carried out a thorough review". The FTT welcomed the landlord's decision to seek an independent report from the RICS.

25. On 6 March 2020, Mr Chung provided a second report (at CB.36-43). On 22 January, he had inspected Flat 72. The floor boarding and the soffit boarding was removed. Mr Chung could not find any evidence of cracking in the fire place. Ms Lovegrove noted that it seems that the plaster and render were not removed. Penetration Radar Scanning indicated significant lamination on the facing brickwork from the basement to the second floor. Opening up works were undertaken to establish the condition of the header bricks. These indicated poor workmanship in the yellow stock brickwork behind the facing brickwork. He recommended that the investigations be extended to all

levels. As a result of this, BSM instructed that scaffolding should be extended to the top of the Building. Ms Lovegrove suggested that this had been unnecessary. However, BSM were acting on the basis of professional advice. Mr Chung suggested (at [27]) that it might be necessary to reconstruct the chimney breast in full (see [27]). However, a more limited alternative was proposed at [28]. On 9 March, a Leaseholder's Meeting was held (at SB116) and which Ms Walker updated the leaseholders on the recent developments.

26. The Applicant decided to obtain a second opinion. On 6 April 2020 (at CB44-62), Mr Sam Stephens, a Consultant Engineer with Pole Structural Engineers ("Pole") provided a report. This confirmed the assessment made by Mr Chung. Mr Stephens concluded that the cracking to the lower chimney breast was severe and could be unstable, He concluded that the damage had been caused by a number of historic and more recent factors.

27. On 21 May 2020 (at CB.63-69), Mr Chung provided a third report. He had carried out investigations at a higher level. Whilst not currently exhibiting visible signs of distress, he considered that there was a significant risk of the same failure as the lower floors in the future.

28. On 2 June 2020 (at CB430), the Named Respondents notified BSM that they were obtaining their own report. They asserted that it was inappropriate for the Applicant to rely on exerts who had previously been involved in advising on the licence which had been granted to Mr Nassar Al Nassar in 2019. The letter refers to an incident on or about 2 January 2020 when a duty porter was alerted to the existence of external cracking. It is asserted that the police and Westminster Council attended. Access was obtained to Flat 72 where building works were underway. It is asserted that the Westminster officer suggested that the cause was drilling or other works by the fireplace in the kitchen. No evidence has been adduced to confirm these assertions. The photo taken by Mr Chang of the fireplace on 3 January (at p.35) does not seem to support this version of events.

29. The Named Respondents had commissioned their own report which was provided by which was provided by Dr Philip Antino MRICS of APA Property Services Limited ("ARA"), dated 8 June 2020 (at SB126-132). He was satisfied that the brickwork could be repaired.

30. In the light of this contrary recommendation, the Applicant decided, on the advice of their Solicitors, to ask RICS to appoint an independent expert. On 22 June, BSM wrote to Mr Simon Frances proposing the appointment of an expert. In its Reply ([45] at CB.528), the Applicant explains the delay in making the appointment. The RICS required a counterparty. BSM asked Mr Frances to be that party. However, he failed to cooperate. On 26 November 2020, the Applicant made a referral to RICS, naming Ms Miss S Jaffery, Flat 80A, as the

counterparty. It is a matter of regret that the Named Respondents did not cooperate with this process. As a consequence of this, neither the Named Respondents nor the Applicant are bound by this determination. It is merely a report from an independent expert to which the Applicant should give serious consideration.

31. On 4 January 2021, the President of RICS appointed Mr Jonathan Rowling FRICS as expert. He appointed Mr Richard Jackson as his expert advisor. Mr Jackson had inspected the Building in 2009. He carried out further inspections on 24 March and 25 May 2021. His report is at CB.93-94. The fine cracking to the side of the chimney which he had noted in 2009, had worsened. He was assured by Mr Nassar Al Nassar that his work to Flat 72 had not included any structural alterations to the original niche in the chimney breast. He noted that tiles had been removed from the original opening and considered that it was possible that some of the impact arising from this work could have disturbed the original opening. The facing brickwork has been unusually sensitive to the alterations that have been carried out over the years. These alterations (changes to the internal openings, and more recently, the alterations at roof level) appear to have left the brickwork highly stressed, and therefore sensitive to what would normally have been described as minor alterations in the area in question, in Flat 72. Mr Rowling was the first expert to recommend the Helix repair to the chimney breast.

32. On 4 June 2021, Mr Rowling made his determination (at CB.86-94). BSM did not receive a copy of his report until 17 June 2021. Mr Rowling addressed four issues, two of which are relevant to this application:

(i) What is the cause of the cracking? Mr Rowling stated: "The brickwork in the outer face of the stack had become highly stressed by several alterations, including the creation of niches, and works to the roof, and unduly sensitive to the alterations that were carried out in Flat 72; that is the removal of tiling, leading to impact damage".

