FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MR/LSC/2018/0070 CHI/00MR/LDC/2018/0057
Property	**:**	32-54 Arundel Street, Portsmouth PO1 1NL
Applicant	**:**	Grey GR Limited Partnership
Representative	**:**	JB Leitch Limited
Respondent	**:**	The leaseholders as named in paragraph 18 of the decision
Representative	**:**	Mackrell Turner Garrett, solicitors, for Mr Mills of Flat 3 at 32 Arundel Street
Type of Application	**:**	Application to determine service charges in respect of major works Section 27A of the Landlord and Tenant Act 1985 To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	**:**	Judge Tildesley OBE Mr D Banfield FRICS Mrs J E Herrington
Date and Venue of Hearing	**:**	Havant Justice Centre 12,13 and 14 November 2018 Reconvene in Absence of parties 5 December 2018
Date of Decision	**:**	14 January 2019

DECISION

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Decisions of the Tribunal

1. The Tribunal refuses to grant dispensation from consultation on the fire safety works in respect of the sub-leaseholders at 32 Arundel Street.

2. The Tribunal grants the application for dispensation for the fire safety works in so far as it affects the sub-leaseholders of Arundel House.

3. The Tribunal decides that it has no jurisdiction to make a determination in isolation on the reasonableness of the amount claimed by the Applicant for fire safety works, professional fees and fire marshals. In the alternative the Tribunal decides that the conduct of the section 27A proceedings by the Applicant is contrary to the overriding objective and amounted to an abuse of process. The Tribunal, therefore, declines to proceed with the section 27A application against the Respondents and dismisses the Application.

4. The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 in favour of the sub-leaseholders at Arundel House and at 32 Arundel Street so that none of the Landlord's costs of the Tribunal proceedings may be passed to the sub-leaseholders through the service charge.

5. The Tribunal orders the Applicant to pay costs of £16,161 plus VAT to Mr Mills within 56 days.

6. The Tribunal determines that the Applicant shall pay costs of £205.33 to Mr Weller and the travel costs of £41.85 to Mr Peter Lewer in respect of the hearing on 3 September 2018 within 56 days. The Tribunal makes no order in favour of Mr David Lewer because his application was made outside the 28 day time limit.

Introduction
References to pages in the hearing bundle are in [ ]

7. The property 32-54 Arundel Street is a former office building which has been converted to provide 42 residential units over four floors with commercial units on the ground floor. The property has recently undergone development to the roof which has provided nine further residential units. Flats 1-6 32 Arundel Street is a self-contained unit within the property with a separate entrance from Lower Church Street and single self contained staircase. The property is situated within Portsmouth City Centre shopping precinct.

8. The Tribunal is primarily concerned with the 36 residential units located over three floors in the main building which will be referred to as "Arundel House" and the six residential units in the self contained block adjoining Arundel House on its Western flank which will be referred to as "32 Arundel Street".

9. The dispute is between the freeholder of the property Grey G R Limited who is also the head lessor of the residential units in Arundel House and the sub-lessees of the 36 residential units in Arundel House together with the sub-lessees of the six residential units in 32 Arundel Street. The head lessor of 32 Arundel Street is Arundel Street Developments which played no part in the proceedings. The Tribunal understands that Arundel Street Developments is in administration.

10. The freeholder made two Applications on 16 July 2018.

11. The first was an application for dispensation from consultation in respect of works to the property relating to emergency procedures, fire, health and safety and the security of the property [28-37] pursuant to section 20ZA of the 1985 Act. The Tribunal originally heard this application on 3 September 2018 but decided to adjourn it for the reasons set out later and fixed a new date so that both applications could be heard together.

12. The Applicant sought dispensation from consultation in respect of the following works and the associated professional fees [59-60] which will be referred to throughout the decision as the fire safety works .

Works	Costs (£)
AOV and Smoke Vent Repairs and Replacement	122,652.00
Service Risers, Enabling works, Sealed Cupboards and Cross Corridor Doors	55,000.00
Emergency Lighting Repair and Replacement	5,000.00

Fire Alarm System	24,500.00
Fire Doors	10,000.00
Fire Safety Repairs Replacement and Signage	6,000.00
Fire Stopping	22,500.00
Health and Safety Risk Assessment	1,000.00
Carpet Replacement	26,000.00
Total	**272,652.00**

13. At the end of the hearing on 14 November 2018 the Applicant amended the amounts claimed in respect of professional fees. The table below contained the amended figures.

Professional Fees	Costs (£)
Fire Safety Specialist	4,600.00
Health & Safety	7,500.00
Landlord	0.00
Surveyor	10,000.00
Total	**22,100.00**

14. The grounds for the dispensation application were set out in the amended statement of case [50-64]. The Applicant said it was necessary to carry out the works urgently to ensure the health and safety of the residents at the property. The Applicant said that it was subject to possible enforcement action by Portsmouth City Council ("the Council") in the event of the works not being carried out. The Applicant maintained that there was not sufficient time to go through the consultation process because of the risks to the health and safety of the residents and the potential enforcement action by the Council. The Applicant believed that the Respondents have not been prejudiced by the lack of consultation.

15. The second application was for determination of liability to pay and reasonableness of service charges under section 27A of the 1985 Act for the fire safety works identified in paragraphs 12 and 13 above plus an additional amount of £110,960.64 for the costs of fire marshals [38-49]. An amended statement of case set out the grounds for the application [333-356].

16. At the hearing Mr Bowker, counsel for the Applicant asked the Tribunal to limit its determination of the section 27A application to whether the overall amount of costs for fire safety works was reasonable within the meaning of section 19 of the 1985 Act and not to decide the contribution paid by individual leaseholders to those costs.

The Decisions for the Tribunal

17. The Tribunal was asked to make the following decisions:

a) To grant dispensation from consultation requirements for the fire safety works.

b) To determine the reasonableness of the amount of costs of the fire safety works.

c) Any orders for costs arising from the proceedings.

18. The parties to the Applications were:

a) Grey G R Limited partnership is the freeholder of the property and the holder of the two head leases for Arundel House. Grey G R Limited appointed the Residents Quarter (Ms Sarah Parkyn Head of Property Management) as the Managing Agent and responsible for the collection of ground rent. The Residents Quarter in turn appointed Mr Hilton Gray of Inspired Property Management Limited to manage the property and collect the service charge. Mr Gray appointed Ms Walheim of Earl Kendrick Associates as Principal Designer and building surveyor for the fire safety works. JB Leitch Solicitors represented Grey G R Limited in these proceedings. JB Leitch in turn instructed Robert Bowker, counsel, Tanfield Chambers to represent the freeholder.

b) The sub-leaseholders of the first and second floors of Arundel House are:

Flat	Leaseholder
54 b	Mr and Mrs Edmunds
54a	Andrew Blackburn
Apartment 11	Brian Chappell
Apartment 32	Diyun Tan & Tiaxuan Ren
Apartment 12	Alexander Kopalidis
Apartment 15	Steven & Harriet May
Apartment 54c	Mitchell Nunn
Flat 14	Sally Frederick
Flat 17	Gerald & Ivana Cool
Flat 18	John & Beatrice Hansford
Flat 19	Sally Frederick
Flat 20	Pauline Lewer
Flat 21	Mitchell Nunn
Flat 22	Patricia Laarberg
Flat 23	Haiming Wang

Flat 24	Chiu Ha Pinky Wong
Flat 25	Mr and Mrs Blackwell
Flat 26	David Lewer
Flat 27	Q7DB Ltd
Flat 28	Mitchell Nunn
Flat 29	Gerald & Ivana Cool
Flat 30	Sin Chun Mar
Flat 31	Aleksandr Gorbenko
Flat 33	Katie Hilton
Flat 54e	Q7DB Ltd (J Blyth)

c) The sub-leaseholders of the third floor of Arundel House are:

Flat	Leaseholder
Apartment 1	Nicholas Marlow
Apartment 2	Nicholas Marlow
Apartment 3	Nicholas Marlow
Apartment 4	Nicholas Marlow
Apartment 5	Nicholas Marlow
Apartment 6	Nicholas Marlow
Apartment 7	Nicholas Marlow
Apartment 9	Nicholas Marlow
Apartment 10	Nicholas Marlow
Apartment 16	Sin Cheung
Apartment 54D	Colin Reeder

d) Mr Mitchell Nunn supplied a statement of case on behalf of Brian Chappell, Andrew Blackburn, Steven & Harriet May, Gerald & Ivana Cool, Sally Frederick, P Lewer, Patricia Laarberg, C Wong on behalf of Chiu Ha Pinky Wong, QZDB Limited, Miss Choi on behalf of Sin Chun Mar, Diyun Tan and Tiaxuan Ren, Katie Hilton, Nicholas Marlow, J Cheung on behalf of Sin Cheung, and four sub-lessees from 32 Arundel Street. A number of sub-lessees made individual submissions including David Lewer, and Peter Lewer on behalf of his wife, Pauline Lewer. Mr Reeder, Mr Kopalidis, Mr and Mrs Blackwell and Mr Gorbenko did not make any representations in respect of the two applications.

e) Arundel Street Developments LLP the head leaseholder of the Ground Floor Offices and the head leaseholder of the residential premises at 32 Arundel Street did not participate in the proceedings. The Tribunal understands that the Applicant served the applications on the Administrators of Arundel Street Developments Limited.

f) The sub-leaseholders of the six flats at 32 Arundel House:

Flat	Leaseholder
Flat 1	Bin Hameed
Flat 2	Q7DB Limited
Flat 3	Eric Mills
Flat 4	Angela Pellett
Flat 5	Paul Weller
Flat 6	Mark Banks & Soulla Banks

g) Mr Mills instructed Mackrell Turner Garrett, Solicitors, who in turn instructed Philip Jones, Counsel Savoy Hill Chambers to represent Mr Mills at the hearing. The other five sub-leaseholders made written submissions to the Tribunal.

h) The applications were served on JDI Developments Limited, the leaseholder of the development on the former roof of the building. JDI Developments declined to take part in the proceedings because the lease did not provide for payment of the service charges until such time as practical completion of the development of the roof space takes place.

i) The Applicant did not name the leaseholders of 42-48 Arundel Street and of the Eastern Flank as parties to the proceedings.

19. The actual dispute was conducted between the freeholder and the sub-leaseholders of Arundel House and 32 Arundel Street.

Lease Structure

20. Seven leases have been granted from the freehold title.

21. The first lease has been granted in respect of the Ground Floor Offices, 32-54 Arundel Street and is currently held by Arundel Street Developments LLP. The head lease is registered under title number PM19973. The five sub-leases granted out of this lease are commercial units.

22. The second lease is in respect of Flats 1-6, 32 Arundel Street and is currently held by Arundel Street Developments. This head lease is registered under title number PM20918. The six sub-leases granted out of this lease are residential apartments at the premises.

23. The third lease is in respect of Third Floor Arundel House and is currently held by the Applicant. This head lease is registered under Title Number PM27687. The eleven sub-leases granted out of this lease are residential apartments at the property.

24. The fourth lease is in respect of First and Second Floors Arundel House and is currently held by the Applicant and is registered under Title number PM28160. Of the 26 sub-leases granted out of this lease, 25 are residential apartments at the premises and one noted to be the head lease in respect of Flats 1-6, 32 Arundel Street.

25. The fifth lease is in respect of 42-48 Arundel Street, Portsmouth and is currently held by Berry Recruitment and Tower Pension Trustee Limited. The head lease is registered under Title Number PM29188. The sub-lease granted out this lease is commercial.

26. The sixth lease is in respect of Airspace up to 10 metres above the roof surface and is currently held by JDI Developments Limited. This lease is registered under Title Number PM31296. Practical completion of the development upon the roof is yet to occur and as such there are currently no sub-leases.

27. The seventh lease is in respect of the Eastern flank between Points A and B and parking spaces and is currently held by Dominion Management Limited. The lease is registered under Title Number PM32829. There are no sub-leases granted out of this title.

28. The relevant head leases for the applications concerning Arundel House are the one for the First and Second Floor (Title Number PM28160) and the one for the Third Floor (Title Number PM27687).

29. The sub-leases carved from these two head leases are slightly different but not in material respects. The sub-leases require the occupational tenants to pay a service charge which accords with the obligation in the relevant head lease.

30. The key obligations in the respective head leases for the purpose of this application are clauses 6.1.1 and 6.1.2 which define the services for which costs can be recovered through the service charge under clause 6.2.

31. Clause 6.1.1 requires the tenant to contribute to the costs of cleaning, maintaining and repairing the exterior, structure, roof and foundations of the building.

32. Clause 6.1.2 requires the tenant to contribute to any other service or amenity that the landlord may in its reasonable absolute discretion acting in accordance with the principles of good estate management provide for the benefit of tenants and occupiers of the building as a whole.

33. The Applicant argued that the fire safety works carried out in Arundel House and the engagement of fire marshals fell within the definition of any other service under Clause 6.1.2 because they accorded with the principles of good estate management and were

clearly provided for the benefit of tenants and occupiers at Arundel House. The sub-leaseholders at Arundel House did not challenge the Applicant's contractual entitlement under clause 6.1.2 to the costs of the fire safety works and of the fire marshals.

34. The head lease for 32 Arundel Street was made on 10 February 2009 for a term of 999 years from 1 January 2008. The six sub-leaseholders hold a sublease for a term of 125 years which requires each of them to pay a service charge to the head lessor equivalent to one sixth of the service charge payable by Arundel Street Developments LLP under the head lease with the freeholder.

35. In order to determine the liability of the sub-lessees for service charge it is necessary to consider the liability of Arundel Street Developments under the head lease. Under Clause 7.7 Arundel Street Developments is obliged to pay a fair proportion of the expenses and outgoings incurred by the landlord in matters described in Clause 7.7.5.

36. Clause 7.7.5 includes the landlord's obligations to maintain and repair the common parts and to provide and maintain fire prevention equipment and apparatus in the common parts as well as repairing the roof, exterior, foundations and main structure of the building and redecorating the exterior. Under clause 1.3 the building is defined as 32 Arundel Street. Clause 4.9 defines the common parts as all of the building except the residential flats, commercial units and the main structure.

37. Mr Mill's solicitors submitted that Arundel Street Developments' obligations to pay service charges under the head lease are limited to costs incurred in relation to the maintenance and repair of the common parts and main structure of the building at 32 Arundel House and does not extend to the costs of repairing and maintaining Arundel House [1083].

38. The Applicant's solicitors accepted the construction of the head lease by Mr Mill's solicitors, and conceded that the Arundel Street Developments and the sub-leaseholders were liable to contribute only to those works carried out on 32 Arundel Street and not to the costs of the fire repair works at Arundel House.

The Proceedings

39. On 17 July 2018 the Tribunal received the Applications. The solicitor's letter accompanying the applications stated that

> "Our client is the landlord of the above property in which significant maintenance and repair works are required in relation to the fire alarms, smoke vents and improvements to fire compartmentation to prevent the spread of fire amongst other maintenance works. Without these works there exists an imminent risk to the lives of

> the residents who live and work at the property. We request that the Applications be dealt with as a matter of urgency and preferably within 7 days".