(ii) Issue Two: How should the cracking be repaired? Mr Rowling recommended "the addition of 'Helibar' and 'Helibond' grout (by Helifix), using 4mm bars, set 35mm into the face of the wall, at every fourth course over the lengths of the cracks in the return walls is anticipated to be the appropriate repair. The Helibar should be set 200mm on either side of the crack, so each bar should be 400mm long, centred on the crack, except where the proximity of the crack to an edge or the main wall prevents that where the bars may be cut short. The cracked bricks should be replaced and cracked joints re-pointed with a lime based (matching) mortar".

33. Mr Rowling addressed two further issues, namely: (i) Under the terms of the leases who is responsible for undertaking the remedial works? And (ii) Under the terms of the leases who is responsible for paying for the

remedial works? His opinion is much less satisfactory on these questions. He proceeded on the erroneous assumption that Mrs Jaffery had carried out works in the vicinity of the external wall and chimney breast. He noted (at [44]) that the scope of his appointment did not extend to the leaseholders of Flat 72 or the Basement Flat.

34. The Applicant's decision to seek advice from a RICS's appointed expert caused a delay of twelve months in the execution of the works. The Applicant could not have contemplated this when their solicitor had suggested this course of action. The one positive outcome is that the "Helifix" method has been identified as the most appropriate repair. This does not require the complete rebuilding of the chimney stack. It is not a solution that any of the experts had previously recommended.

35. Time does not stand still. During the period of June 2020 to June 2021, there were a number of developments:

(i) On 8 October 2020, Mr Antino had prepared a further report (at SB.146-150). He did not consider that the investigations carried out by the Applicant had been sufficient. He was extremely disparaging about Ms Walker and the manner in which BSM were managing the Building.

(ii) On 11 February 2021 (at CB.70), Mr Chung carried out a further inspection. He found that further cracking had occurred. He noted that there had been evidence of historic crack stitching which had clearly not worked. He recommended additional restraint on the face of the chimney breast to be provided by scaffold propping and boarding.

(iii) On 18 May 2021, the FTT had issued their decision on the Named Respondent's application to appoint a manager (see [24] above). Having heard evidence over three days, the FTT complimented Ms White and BSM for their management of the Building. The FTT welcomed the Applicant's decision to seek an independent report from RICS.

(iv) The Applicant's insurers were becoming restless. On 19 May 2021 (at CB.56), AXA Insurance ("Axa") required works to commence within 30 days, with the threat that it would cancel the insurance if works were not commenced by 18 June. On 14 May (at CB.158), AXA had inspected the Building and found it to be in a "poor and unacceptable state of repair". AXA were satisfied that damage to the chimney created the potential risk of collapse and required urgent remediation works. Whilst AXA understood that the works were subject to Section 20 Consultation, remediation works had not been instigated in a timely manner.

36. On 26 May 2021, in response to this pressure from AXA, the Applicant issued their application to this tribunal (see [2] above). BSM had

already spent £72,436 on scaffolding and the costs were increasing. However, BSM still awaited the report from RICS and had not decided on the appropriate repair. BSM had gone to tender on the works that were originally proposed to rebuild the stack. The Tender Report, dated September, from Day Associates, is at CB.71-83. 40 companies had been approached to declare an interest; 13 had done so and had been invited to tender; only one tender was returned. Day Associates suggested that the reason for the lack of interest was the "high risk" nature of the project. The one tender was in the sum of £253.080. The overall cost of the project, with fees and VAT, was £334,066.

37. On 4 June 2021 (at SB.80), the Tribunal gave Directions. The Procedural Judge noted that there was some ambiguity as to whether the application related to the temporary scaffolding works or whether it extended to the long-term repairs. On 11 June, the proceedings were served on the Respondents. On 28 June (at SB.155-156), two of the Name Respondents served their formal responses. On 2 July (at CB.87-154), they served their detailed response. They alleged a lack of transparency and even-handedness. They did not oppose dispensation in principle, but argued that they had been prejudiced and that dispensation should be granted on terms.

38. On 17 June 2021, BSM received a copy of Mr Rowling's RICS Report (CB.86-92). BSM took the view that the report privileged and did not provide a copy to the Respondents. On 7 July (at SB.160), BSM applied to the tribunal for a three month stay whilst they reviewed the works that were required. On 14 July (at SB.161), BSM wrote to the Named Respondents summarising the "Helifix" package of works which Mr Rowling had recommended. On 11 August (at SB.172), Wallace wrote to the tribunal opposing the application for a stay. Wallace referred to the correspondence in which the Named Respondents had requested disclosure of the RICS Report. On 13 July, the tribunal had directed the Applicant to explain the basis on which privilege was claimed. On 4 August, the Applicant disclosed a redacted version of the report. On 17 August, Judge N Carr refused a stay. On 31 August, the Applicant disclosed the RICS Report. The Applicant also sought permission to amend their application to seek dispensation in respect of the works specified at [3] above.