40. The Applicant's representative in the Application for dispensation stated "No" to the question: "Have the works been carried out", and stated under question 10 Track Preferences on why it was urgent to hear the case: "The property requires several adaptations and improvements specifically relating to emergency procedures, fire health and safety and the security of the property".

41. The Tribunal decided to fast track the dispensation application and fixed a hearing for the 3 September 2018 at Havant Justice Centre.

42. The Tribunal decided to list the section 27A application separately and arranged a case management hearing for the 16 August 2018. The Tribunal gave as its reason:

> "The Applicant requested that the Section 27A application be dealt with at the same time as the dispensation application. The Tribunal was not in favour of this for the following reasons. The Applicant at the time of the request had not provided a statement of case setting out the proposed costs and the scope of the works which meant that the leaseholders did not know the case that they had to answer. The hearing together of the section 27A application and the dispensation application was likely to add delay and complicate the dispensation application. Finally the Applicant has an obligation to repair and maintain the building and this is not dependent upon the outcome of the section 27A application or the dispensation application. In short if the Applicant is saying these works are urgent with an imminent risk to life they have an obligation to do these works and run the risk that it may not get full recovery of the costs through the service charge".

43. The impression given at the case management hearing on 16 August 2018 to the Tribunal by the Applicant's representative was that the works had not been carried out, which was evident from direction 15 requiring the Applicant to give an explanation for not carrying out these works if lives are in imminent danger. The Tribunal also learnt at the case management hearing that service charge demands had been issued against the leaseholders for the costs of the proposed works. Following the case management hearing the Applicant agreed to suspend the service charge demands pending publication of the Tribunal's decision. The Tribunal listed the section 27A application for hearing on the 12 November 2018.

44. On 3 September 2018 Judge Tildesley and Mr Banfield attended the property for inspection in connection with the hearing later on in the day to deal with the application for dispensation. The Applicant and its representatives did not attend the inspection and no reason was given for their non attendance. Mr Bowker, counsel, attended the

hearing and requested the Tribunal to proceed with the application. Ten sub-leaseholders attended the hearing.

45. The Tribunal declined to proceed with the application and adjourned it to the same day as the section 27A application which was now listed for three days.

46. The Tribunal's reasons for adjournment of the dispensation application were as follows:

a) The Applicant's section 20ZA application was contradictory. The Application indicated that no works had been carried out. The Applicant's statement of case said it was seeking retrospective dispensation of the consultation requirements which suggested that the works had been carried out.

b) The Tribunal learnt for the first time at the hearing that the works had commenced early this year. The Tribunal was entitled to assume that the works had been let on a contract to a specific contractor having regard to the extent of the specification and the specialised nature of the works involved. This information was at odds with that provided by the Applicant's representative at the case management conference for the section 27A application held on the 16 August 2018 when the Tribunal was informed that there had been no quotations obtained for the works. The Tribunal also noted that the Applicant's representative did not disclose that works had started early this year in its response of 24 August 2018 to a specific question posed by the Tribunal about why the works had not commenced.

c) The hearing bundle for the dispensation application prepared by the Applicant did not enclose the schedule of works attached to the "specification of works". The Tribunal noticed the omission and requested a copy of it. The Tribunal understood on 3 September 2018 that the leaseholders had received their copy of the specification on the Saturday two days before the hearing. Mr Bowker, counsel, did not have a copy of the schedule in the bundle supplied to him.

d) The Applicant and its witnesses did not attend the inspection and the hearing on 3 September 2018 which meant that the leaseholders had no opportunity to cross examine on the documents presented in the hearing bundle.

e) The Applicant supplied no explanation for its non-attendance and that of the witnesses. The Tribunal had to make its own enquiries of the Landlord's representative for the non-attendance.

47. The Tribunal issued directions for the hearing on 12 November 2018 which was listed for three days. The Tribunal required the Applicant to provide amended statements of case for both applications, the

Applicant to consider the liability of the leaseholders at 32 Arundel Street, a witness statement from the principal designer or similar person concerned with the development of the nine flats in the roof space on the effect of these works to the existing services at Arundel House, and details of the contribution of JDI Developments under the head lease towards the costs of shared services.

48. The hearing was held on 12 November 2018 and lasted three days. Mr Bowker, Counsel appeared for the Applicant. Mr Gray and Ms Walheim gave evidence on their witness statements for the Applicant [1164-1281 & 1282-1386]. The Applicant's solicitors prepared five bundles of documents which were admitted in evidence and one bundle of authorities.

49. Mr Jones, counsel appeared for Mr Mills of Flat 3, 32 Arundel House. Mr Mitchell Nunn on behalf of the sub-leaseholders who submitted a statement of case, Mr Weller and Mr Lewer of behalf of Mrs Lewer gave evidence on their statements. A number of other sub-leaseholders attended the hearing over the three days. At the end of the hearing the Tribunal gave oral directions in respect of written submissions on costs.

50. The Tribunal inspected Arundel House and 32 Arundel Street in the presence of the parties prior to the hearing.

51. The Tribunal reconvened on 5 December 2018 in the absence of the parties to deliberate on the evidence.

Chronology of Events

52. **26 October 2017**: Mr Lomax of the Council wrote to GD3 Property[1] in respect of his inspection of the common areas of Arundel House to carry out a risk assessment under Housing Health and Safety Rating System (HHSRS) [110]. Mr Lomax informed GD3 Property that fire safety had been rated at a very high risk and a category 1 hazard. Mr Lomax enclosed a schedule of works which were intended to reduce the risks. Mr Lomax indicated that the Council's policy was to work with landlords to carry out the necessary improvements but if no agreement was reached enforcement action would be taken.

53. **9 November 2017:** the Applicant purchased the property, and was registered as owner at the HM Land Registry on 10 January 2018.

54. **6 December 2017:** Sarah Parkyn of Residents Quarter emailed Mr Gray of Inspired Property Management thanking him for taking on the site ("I owe you"). Ms Parkyn attached a copy of the

[1] GD3 Property the managing agents for the previous owners of the building

"improvement notice"[2] served on GD3 in October 2017, which Ms Parkyn said she had only just learnt about. Ms Parkyn stated that as far as she was aware nothing had been done in relation to the notice and requested Mr Gray to contact the Council and arrange to meet Mr Lomax early January 2018. Ms Parkyn explained the process for requesting a freeholder loan and enquired of Mr Gray whether the landlord was likely to need a section 20 consultation or a section 20ZA application before proceeding [1311].

55. **11 December 2017**: Mr Gray instructed Ms Walheim of Earl Kendrick to carry out an assessment on the building condition and provide a specification of works for external repairs, redecoration and refurbishment of the internal areas [1310].

56. **12 January 2018:** Mr Gray and Ms Walheim inspected the property.

57. **25 January 2018**: CARDINUS Risk Management carried out a combined fire and health and safety risk assessment and produced a report dated 30 January 2018 [167-199]. The report identified one high risk of arson with a required by date of 30 January 2018; 27 medium risks with a required by date of 30 April 2018; and one low risk with a required by date of 26 July 2018.

58. **29 January 2018**: Rohit Sood from FireTechnics inspected the fire safety systems on site. Mr Sood found that there was no fire detection at 32 Arundel Street and that the original fire alarm system in Arundel House no longer existed. All that remained in Arundel House was the repeater panel on the ground floor staircase [162]. Mr Sood also discovered on the third floor the actuator for vents was disconnected and hanging as major construction work was being carried out on the roof [163]. Finally Mr Sood carried out a three hour test of emergency lighting. Mr Sood discovered that all emergency lighting at 32 Arundel House was switched off at the breaker. Mr Sood also tested the lights on the first and third floors of Arundel House and found various faults (164).

59. **16 February 2018:** Hampshire Fire Service inspected the property [1372].

60. **16 February 2018:** Mr Gray requested a quotation from Churchill Security Limited for static security services. The quotation given for a fire trained officer was £16 per hour. Churchill supplied services from 16 February 2018 to 2 March 2018 [1488-1491].

61. **26 February 2018**: Mr Gray arranged for GRM Waste Solutions to remove the rubbish that had been dumped in the common parts (over 3 tons). Able Group completed urgent work on emergency

[2] Ms Parkyn was referring to Mr Lomax's letter dated 26 October 2017 which was not an improvement notice.

communal lighting [1483 -1487]. The carpets in the communal areas were replaced [1546]. Mr Gray said he was trying to get things done in order of priority as quickly as possible. Mr Gray said he was guided by the officers of the Fire Service and the Council. Mr Gray believed he did not waste any money and that he acted in the right way in the circumstances based on the information he had at the time.

62. **26 February 2018**: Mr Gray and Ms Walheim carried out an onsite inspection with Mr Knight of Hampshire Fire Service and Ms Carolyn Tanner of the Council. Mr Knight told Ms Walheim that he thought the fire risk to the building was high but that the proposed works scheme and on site security were addressing those risks. Ms Tanner expressed concerns about building security and the risks created by rough sleepers [1376].

63. **21 and 28 February 2018:** FireTechnics provided a quotation for supply, installation, test and commission of a smoke ventilation systems for Arundel House and for 32 Arundel Street [206] in the sum of £102,210 excluding VAT [204], and provided a quotation for the fire alarm system in the sum of £20,335.49 [213].

64. **2 March 2018**: Ms Walheim of Earl Kendrick Associates provided Mr Gray with a "Conditions and Planned Maintenance Report" for the property [118-152]. The Report contained separate sections on Arundel House and 32 Arundel Street.

65. Ms Walheim in "The Executive Summary" highlighted no operational fire alarm in the building and warned that if fire broke out early warning would not be possible. Ms Walheim also identified that the smoke ventilation system for the building was not functional and should be replaced as a matter of urgency. Ms Walheim reported on trip hazards throughout Arundel House as a result of poorly laid carpets and that security into and within Arundel House was a concern.

66. Ms Walheim's conclusion was that she had serious concerns regarding the current safety of the building and risk of fire outbreak from potential electrical faults [149]. Ms Walheim identified 14 separate set of works that were required immediately within six weeks. They were:

- Removal of bulk waste
- Reinstatement of fire detection system
- Testing of emergency lighting
- Testing of electrical equipment installations
- Reinstatement of smoke ventilation
- Testing of emergency lighting
- Repairs to lighting provision
- Inspection of the communal and escape staircases by a structural engineer

- Installation of onsite security
- Installation of compartment (cross-corridor) doors
- Repairs to breaches in compartmentation
- Removal of internal carpets to stairways and corridors
- Confirmation on Development agreements and compliance
- Construction of an enclosure of the escape stair to the foot of the steps.

67. Ms Walheim produced a cost plan for the 15 year planned maintenance programme [152 & 153]. Ms Walheim identified works to the value of £296,185 excluding VAT for 2018, of which works to the value of £6,650 were attributable to 32 Arundel Street.

68. Ms Walheim drafted a specification of the Works and tender documents in March 2018 [318-328]. The specification was updated in July 2018 [222-317].

69. **5 March 2018:** Wessex Fire and Rescue Service (UK) Ltd commenced the supply of two fire marshals at £16 per hour and a daily rate of £768 plus VAT [736].

70. **6 March 2018**: Hampshire Fire Service inspected the property [1372].

71. **25 March 2018:** Mr Gray, Miss Walheim and Mr Sood held a site visit to inspect the works that had been carried out. Mr Gray noted that the fire alarm installation had begun, the lift inspection had been completed, the common parts had been cleared of all rubbish, new carpets fitted and lighting reinstated including emergency lighting.

72. **12 April 2018**: Earl Kendrick instructed Construction Evaluation Limited, structural engineers, to determine if the vent shafts could be re-opened for use. Construction Evaluation Limited identified a need to core drill between each of the floors in order to create a clear pathway as possible in the shafts.

73. **18 April 2018:** A tender document was issued to JHM Contracts Limited for the enabling building works including the core drilling between the floors. On 25 May 2018 Miss Walheim confirmed the contract in the sum of £34,735 with JHM to start works on 30 May 2018 with completion on 1 July 2018 [1216].

74. **11 May 2018:** Mr Gray and Ms Walheim had a meeting on site with Mr Lomax of the Council [1377]. The notes recorded that installation of the fire detection system had been delayed by the link to the annex. Mr Lomax required an overhaul of the fire doors and for electrical installation condition report (EICR) to be provided as matter of urgency. Mr Lomax commented that the works may have

been specified but progress had been slow, and that the next notice may be a harsher penalty if EICR was not supplied.

75. **23 May 2018**: Sarah Parkyn Head of Property Management for Residents Quarter wrote to the leaseholders explaining the works that had been done to the property [1592]. Ms Parkyn stated that the landlord had forward funded the major maintenance programme which included replacing the fire alarm, installing automatic smoke vents, making statutorily required improvements to fire compartmentation to prevent likely spread of fire, replacing entrance doors and the carpets. Ms Parkyn also said that Inspired Property Management had been working closely with Hampshire Fire Service and the Council to ensure that the property was safe for the benefit of all leaseholders and residents. According to Ms Parkyn, on the recommendation of the Fire Service and the Council, fire marshals were immediately on the site 24 hours a day to alert both residents and visitors in the event of a fire. Ms Parkyn said that if the fire marshal service was not provided there was a serious risk that the Council would issue an enforcement notice preventing anyone from occupying the property until the improvement works had been completed. Finally Ms Parkyn advised that due to the urgency of fire safety works Inspired Property Management was not able to carry out the usual consultation on the landlord's behalf and as a result the landlord would be applying to the Tribunal for dispensation from consultation requirements [1592-1594].

76. Ms Parkyn informed leaseholders that Inspired Property Management would be writing shortly with the anticipated cost of services (service charge budget) for the period 1 January 2018 to 31 December 2018 together with the service charge invoice. Ms Parkyn advised that service charge demands were not issued earlier in the year for two reasons. The anticipated costs were not known until very recently. The second was that the leases required service charge contribution to be based on "fair and reasonable" proportion of costs. Ms Parkyn stated that in order to ensure costs were fair and reasonable a measured survey had been undertaken and that the service charge would be apportioned on the actual square footage of an apartment. Ms Parkyn added that if access was denied to carry out the survey, a leaseholder would be required to pay an equal proportion of the costs.

77. **Around 30 May 2018** Ms Walheim took the decision to remove JHM contracts Limited as the contractor for the enabling building works, and replace them with FxTive Solutions Limited which was a maintenance contractor known to Inspired Property Management. Mr Gray advised that FxTive Solutions Limited had a vast pool of approved contractors to draw upon for all the works. Further, Mr Gary Whelon, the Managing Director of FxTive Solutions, had agreed to be the contract manager and site foreman. Ms Walheim had originally anticipated completion of the enabling building works

in July 2018 but this had been put back to the end of October 2018 following the removal of JHM contracts limited.