39. On 7 August 2021, Judge Carr held a Case Management Hearing ("CMH"). On 8 September (at CB.2-9), the Judge gave Directions. She also made the following determinations:

(i) Permission was given to the Applicant to amend its dispensation application. The Amended Application is at CB10-20).

(ii) The Named Respondent's application to strike out the original application was refused.

(iii) An Order was made under Section 20C of the Act that the Applicant's costs of and caused by the request that its application for the proceedings to be stayed, and for permission to amend between the dates of 17 June and 7 September 2021, inclusive of the CMH and costs of amendment of the Application, should not be regarded as relevant costs to be added to the service charge account and paid by the Named Respondents. This order was made because the Applicant had failed to adequately address why it was asserting that the RICS Report was privileged.

(iv) The Named Respondent's application for a wasted costs order under Rule 13(1)(b) of the Tribunal Rules was adjourned to this hearing.

40. The Applicant is now seeking dispensation in respect of the following works:

(i) External Propping Scaffolding relating to the ongoing external propping scaffolding works at a cost of £71,435.60 already incurred for scaffolding from January 2020 to March 2021 and estimated continued scaffolding costs for a further 35 weeks from 6th March 2021. The tribunal has been provided with a Schedule of the costs invoiced by Kingfisher for the period 17 April 2020 and 25 March 2021 totalling £71,435.60 (at CB.308). This includes £13,200 for the erection of the scaffolding and £58,235.60 for the monthly charges. This includes an invoice of £5,400, dated 25 March 2021, for the additional strengthening to the scaffolding. This had been recommended by Mr Chung on 11 February 2021.

(ii) The Remedial Works as set out in the enclosed specification for structural repairs dated 12 July 2021 (at CB.95-99) and specification of works dated 13 August 2021 (CB.100-155). On 17 June 2021, the Applicant received the RICS Determination, which forms the basis of the works. On 12 July, EDA (Engineering Design and Analysis), the firm for which Mr Jackson works, drew up a Specification for Repairs to the Cracked Brickwork based on the Helifix method. On 13 August, Earl Kendrick, building surveyors, produced a detailed specification of works for the tendering process. On the same day, tenders were issued to four contractors. On 10 September, the tender process closed. Three tenders were returned (all exclusive of VAT):

(a) P.J.Harte: £49,440 (at CB.310-320);
(b) A.S.Ramsay: £142,214 (at CB.337-346) and
(c) Collins Contracts: £158,103 (at C.321-333).

On the same day, the Applicant chose its contractor based on the recommendation of Earl Kendrick Associates. P.J.Harte had provided the lowest quote. On 30 September, the works commenced.

41. Pursuant to the Directions given by Judge Carr, the Applicant has served the Amended Application and the Directions on the Respondents. The following responses have been received:

(i) The Named Respondents have filed a Statement of Case, dated 18 October 2021 (at CB.290-434). This was drafted by Counsel. This includes a Report from Dr Antino, dated 14 October 2021 (at CB.347-364. He purports to present his report as an independent expert. On 23 September, he had had a site meeting with both Mr Jackson (EDA) and Mr Glen Hardington (Earl Kendrick). Dr Antino is highly critical of all the steps that the Applicant has taken. He describes the initial response in January 2019 as "knee jerk". There had been no "logical/rational investigative process, analysis, diagnosis or prognosis and/or data". The assessment that the chimney was dangerous and liable to collapse is described is described as "rash and unsubstantiated". The instruction to erect a scaffolding structure is described as being "far in excess of what would have been reasonably necessary to the ordinarily competent surveyor/engineer investigating localised structural cracking". He is satisfied that there is a clear causal link between the damage and the work executed in Flat 72 and this leaseholder should shoulder all the cost of the repairs. Any works to the chimney breast above ground level fall outside of the scope of the works envisaged in the Notice of Intention which had been served in January 2021. He does not consider Specification drawn up by Mr Jackson to be reasonable. He suggests that a revised specification would cost £45,000 + VAT. The tendering process was flawed and the range of the tenders indicated that two of the contractors were not "remotely interested in tendering for these works". He concludes that the service charge payers should not bear any of the costs of the works and that all the associated and incidental costs are a matter between the Applicant and Mr Nassar Al Nassar.

(ii) The Receiver has filed a witness statement by Ms Ranby-Gorwood, dated 7 October 2021, (at CB.436-439), a further report from Dr Antino, dated 7 October 2021 (at CB.440-449) and a Bundle of Documents (at CB.450-516). At [15] of her statement, she argues that the application for dispensation is premature. The Applicant should rather make further investigations as to the cause of the damage and look to those leaseholders responsible for the structural damage to pay for the works. She also raises a number of matters which are not relevant to this application. In February 2020, their tenant moved out of the Basement Flat. The Receiver has been unable to sell the flat because of the ongoing chimney dispute. There has also been a problem of rising dampness. This flat is immediately underneath Flat 72, the flat owned by Mr Nassar Al Nassar. Ms Ranby-Gorwood complains that that there have been four leaks from Flat 72. Scaffolding prevents access to the Basement Flat. She referred to the photographs taken on 6 October 2021 at CB.491 and CB.470. Ms Ranby-Gorwood claims that the Receiver has lost an income if £3,791 per month (£75,820 per annum) from being unable to let the basement flat.