78. **13 June 2018**: Ms Walheim confirmed that it was necessary to re-assess the proposed vent system following the exposure of steel beams.

79. **15 June 2018**: cross corridor doors were installed as an integral part of the new vent system.

80. **18 June 2018:** Inspired Property Management sent service charge demands to Grey GR Partnership in the sums of £97,878.91 and £271,423.08; JDI Developments: £84,796.52; Prinset Limited: £15,313.40; Arundel Street Developments: £80,255.09 (Ground floor) and £74,492.74 (32 Arundel Street); Mr and Mrs Edmonds: £6,400.89; Mr Mitchell Nunn: £8,964.4, £6,095.10, £9,287.11; Q7DB Limited: £3,344.78, £3,022.18; Mr and Mrs Blackwell: £7,215.70; David Lewer: £4,821.92; Mrs Pinky Wong: £9,185.26; Mr Wang: £8,387.26; Ms Hilton: £8,930.57; Andrew Blackburn: £9,762.49, £7,198.68; Mr and Mrs Ren: £10,136.05; Mrs Mar: £9,100.25; Mr and Mrs Cool: £9,100.25, £8,217.44; Mr Gorbenko: £8,692.84; Mr Kopaldis: £8,132.64; Mr and Mrs May £6,315.87; Mr and Mrs Laarberg: £7,623.11; Mr Chappell: £8,879.68; Mrs Lewer £9,303.92; Mr and Mrs Hansford: £9,168.23; Ms Frederick: £9,643.62; Nicholas Marlow: £8,472.09, £8,387.18, £8,879.51, £8,472.09, £10,899.99, £8,964.46, £9,083.32, £9,287.06, £10,034.11, & £8930.51; Mr and Mrs Cheung: £4,957.63; and Mr Reeder: £1,511.05.

81. Inspired Property Management supplied a budget for the Estimated Service Charge Expenditure in the sum of £552,097 [718] with the demands. The budget was broken down into four areas: Area 1 External Fabric/Insurance All Units (Commercial and Residential): £434,312; Area 2 Estate Charge All Residential excluding 32 Arundel Street: £36,185; Internal Communal Areas All Residential Excluding 32 Arundel Street: £74,100 and Lift Charge All Residential Units excluding 32 Arundel Street: £7,500. The costs of the fire safety works were charged under Area 1, which meant that a contribution to the costs of those works was demanded from the residential units, the commercial units and JDI Developments under the Airspace lease.

82. **16 July 2018**: Grey G R Limited Partnership applied to the Tribunal for dispensation from consultation requirements and for determination of service charges in connection with the fire safety works.

83. **23 July 2018:** A meeting of the fire implementation team, Mr Gray, Ms Walheim, Mr Whyte of FireTechnics and Mr Whelon of FxTive Solutions Limited were present [1380]. The meeting decided upon a new venting system which involved the installation of smaller fans

with actuators. Mr Gray confirmed that there was no requirement by the freeholder to undertake works on the common areas of 32 Arundel Street due to the head lease ownership. Mr Gray terminated works on site due to concerns that funds were being expended on a system which would not achieve the freeholder's objective. Ms Walheim advised Mr Gray to seek directions from Fire Risk Assessors as to criteria for the removal of the fire marshals. Ms Walheim suggested that Mr Gray should seek confirmation from the Assessors that the fire marshals could be off-hired provided the fire doors were secure, the emergency lighting and fire alarm were in place together with an evacuation policy.

84. **23 July 2018**: Mr Gray gave instructions for the installation of new security doors to the building.

85. **31 July 2018**: Fire technics supplied a revised quotation for the venting works.

Current Position regarding the Fire Safety Works

86. The Applicant has forwarded funded the works in the sum of £327,165.30 (including VAT) [1373].

87. Paragraph 23 of the statement of case for the dispensation application indicated that all works were completed except remedial works to electrical installations, replacement of doors to riser cupboard, core drilling between floors, creation of maximum clear openings for the existing vent system and the replacement of the front entrance door.

Consideration

Dispensation Application

88. The Tribunal starts with the Application for dispensation from consultation requirements.

89. The Applicant applied for dispensation in respect of the works identified in paragraph 12 above which have been referred for ease as "fire safety works".

90. The Tribunal is satisfied that the "fire safety works" fell within the definition of qualifying works as meaning "works on a building or any other premises".

91. The Applicant treated the "fire safety works" as one set of works, and did not attempt to break down the works into separate parcels of work flows.

92. The Applicant also included the professional fees as part of the costs of the works (paragraph 13). In this respect the Applicant followed

the approach as advocated in "Service Charges and Management" Tanfield Chambers 4th edition at 13-05 which states:

> "It is thought that qualifying works will generally be limited to the contractor's costs and will not include related professional fees (eg surveyors, structural engineers, the managing agent's tenant's liaison fees etc), save, possibly where the professional fees constitute an integral part of the actual physical works. However in the absence of an authoritative decision on the point, the position cannot be regarded as certain and the prudent approach is to ensure that consultation is carried out for both professional fees as well as the contractor's costs".

93. The Applicant stated that the total costs of the works with professional fees were £294,752[3] which exceeded the £250 contribution payable by one or more tenants for the works.

94. The Applicant concedes that the fire safety works including the professional fees were subject to the requirements to consult leaseholders as set out in section 20 of the 1985 Act and the Service Charges (Consultation Requirements) (England) Regulations 2003.

95. The Applicant accepts that it has not complied with the requirements in the 2003 Regulations in connection with the fire safety works, and that it would be limited to a contribution of £250 from each head lessee unless it is granted dispensation from the consultation requirements.

96. The Applicant was not required to consult on the costs of the fire marshals because their engagement was not subject to a qualifying long term agreement and did not fall within the definition of qualifying works.

97. The Applicant has an obligation to consult not only with the head lessors but also with the sub-leaseholders of the residential premises in Arundel House and 32 Arundel Street who were named as Respondents to the dispensation application.

The Applicant's Evidence

98. The Applicant contended that it did not have sufficient time to consult because it was necessary to carry out the works urgently to ensure the health and safety of the residents at the property and to avoid potential enforcement action by the Council and the Fire Service.

99. Ms Parkyn in a letter to tenants on 3 July 2018 [834] stated that Inspired Property Management Limited had been working closely with the Council and the Fire Service to ensure that the property was safe for continued occupation. Further Ms Parkyn said that section

[3] The costs of the professional fees were amended at the conclusion of the evidence at the hearing.

20 consultation took approximately three to four months, but due to the urgency of the fire safety works required at Arundel House there was not time to carry out the consultation before instructing contractors. Finally Ms Parkyn stated that the Council and the Fire service had advised the freeholder that the works were required immediately, in order to ensure the property was safe for occupation.

100. Mr Gray stated in evidence that the Applicant would probably not have had enough time to carry out the necessary consultation process before the end of April 2018 which was the deadline to which the Applicant was working because of the threat of enforcement by the Fire Service, the danger to life and the urgency of the works. Mr Gray added that he believed the leaseholders of the building had been kept updated throughout the project.

101. The Tribunal intends to scrutinise the Applicant's and Mr Gray's statements against the evidence.

102. The Tribunal starts with the involvement of the Council and the Fire Service with the building.

103. The Applicants relied on Mr Lomax's letter dated 26 October 2017. Although Mr Lomax found a category 1 fire safety hazard at the property, he indicated that it was the Council's policy to work with landlords to ameliorate risk, and invited the then managing agents to contact the Council with a view to agreeing a timescale for carrying out the necessary works. The letter itself did not constitute an enforcement notice.