42. The Applicant has filed its Statement of Case in Reply (at CB.519-533). This is also drafted by Counsel. Mr Carr sets out the matters which he later repeated in his Skeleton Argument. The Building was in disrepair. Urgent repairs were required. The Notice of Intention, dated 8 January 2020, gave the leaseholders notified the leaseholders of the works that were contemplated. Thereafter, there was further engagement before the landlord went out to tender. Time did not permit the service of a Notice of Estimates. However, no prejudice has been caused to the leaseholders.

43. On 29 November 2021 (at CB.584), Mr Jackson responded to the points raised by Dr Antino:

(i) He did not accept Dr Antino's assertion that the propping scaffolding was not in fact providing support to the brickwork. The boards were clearly in compression in places, and were working as part of the support. Had they been doing nothing, they would have fallen away from the wall. The efficacy of the propping boards is illustrated by the photos at CB.394 and 400.

(ii) He did not accept Dr Antino's assertion that Helibar fixings with Helibond mortar were not required where the chimney stack had pulled away from the main elevation. The Helibar repairs would improve the overall integrity of the existing chimney stack.

(iii) He did not accept that the repair works should be restricted to the severe cracking at the ground and first floor levels of the Building only. The upper repairs were provisional items, subject to close inspection from safe, accessible scaffolding.

(iv) He did not accept Dr Antino's position in relation to the sequencing of the Works. The intention was to improve the load-bearing capacity of the brickwork, working from top to bottom. This would improve the ability of the brickwork to corbel as work progresses down the stack, and arguably reduce the load on the brickwork where it is badly fractured. It also allows the scaffolding to be brought down as the repairs are carried out, at the earliest opportunity.

(v) He did not accept Dr Antino's assertion that adverse inferences should be drawn from the difference in price of the tenders in this case. The tenders were prepared, based on the information that was available at time of tender, and on the assumption that the existing scaffolding was safe and accessible. It is now apparent that a new scaffold tower is required.

(vi) Mr Jackson is satisfied that it was originally necessary for the scaffolding to be erected to the full height of the building to facilitate

urgent investigations. Thereafter, it was more cost effective for it to remain up.

(vi) Mr Jackson is satisfied that working "top down" is the most practical solution here. He was surprised at Dr Antino comments that he had not seen the steel plates, as they were clearly visible externally from ground floor level.

(vii) Mr Jackson emphasises that the Licence to Alter Report and the drawings for the works to Flat 72 make no reference to structural alterations to the chimney breast. He has no reason to question the leaseholder's account that only the tiled finish was removed. No evidence has been provided that confirms that structural alterations were either proposed or carried out to the chimney breast at the time of the application.

44. Whilst this application has been pending, AXA has continued to press the Applicant to start the works at the earliest opportunity. On 22 June (at CB.158), AXA threatened to cancel the insurance with effect from 23 July. On 29 July (at CB.160), AXA agreed to extend this to 1 September. On 30 July (at CB.163), AXA provided a further extension, requiring the contractors to be on site by 30 September. Mr Carr stated that the Applicant had met this deadline. The Tribunal is satisfied that neither the Named Respondents nor the Receiver have recognised the consequences for both landlord and the leaseholders had the insurance been withdrawn.

45. At the hearing, the Tribunal was provided with a Contract Instruction issued by Earl Kendrick, dated 18 November 2021. This suggested that the contract price has now increased to £101,1001. The most significant variation is the provision for a new scaffold tower at a cost of £34,255. It was unclear whether the sums included in this Schedule include VAT.

The Tribunal's Determination

46. The primary issue which this Tribunal is required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements, and if so, whether to impose any conditions. This application does not concern the issue of whether any service charge costs will be reasonable or payable. However, as noted above, the statutory consultation procedures are part of the statutory armoury to protect lessees from paying excessive service charges or for works which were not reasonably required.

47. This Tribunal has not heard live evidence. However, we have been referred to some 900 pages of documents and a number of expert reports. None of these experts have had their opinions tested by cross-examination. However, we are assisted by the decision of the FTT in LON/00BK/LDC/2021/0143. Judge Dutton and Mrs Redmond (the

FTT) heard a number of witnesses over a three day hearing. We find their assessment of the parties involved in the management of this Building to be extremely perceptive. Their findings confirm our assessment of the evidence.

48. The Building at Block 6, Ashley Gardens is owned by the Applicant company which is controlled by the 19 leaseholders all of whom are shareholders. There are currently seven directors, Mr Duran Dhamija, Mr Stephen Mitchell, Mr Abdelah Binmahfouz, Dr Amin Jaffer, Mr Robin Leon, Mr Cyrus Nasseri and Mr Yaser Binmahfouz. None of them have provided witness statements. However, it is apparent that they have been content to leave the management of the Building to BSM, the managing agents. They have accepted and acted on the professional advice with which they have been provided.

49. As the FTT noted, the Frances family and Mr Ramsay (the Named Respondents) have joined together to challenge the effectiveness of the present manager and the directors. They have previously been directors. Mr Ramsay resigned in July 2018, having lost the confidence of his fellow leaseholders. There has been a history of neglect which they failed to address when they were directors. They have been substantially in arrears with their service charges. However, they have been willing to expend substantial sums on litigation. The Applicant offered them the opportunity to engage in the appointment of an independent expert appointed by RICS. They failed to cooperate. They have been as critical of the repairs proposed by Mr Jackson as they have been of the advice offered by the two previous experts, HPM (Mr Chung) and Pole (Mr Stephens).

50. Since 29 November 2019, BSM have been managing the Building on behalf of the Applicant. They took over from Warwick Premier. In October 2017, NML Hawksworh had been managing the Building. It is apparent that the management of this Building is a thankless task for any managing agent. Within two months of their appointment, the Named Respondents initiated the procedures for applying for a Tribunal appointed Manager. It is unsurprising that the FTT found that it was not just and convenient for the Tribunal to appoint a manager. The FTT was impressed by Ms Walker and was satisfied that BSM had not been given an adequate opportunity to fulfil their responsibilities. We also note that the expert called by the Named Respondents had seen his role as to "disparage" the reports of their landlord's experts. These proceedings, with both parties instructing experienced Counsel, must have been extremely expensive both for the Named Respondents (who had to bear their own costs) and for the leaseholders (who had to bear the Applicant's costs through their service charges).

51. Ms Walker did not give evidence to this Tribunal. However, we are satisfied that BSM have approached their task of managing this Building in a responsible and competent manner. They have sought to

engage with all the leaseholders. At an early stage, they were willing to seek a second opinion from Pole. They had due regard to the contrary opinion expressed by Dr Antino. They then sought the advice of an expert appointed by RICS. Having received the determination by Mr Rowling, they have then acted on the advice of Mr Jackson, the independent expert advisor appointed by Mr Rowling.

52. We make one criticism of the Applicant. It should have disclosed the RICS determination made by Mr Rowling at the earliest opportunity. We understand why the Applicant may have had some concerns about this report and that this may have been withheld on legal advice. Judge Carr marked her disapproval of this in the Order which she made on 7 September 2021 (see [39] above).

53. The Tribunal has considered the reports from a number of experts. We find the reports of Mr Jackson to be the most compelling. He had inspected the chimney breast in 2009 and had noted the cracking and recommended repairs. It is therefore apparent that it has been in disrepair for a number of years and well before Mr Nassar Al Nassar executed any works in Flat 72 in 2019. Mr Jackson recommended the Helifix package repairs to Mr Rowling. We are satisfied that this the most cost-effective repair to the chimney breast. Mr Jackson supervised the tendering process. We are satisfied that this was a robust process which has sought to secure best value.

54. The Tribunal has also had due regard to the reports produced by Mr Chung and Mr Stephens. We are satisfied that they were both competent and experienced experts. The Applicant was justified in acting on their advice. We note that both Mr Chung and Mr Stephens proposed the rebuilding of the entire stack. The fact that the Applicant has now chosen a more limited package of repairs does not mean that their approach was flawed. Different experts may reach different conclusions; all may be equally justified. We record that Mr Chung had also suggested that a more limited package of repair might suffice. The significant fact is that when leaseholders suggested that a further opinion should be sought, the Applicant was willing to do so.

55. We were less impressed by the reports of Dr Antino. His reports do not reflect the objectivity and detachment that we would expect from an independent expert. His language is colourful and pejorative (see 41(i) above). He also seems to have seen his role as to disparage the reports of the landlord's experts. Mr Jackson has addressed the points raised by Dr Antino (see [43] above). We have no hesitation in preferring the expert opinion of Mr Jackson.

56. A significant expense in this case has been the erection of the scaffolding. This was initially recommended by Mr Chang in January 2020. In February 2021, he recommended that further scaffolding be

erected. Mr Jackson has confirmed that this was necessary to support the brickwork.

57. There has been a significant delay between the erection of the scaffolding in January 2020 and the commencement of the works on 30 September 2021. The Named Respondent's application for a tribunal appointed manager was an unnecessary distraction. The Applicant has explained the delay caused in obtaining the determination of the RICS appointed expert. The Named Respondents now seem to suggest that the works were started prematurely. The Applicant should rather have initiated yet further litigation against Mr Nassar Al Nassar to compel him to execute the works. The Tribunal commented that these disputes have been good for the lawyers; the benefit to the leaseholders is far less apparent.