104. In his letter dated 26 October 2017 Mr Lomax required works to the doors in the common areas which were necessary to ensure compartmentation, and to the riser cupboards so that they were in such a condition so as to prevent the spread of fire. Mr Lomax also asked the freeholder to provide a current electrical safety report.

105. Mr Lomax also identified that there appeared to be a redundant automatic operating ventilation system (AOV) within the building and requested a report from the freeholder on whether the AOV was needed.

106. Further Mr Lomax requested confirmation from the freeholder that the fire alarm and smoke detection systems were adequate and in working order and for the freeholder to provide a full test certificate that the current emergency lighting system was in full working order.

107. Finally Mr Lomax asked the freeholder to undertake all necessary works, to ensure that the building was secure and that all carpets in the common areas were stuck securely to the floors to prevent trip hazards.

108. The previous managing agent did not take action on Mr Lomax's letter. Ms Parkyn of Resident's Quarter and Mr Gray were made aware of the contents of the letter around 6 December 2018. At the same time Ms Parkyn alerted Mr Gray of the requirement to consult with leaseholders or in the alternative to apply for dispensation from consultation requirements. Around this time leaseholders were contacting Residents Quarter about homeless people sleeping in the property and about the accumulation of rubbish within the property.

109. According to the chronology, Mr Knight of the Fire Service first inspected the property on 16 February 2018. Mr Knight expressed concern about missing and damaged fire doors, power failures which meant that emergency lighting might not be working, visible damage to compartmentation and electric fuse boards, insecure premises, and the unacceptable amount of combustible refuse in corridors. Mr Knight indicated that he discussed the possibility of a prohibition notice with his superiors but did not follow through with a notice because of the swift response taken by Mr Gray in appointing fire marshals on 16 February 2018 and the various actions taken by Mr Gray on 26 February 2018 (see paragraph 61 above) [1208].

110. The chronology referred to further inspections by the Council and the Fire Service on 26 February 2018, by the Fire Service on the 6 March 2018 and by the Council on 11 May 2018 when Mr Lomax expressed his dismay about the slow progress being made.

111. Mr Lomax and Mr Knight did not inspect the common areas at 32 Arundel Street, and their observations were confined to the fire hazards in Arundel House.

112. Ms Walheim in cross-examination confirmed that CARDINUS did not identify anything wrong with the fire safety at 32 Arundel Street but there were no certificates to confirm this.

113. The Tribunal turns now to the evidence on the works organised by Mr Gray for the Applicant.

114. Mr Gray commissioned CARDINUS Risk Management to carry out a combined fire and health and safety risk assessment on 25 January 2018. It would appear that the commissioning was at the behest of Ms Parkyn of Resident's Quarter rather than in response to the requirements of the Council and the Fire Service [1311]. The Tribunal notes that the risk assessment only identified one high priority which was to do with the security of the building and the risk of arson.

115. In January 2018 Mr Gray requested Firetechnics to report on the state of the fire alarms, the AOV and the emergency lighting. Mr Gray's request was directly linked to the observations of Mr Lomax in his letter of 26 October 2017.

116. On 21 and 28 February 2018 Firetechnics provided quotations for the supply, installation, test and commission of a smoke ventilation systems for Arundel House and for 32 Arundel Street in the sum of £102,210 excluding VAT [204], and a quotation for the fire alarm system in the sum of £20,335.49 [213]. These quotations, however, were open for two months.

117. The Applicant, however, provided no evidence that it or its contractors had given consideration on whether the AOV was needed before asking Firetechnics to supply a quotation. This is what Mr Lomax had required in the first instance.

118. Mr Gray went ahead with the replacement of the carpets which was not strictly in accordance with the recommendations of Mr Lomax who asked for all carpets in the common areas to be stuck securely to the floor.

119. Mr Gray appointed Ms Walheim of Earl Kendrick Associates as Principal Designer and building surveyor for the fire safety works. Ms Walheim issued a Conditions and Planned Maintenance Report on 2 March 2018.

120. Ms Walheim's report established a maintenance programme for the building for the next fifteen years to 2032. In addition Ms Walheim estimated a budget of £355,000 excluding VAT and professional fees in Year 1 to improve the general standard of the building and make safe the property. The preponderance of these costs was allocated to improve the condition of Arundel House. Ms Walheim identified works to 32 Arundel Street in year one to the value of £6,650.

121. Ms Walheim concluded that she had serious concerns regarding the current safety of the occupants of the building and risk of fire outbreak from potential electrical fault. Ms Walheim highlighted 14 sets of works which were required immediately within six weeks. By the time of the publication of the report some of the steps had already been taken, removal of bulk waste, testing of emergency lighting, repairs to lighting provision, removal of all internal carpets and installation of onsite security. Other sets of works had been put in motion, the reinstatement of the fire detection system and the smoke ventilation system. The works that remained were the enabling building works for the ventilation system, the riser and the measures to improve compartmentation in the building.

122. Ms Walheim's serious concerns regarding safety and risk of fire outbreak were directed at the condition of Arundel House. In respect of 32 Arundel Street, Ms Walheim reported that there was no requirement for a fire detection and alarm system in 32 Arundel Street if a stay put policy was implemented. Ms Walheim proposed an installation of an operable smoke vent to the staircore in 32 Arundel Street at a cost of £5,000 but not until 2020.

123. The Tribunal next considers the evidence on the progress of the works and the measures taken to control costs and quality of the works.

124. Ms Walheim produced an outline works programme [1306.1] which showed that the only works completed by April 2018 were the clearance of bulk refuse, replacement of carpets and reinstatement of emergency lighting. The programme highlighted delays in the other work streams which accounted for 85 per cent of the budget allocated for emergency works (£272,652).

125. The causes of the delays varied between the different work streams. The installation of the AOV had been impeded by the restricted shaft sizes and the presence of structural beams in the vents. This meant that an alternative solution had to be found which the Tribunal understands would involve the installation of mechanical fans. The Tribunal notes that the minutes of the site meeting on 23 July 2018 [1378] recorded that

> "The restricted shaft sizes has been identified as a design constraint from the commencement of the scheme and the Client has voiced concern that the system design did not take this into consideration".

126. Mr Gray and Ms Walheim on their first inspection of Arundel House observed that the fire alarm system was not working and that the panel had been completely destroyed and was left hanging down the wall by wires. Ms Walheim asserted that FireTechnics were commissioned to provide an integrated fire detection system for the 1st to 3rd floors of Arundel House. According to Ms Walheim there was no requirement for the system to be networked to the fire alarm for the new development on the fourth floor. Ms Walheim had programmed completion of the installation of the new fire alarm system for the 11 May 2018. The works, however, were still not finished by the time of the Tribunal's first inspection of the property on 3 September 2018 and on the second inspection the new fire alarm panel was registering error messages. Ms Walheim advised that the delay was because the building required a new power supply.

127. The final main area of work was the enabling building works which involved enlarging the wall aperture for the vent louvres, and the opening to the smoke vent, the creation of new partitions for the smoke vent equipment and the installation of new cross corridor fire doors. Ms Walheim issued a tender document to JMH Contracts Limited to complete these works by 1 July 2018. Unfortunately Ms Walheim was not satisfied with the standard of works carried out by JMH Contracts which meant that they were taken off the contract and replaced by FxTive Solutions Limited. This resulted in the putting back of the deadline for completion until a date in September 2018.

128. Mr Gray was responsible for engaging the majority of the contractors for the works. Mr Gray instructed Able Group to carry out the work on emergency communal lighting, Firetechnics to organise the works for the existing fire detection and smoke venting systems, GRM Waste Solutions for the removal of the bulk waste, Lee White Carpets for the laying of new carpets to the communal areas of Arundel House, and Fxtive Solutions for the enabling building works.