Has the Tribunal Jurisdiction to Grant Dispensation

58. Ms Lovegrove argues that the Tribunal has no jurisdiction to grant dispensation as the proposed works are the liability of Mr Nassar Al Nassar, the leaseholder of Flat 72 whom the Named Respondents contend caused the structural damage to the chimney stack.

59. The Tribunal has been provided with a copy of the lease to Flat 83a (at CB.167). Ms Lovegrove referred us to the following provisions:

(i) By Clause 3(17), the leaseholder covenants to "make good all damage caused through the act or default of the Lessee or of any servant or agent of the Lessee (a) to any part of the building […] and in each case to keep the Lessor indemnified from all claims and expenses and demands in respect thereof".

(ii) By Clause 4(3), the landlord covenants "to maintain repair redecorate renew amend clean repoint paint grain varnish whiten and colour (a) the structure of the building and in particular […] the external and internal walls […] chimney stacks […]".

60. Ms Lovegrove argues that where repairing obligations are imposed both on the landlord and on the tenant, they should be construed, so far as reasonably possible, so as to avoid overlapping obligations. We agree. She goes on to argue that if the damage to the chimney stack was caused by the leaseholder of Flat 72, this leaseholder has the sole responsibility for carrying out the repairs. Were the landlord to carry out the repairs, it would not be entitled to pass on the cost through the service charge. We disagree.

61. We are satisfied that the landlord has the primary responsibility to maintain, repair and renew the structure of the Building including the chimney stack. We are further satisfied that the interpretation for which Ms Lovegrove contends would lead to absurd results which the

contracting parties would not have contemplated (see *Arnold v Britton* [2015] AC 1619).

62. The Tribunal gave the following example:

(i) If the front door of the Building was damaged and insecure, the landlord would be under a duty to carry out emergency repairs to the door in order to secure the building.

(ii) It would be absurd were the landlord to be required to investigate who had caused the damage, before carrying out such repairs.

(iii) If a leaseholder had damaged the door, for example because he had lost his keys and needed to gain access, he would be under a responsibility to make good his damage. If the leaseholder failed to do so, the landlord would be entitled to seek reimbursement for the cost of any repairs. The landlord would not be justified in leaving the Building insecure, until the leaseholder in default had carried out the necessary repairs.

(iv) In many situations, it might not be possible to establish who had caused the damage or it might be disproportionate to do so. In such circumstances, this would be a proper cost for the landlord to pass on through the service charge.

63. The Named Respondents contend that there is clear and cogent evidence that Mr Nassar Al Nassar caused the damage to the chimney stack. He should be solely responsible for the repairs to make good that damage. If the Applicant decides to mitigate its loss by erecting scaffolding and carrying out the necessary repairs, this is not a cost which can be charged to the service charge account. The landlord's remedy is to sue Mr Nassar Al Nassar.

64. The Tribunal cannot accept this argument. We are satisfied that the Applicant had no option but to erect scaffolding when the crack appeared to prevent further damage to the chimney stack. It has also been obliged to arrange for the necessary repairs.

65. The Tribunal is not satisfied that there is clear and cogent evidence that Mr Nassar Al Nassar caused the damage. Given the extensive material that we have been required to consider, it is appropriate for us, as an Expert Tribunal, to set out assessment of this evidence:

(i) In 2009, Mr Jackson noted cracking to the chimney breast (see CB.93). At that date, it was in disrepair. None of the repairs which had been recommended, were executed.

(ii) We agree with the assessment made by Ms Jane Frances on 4 January 2020 (at [21] above). The cracking was due to the relentless structural changes which have taken place in a number of flats over many years.

(iii) This damage may have been aggravated by inherent weaknesses in the stack.

(iv) In 2019, Mr Hassan Al Hassan carried out alterations to Flat 72. This did not involve any structural work to the niche in the chimney breast. Tiles were removed from the original opening and it is possible that some of the impact arising from this work could have disturbed the original opening.

(v) The facing brickwork has been unusually sensitive to the alterations that have been carried out over the years. These alterations appear to have left the brickwork highly stressed, and therefore sensitive to what would normally have been described as minor alterations in Flat 72.

(vi) The minor works executed in Flat 72, may have been the straw that broke the camel's back. It seems to have been no more than this.

66. Given this assessment, we suggest that the Applicant would only have a remote prospect of establishing that Mr Hassan Al Hassan was liable for the disrepair to the stack. The Applicant would need to ask itself this question: Given the prospect of establishing liability against any leaseholder, would it be proportionate to bring such a claim? The claim would be brought on behalf of the service charge payers, and the landlord would be entitled to pass on its reasonable costs through the service charge account. However, it would need to be satisfied that its action in bringing such a claim was reasonable.

The Granting of Dispensation

67. The Tribunal is satisfied that it is appropriate to grant dispensation in this case. The Tribunal will explain its reasons for doing so, before addressing the arguments advanced by Ms Lovegrove and Ms Ranby-Gorwood.

68. First, the Tribunal deals with dispensation in respect of the external propping scaffolding. The Tribunal makes the following findings:

(i) The Applicant was justified in erecting the scaffold in January 2020 and strengthening this in February 2021. BSM were acting on the basis of professional advice. This was required to support the brickwork. With the benefit of hindsight, Mr Jackson confirms that this was the correct decision.

(ii) The Tribunal rejects the evidence of the Named Respondents that this work was not necessary.

(iii) The scaffolding was erected as a matter of urgency. There was no time to embark upon the statutory consultation process.

(iv) On 8 January 2020, the Applicant served a Notice of Intention (see [22] above). This alerted the leaseholders to the need for temporary restraints and propping of the structure.

(v) Had any of the leaseholders considered that this was unnecessary, they could have responded before the end of the consultation period on 12 February 2020. They did not do so.

(vi) Hade any leaseholder considered that the scaffolding should have been secured from another contractor, they could have nominated one. They did not do so.

(vii) It is difficult to see how any prejudice arose from this process, given our finding that the Applicant had no option but to erect scaffolding to secure the Building.

69. The cost of the scaffolding has been substantial. If any leaseholder seeks to contend that the cost incurred has been unreasonable, they would be entitled to make an application to this Tribunal under Section 27A of the Act.

70. Secondly, the Tribunal deals with dispensation in respect of the remedial works. The Tribunal makes the following findings:

(i) On 8 January 2020, the Applicant served a Notice of Intention (see [22] above). This alerted the leaseholders to the need for the following works: (a) Investigations into the cause of the cracking and distortion; (b) Repairs to external face of elevation to include reconstructing the face of the chimney breast; and (c) Preliminaries, Professional Fees, VAT, Contingency and Health and Safety Compliance temporary restraints and propping of the structure.

(ii) The Regulations only require the Notice to describe "in general terms the works proposed to be carried out". This Notice sufficiently described the repairs which commenced on 30 September 2021.

(iii) The Notice invited the leaseholders to make written observations on the proposed works and to nominate a person from whom an estimate should be sought by 12 February 2020. No leaseholder responded to this notice.

(iv) Despite this, there was extensive consultation on the scope of the works that were proposed.

(v) On 13 August 2021, Earl Kendick sought tenders from four contractors. Three tenders were returned.

(vi) Strictly, the Applicant should have served a Stage 3 Notice about Estimates and given the leaseholders 30 days to comment on the three tenders that had been returned.

(vii) On 10 September 2021, three tenders were returned. On the same day, Earl Kendrick awarded the contract to the P.J.Harte who had retuned the lowest tender so that work could commence on 30 September.

(viii) The Tribunal is satisfied that the works were urgent:

> (a) AXA were threatening to withdraw insurance (see [35(iv)] and [44] above). On 14 May, AXA had inspected the Building and concluded that it was in an unacceptable condition.
>
> (b) Had insurance been withdrawn, both the landlord and the leaseholders would have been in an impossible position. The landlord would have been in breach of covenant. The leaseholders would have had flats which they could not sell.
>
> (c) There had already been excessive delays. There was a danger that the Building was further deteriorating. The cost of the scaffolding was increasing. The Basement flat could not be let or sold whilst the scaffolding was in place. All the flats were blighted whilst the disrepair was unresolved.

(ix) No prejudice has been established. No alternative contractor had been nominated. The Applicant had accepted the lowest tender.

71. The cost of the works will be substantial. The Tribunal was concerned to see the Earl Kendrick Contract Instruction, dated 18 November 2021, and the increase of £41,661 in the contract price. The Applicant needs to explain the reasons for this increase in costs to the leaseholders. If any leaseholder seeks to contend that the cost incurred has been unreasonable, they would be entitled to make an application to this Tribunal under Section 27A of the Act.

72. The Tribunal turns to the issues raised by the Named Respondents and the Receiver. The Tribunal does not accept the argument that there was no urgency. The Applicant received the RICS determination from Mr Rowling on 17 June 2021. AXA were already threatening to withdrew insurance. The Applicant had no option but to proceed with the works at the earliest opportunity.

73. Ms Lovegrove argues that a further Notice of Intention should have been served once the Applicant had decided to proceed with the works recommended by Mr Rowling. The Tribunal does not accept this argument. However, if we are wrong on his, we are satisfied that it would be appropriate to grant dispensation. No prejudice has been established:

(i) There had been extensive engagement on the scope of the works. Whilst the Named Respondents would not have accepted the scope of the works recommended by the RICS appointed expert, the Applicant would have proceeded with these works. It would have been entitled to do so.

(ii) The Applicant tested the market by going out to tender. It has accepted the lowest tender.

(iii) The approach adopted by the Applicant has been justified by the need for urgency. The Applicant has sought to comply with the spirit of the consultation procedures. There has been extensive consultation about the scope of the works. The Applicant has tested the market in order to secure best value.