129. Mr Gray did not undertake a competitive tendering exercise to select the contractors for the works. The Tribunal formed the view that Mr Gray went straight to his "trusted" contractors. Two of the "trusted" contractors, Firetechnics and FxTive Solutions, sub-contracted the works and managed the sub-contractors in terms of quality control and regular reporting.

130. Mr Gray's explanation for using trusted contractors was the urgency of the work and the difficulty of obtaining local contractors because many local contractors declined to work on the building due to previous history of non-payment of invoices and their acquired knowledge of the property.

131. Ms Walheim for Earl Kendrick instructed JHM Developments in respect of enabling building works, Constructive Evaluation to undertake scanning and core drilling works through the concrete, Rhodar to undertake Asbestos removal from the riser cupboards, and Hampshire Lift Services to undertake inspection of the lifts.

132. Ms Walheim stated that she engaged in a tendering exercise which resulted in the appointment of JMH Developments. The tendering exercise involved contacting three local firms and JHM Developments on 13 April 2018. Ms Walheim spoke with the local firms on the telephone to see if they were interested. Apparently the local firms did not express an interest so she awarded the tender to JHM Developments Limited on 18 April 2018. Ms Walheim considered JHM Developments a trusted contractor who had done work before for Earl Kendrick. Ms Walheim gave no reason why the work carried out by JHM Developments on the property was not up to standard.

133. Ms Walheim went direct to Constructive Evaluation, Rhodar and Hampshire Lift Services and did not consider other contractors for the respective works.

134. Ms Walheim said the urgent works were costed as soon as possible. Ms Walheim stated she had prepared the estimated costs using her experience of similar buildings and experience of acting as contract administrator and surveyor for various capital expenditure projects and using available published cost/pricing information [1306].

135. The Tribunal observes that the costs of a substantial part of the works had already been fixed and not subjected to Ms Walheim's

evaluation on appropriateness. These were the prices for the AOV, fire alarm system, emergency lighting and carpet replacement.

136. Ms Walheim accepted that the costs estimates had increased as a result of the structural openings at roof level, and the various changes to the AOV specification. Further the actual costs of the fire marshals had exceeded significantly the estimate of £90,000 because of the delays in carrying out the fire safety works. Finally Mr Gray acknowledged that the cancellation of the contract with JHM Developments had incurred additional costs, Mr Gray indicated that he had withheld payment of the invoice presented by JHM Developments.

137. Finally the Tribunal examines the evidence on the Applicant's reasons for not consulting with the leaseholders and the contact that the Applicant has had with the leaseholders over the works.

138. Mr Gray acknowledged that he was made aware of the requirement to consult and or to apply for dispensation back in December 2017. Mr Gray's explanation for not doing so was that it was fundamental to obtain funding which was not possible from the leaseholders because he was not in a position to send out demands. Mr Gray also mentioned the urgency of getting the work started.

139. Ms Walheim stated that the decision to consult rested with Mr Gray and the client.

140. Mr Gray in his witness statement stated that he believed that the leaseholders of the building had been kept up to date throughout the project [1166]. Mr Gray referred to written communications on 23 May 2018 and 3 July 2018 to the leaseholders from Ms Parkyn of Residents Quarter on the proposed works [1183]. In addition Mr Gray said that the leaseholders were given the opportunity to access documents through the Tenant Portal system which currently contained 22 PDF documents relevant to the fire safety works. Mr Gray, however, acknowledged that leaseholders were not given details about how to access the portal until they received the service charge demands on 18 June 2018.

141. Although leaseholders were made aware of the works on 23 May 2018 by Ms Parkyn, the Tribunal is satisfied that the leaseholders did not understand the scale of those works until they received the service charge demands on 18 June 2018.

142. The Tribunal finds the following facts on the Applicant's actions in connection with the fire safety works and its statutory responsibilities to consult with the leaseholders:

a) The Council and the Fire Service had issued no formal enforcement notice against the previous and the existing freeholders in respect of Arundel House. The action taken by

the Council took the form of a warning letter and an invitation to the freeholder to put forward proposals to ameliorate the risks of fire.

b) The Council and the Fire Service were concerned solely with the hazards at Arundel House. Their Officers did not inspect 32 Arundel Street.

c) In December 2017 when Inspired Property Management took on the management of the property, conditions in Arundel House posed serious risks to the health and safety of the occupants, particularly in respect of security and fire safety. Mr Gray, however, did not take immediate action until February 2018 when he made arrangements for the removal of rubbish and the engagement of fire marshals. These steps appeared to assuage the concerns of Mr Knight of the Fire Service who was at that stage contemplating a prohibition notice.

d) The programme of fire safety works established by Ms Walheim was derived from the recommendations made by Mr Lomax of the Council in October 2017 and her inspection of the property. The works identified for 2018 related almost exclusively to Arundel House. Ms Walheim proposed only minor works to 32 Arundel Street.

e) Once Mr Gray had taken the steps of removal of rubbish and the engagement of fire marshals in February 2018, the sense of urgency with the programme of works appeared to dissipate. The quotations supplied by Firetechnics for the fire alarm and the installation of the AOV system was left open until 20 and 28 April 2018 respectively. Ms Walheim did not send the tender for the enabling building works to JHM developments until 18 April 2018 with a completion date of 30 July 2018.

f) The Applicant adduced no evidence that it had considered whether it was necessary to reinstate the AOVs in Arundel House. The solution proposed by Firetechnics did not take account of the restricted shaft sizes which had been identified at commencement of the project. As a result the budget for the installation of AOVs has been exceeded, and at the time of the hearing in November their installation had not been completed.

g) The Applicant's agents did not engage in a competitive tendering exercise for their choice of contractors except in the case of the enabling building works. The agents chose their "trusted" contractors for the works.

h) The competitive tendering exercise for the appointment of JHM developments was perfunctory, which was supported by the fact that the tender was withdrawn from JHM

developments because of unsatisfactory work. The Tribunal formed the impression that Ms Walheim had made up her mind to use them for the enabling building works.

i) The absence of a tendering exercise for a substantial part of the programme for the fire safety works questioned the competitiveness of the prices charged by the contractors for the said works.

j) Ms Walheim's assertion that she relied on her knowledge of previous contracts and her use of available published cost/pricing information provided no comfort that the prices charged by the contractors were reasonable. Most of the programme costs had already been fixed by the time she drew up the budget estimate.

k) The key work streams of AOV installation, fire alarm detection system and enabling building works have experienced significant overruns with a consequential effect on costs, particularly of the fire marshals.

l) The Applicant did not apply its mind at the outset of the programme to identify those works that were necessary in order to remove the requirement for fire marshals. The evidence showed that Ms Walheim first raised this issue at the meeting on 23 July 2018.

m) Mr Gray was aware from the outset of the appointment of Inspired Property Management as the managers for the property in December 2017 of the requirement to consult and of the possibility to make application for dispensation. The Tribunal is satisfied that Mr Gray made no effort to engage with the consultation process and waited until the service of the service charge demands in June 2018 before he communicated with the leaseholders about the proposed works.

n) The letter accompanying the service charge demands made various claims regarding the requirements of the Fire Service and the Council which were not accurate. Mr Gray in his letter made frequent reference to an Enforcement Notice being served on the previous landlord by the Council. Mr Gray said that the council required the replacement of the AOV, and that the completion of the fire safety works required the sign off of the Fire Service and the Council. Mr Gray in his letter did not distinguish between the various parts of the building which gave the impression that the service charge demand had an equal effect on all leaseholders and sub-leaseholders in respect of liability.