74. Ms Lovegrove argues that dispensation should be granted on the following terms:

(i) the Applicant should be required to make a further application to this tribunal under section 27A to determine the "payability" of the works. This is not an appropriate condition. This Tribunal has merely agreed to grant dispensation. It is open to any party to argue that the eventual cost of the works is unreasonable.

(ii) The scaffolding costs should be limited to £4,700 + VAT. This is not an appropriate condition. The Tribunal has found that the provision of the scaffolding was necessary.

(iii) More limited repairs should be executed to the chimney. The Tribunal is satisfied that the Applicant is entitled to proceed with the Schedule of Works recommended by Mr Jackson.

(iv) The costs should be limited to £45,000 + VAT. The Tribunal is satisfied that the Applicant is entitled to proceed with the Schedule of Works recommended by Mr Jackson and with the tender accepted from P.J.Harte.

(v) the Applicant should pay the costs of the Named Respondents. There is no justification for this. Their challenge has failed.

(vi) An order should be made under Section 20C so that the Applicant is unable to pass on its costs relating to this application against the Named Respondents. There is no justification for this. Their challenge has failed. It would be unjust for the cost of this application to be borne by those leaseholders who have not opposed the application.

75. The Tribunal has noted that it is open to any leaseholder to challenge the eventual costs of either the scaffolding or the remedial works through an application under Section 27A of the Act. However, the Tribunal gives this warning. Against the background of all the litigation involving this Building, a penal costs order might be made should any such application be brought unreasonably.

Application under Section 20C

76. The Named Respondents apply for an order under section 20C of the 1985 Act. In the light of our findings above, the Tribunal is satisfied that it would not be just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act. Their challenge has failed. It would be unjust for the cost of this application to be borne by those leaseholders who have not opposed the application and whose position has been vindicated.

Application for Costs Under Rule 13(1)(b)

77. The Named Respondents seek an order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in respect of the first application. Ms Lovegrove argues that it was manifestly unreasonable to bring the original application. The grounds for making this application are set out in the letter, dated 11 August 2021, sent by Wallace (at SB.172):

(i) Issuing the application when receipt of the RICS Determination was imminent. The Applicant responds that it had no idea when the Determination would be received or what it would conclude. AXA was threatening to withdraw the insurance for the Building.

(ii) Proceeding to serve an application which it must have known could not be pursued as a result of the RICS Determination. The Applicant responds that it was obliged to serve the application as a result of the Directions which had been given on 14 June.

(iii) Sitting back and allowing the Named Respondents to incur the considerable expense of responding to the Application when the Applicant was aware that the RICS Determination would make the

Statement in Response irrelevant. On 17 June, the Applicant received a copy of the Determination. On 2 July, the Named Respondents filed their Statement of Case (at SB.87-100 with documents at 101-154). This was drafted by Counsel. On 7 July, the Applicant applied for a three month stay. This was opposed by the Named Respondents.

(iv) The Applicant failed to serve the leaseholders with the appendices to the Dispensation Application. The Applicant responds that it was only directed to serve the application form. This was strictly correct.

(v) The Applicant refused to provide a copy of the summary of scaffold costs referred to in the Dispensation Application to either the Tribunal or the Named Respondents. The application form stated that the cost of the scaffolding from January 2020 to March 2021. This was not a Section 27A application. An order for disclosure could have been sought.

78. Rule 13(1)(b) provides that a Tribunal can only make an order if satisfied that a party acted unreasonably in bringing proceedings. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC), the Upper Tribunal set a high threshold for such an application. At [20], the Upper Tribunal referred with approval the judgment of Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205 (a wasted costs case):

> "Unreasonable" … aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

79. The Tribunal is satisfied that the Named Applicants have not established any unreasonable conduct on behalf of the Applicant that would justify a penal costs order. It has acted on the advice of competent legal advice throughout. In their letter of 11 August, the Named Respondents applied for the original application to be dismissed. Judge Carr refused this application. This is the first application which we have been required to consider in our determination. We have found against the Named Respondents.

80. The Applicant faced a dilemma as to when to issue this application. On the one hand, AXA was applying immense pressure to start remedial works at the earliest opportunity. On the other hand, the Applicant was

awaiting the decision from the RICS Expert. It hoped, seemingly in vain hope that it might be possible to agree a schedule of works which was acceptable to all leaseholders.

81. The Applicant made one error of judgment. That was its failure to provide the Named Respondents with a copy of RICS Determination. On 7 September 2021, Judge Carr reflected this in the Section 20C costs order which she made (see [39] above). Such an error of judgment falls far short of the threshold of unreasonable conduct justifying a penal costs order.

Service of this Decision

82. The Tribunal will email a copy of this decision to the Applicant, the Named Respondents and the Receiver. The Applicant is responsible for emailing or sending a copy of the decision to all the other leaseholders.

Judge Robert Latham
29 December 2021

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made **by e-mail** to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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