o) Mr Gray's explanation for not engaging with the consultation process or communicating with the leaseholders because of the urgency of works did not marry with the facts. The Tribunal considers there were opportunities at the beginning when he was first appointed and after completion of the urgent matters in February 2018 for him to consult with leaseholders about the proposed works or to apply then for dispensation of some or all of the requirements. It appears to the Tribunal that Mr Gray's focus was on arranging forward funding from the freeholder for the works, and that Mr Gray believed that his explanation in the letter accompanying the service charge demand would be sufficient to deal with leaseholders' concerns with its emphasis on compulsion by the Council and the Fire Service.

p) The Tribunal is satisfied that the Applicant only decided to apply for dispensation following the furore created by the service charge demands. The initial responses of Mr Gray and Ms Parkyn to challenges to the demands were that the charges were due and payable [1609; 1615]. On 3 July 2018 the Applicant through Ms Parkyn altered it stance and advised leaseholders that it was making an application for dispensation.

q) The Applicant made its applications for dispensation and service charges on 17 July 2018. The Applicants named the sub-leaseholders of 32 Arundel Street as Respondents to both applications. The accompanying letter with the application requested a hearing as a matter of urgency preferably within seven days because of the existence of an imminent risk to the lives of the residents who lived and worked at the property.

r) The Applicant persisted with its insistence that the sub-leaseholders of 32 Arundel Street remained as Respondents even after the Applicant's advisers agreed with the sub-leaseholder's position that they were not liable for the costs of the fire-safety works at Arundel House [1160].

The Respondents' Evidence

143. The Tribunal turns now to the Respondents' evidence on the dispensation application with particular reference to their claims on prejudice. The Tribunal considers that the sub-leaseholders at 32 Arundel Street are in a different position from the sub-leaseholders at Arundel House. The Tribunal starts with 32 Arundel Street.

144. The principal contention of the sub-leaseholders which was accepted by the Applicant was that on proper construction of the sub-leases and head lease for 32 Arundel Street the sub-leaseholders were only obliged to pay service charges limited to costs incurred in relation to the maintenance and repair of the common parts and main structure

of the building at 32 Arundel Street. They had no liability for the costs incurred on the fire safety works for Arundel House.

145. The sub-leaseholders at 32 Arundel Street further contended that the Applicant had failed in its applications for dispensation and service charges to separate out the costs, if any, liable to be paid by them as service charges. Again this was accepted by the Applicant.

146. The sub-leaseholders at 32 Arundel Street pointed out that the risk of enforcement action by the City Council and the Fire Service did not apply to 32 Arundel Street because there had been no visits by these bodies to 32 Arundel Street.

147. Mr Weller highlighted that there was no requirement for fire detection and alarm systems at 32 Arundel Street where a stay put policy had been implemented.

148. Mr Weller stated that Inspired Property Management should have sought local contractors and not chosen London contractors with London rates. Mr Weller also argued that the management of the project was poor which was evidenced by the change of contractors and by having the lead contractor managing the works on a day to day basis.

149. The Tribunal now considers the views of the sub-leaseholders at Arundel House.

150. Mr Nunn submitted a statement of case on behalf of himself and twenty leaseholders which included several sub-leaseholders from 32 Arundel Street. Mr Nunn gave evidence at the hearing.

151. In the statement of case the sub-leaseholders did not challenge the condition report and the specification of works as drawn up by Ms Walheim. The sub-leaseholders stated that they only became aware of the condition of the building following the demands for service charge in June 2018. They did not consider that the costs for the replacement of the fire alarm system, fire stopping works and the AOVs were reasonable. They argued that the fire alarm system and fire compartmentation of Arundel House as originally installed were not fit for purpose and that costs of those works should be recovered from the initial developer of Arundel House. Similarly they said that the AOV system was not operational because of the works that were being carried out on the fourth floor, and that the costs of those works should be met by the Head lessor for the roof space (JDI Developments). The sub-leaseholders questioned the wisdom of laying new carpets before undertaking the majority of the works. They challenged why the engagement of the fire marshals had carried on when the original recommendation of Ms Walheim was to provide the fire marshal services for a short term (two months only).

152. Mr Bowker pointed out that Mr Nunn was a Finance Director of a Property Management Company and should have been fully aware of the requirement to establish prejudice from the Applicant's failure to consult. Mr Bowker criticised Mr Nunn for not calling expert evidence and failing to produce alternative quotations for the fire safety works. Mr Nunn supplied quotations from three firms including Wessex Fire and Rescue Services for the fire marshals which Mr Bowker argued had not been procured on a "like for like" basis with the service at Arundel House.

153. Mr Peter Lewer gave evidence on behalf of his wife. Mr Lewer considered that the sub-leaseholders had been prejudiced by the failure to consult because they were not able to review and compare the quotations obtained by the Applicant. Mr Lewer suggested that the Applicant may have accepted an excessive quotation, pointing out that it had already had to replace one of its chosen contractors JHM Contracts Limited, because of its inferior work.

154. Mr Lewer referred to the references in the Firetechnics' report of the contractor working on the new development on the fourth floor disconnecting the vent actuators and removing the domes. Mr Lewer believed the same contractors were responsible for the disconnection of the fire alarm equipment.

155. Mr Lewer was sceptical of the Applicant's claims on the urgency of the works. Mr Lewer believed that Mr Gray had had adequate time from his first inspection of the building in January 2018 and the end of April 2018 to consult with leaseholders.

156. Mr Blyth of Q7DBLtd, Yuet Wah Yu on behalf of Chui Ha Pinky Wong, Gerald and Ivana Cool, Steve and Harriet May and Ting Yan Choi on behalf of Mar Siu Chun made written submissions but did not give evidence in person at the hearing. Their submissions have various themes in common, namely: that the condition of the building has deteriorated in the last two years which coincided with the development of the roof space on Arundel House; the present freeholder which is controlled by a Pension Trustee would not have purchased the building on a whim and should have been aware of its dangerous condition when it acquired the property; and that there appeared to be design problems which should be covered by warranties when the building was converted into flats.

The Tribunal's Determination

157. Under section 20ZA(1) of the 1985 Act the Tribunal may dispense with all or any of the consultation requirements in relation to any qualifying works if it satisfied that it is reasonable to dispense with the requirements.

158. The leading authority on applications for dispensation is the Supreme Court's decision in *Daejan Investments v Benson* [2013] UKSC 14. Lord Neuberger said at paragraphs 44-46:

> [44] Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
>
> [45] Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be - ie as if the Requirements had been complied with.
>
> [46] 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 in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them".

159. Thus the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the sub-leaseholders would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the sub-leaseholders to identify any relevant prejudice which they claim they might have suffered. If the sub-leaseholders show a credible case for prejudice, the Tribunal should look to the Applicant landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the sub-leaseholders fully for that prejudice.

160. Lord Neuberger added that given the landlord would have failed to comply with requirements, the landlord could scarcely complain if the Tribunal views the tenants' arguments sympathetically, for instance by resolving in the tenant's favour any doubts as to whether the services would have cost less. Further Lord Neuberger said the more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice. Finally Lord Neuberger stated that the Tribunal should be sympathetic to the tenants not merely because the landlord is in

default of its statutory duty but because the Tribunal is having to undertake the exercise of reconstructing what would have happened.

161. According to the Authors of "*Service Charges and Management*" 4th edition Tanfield Chambers at 13-44: Relevant prejudice appears to be limited to "financial" prejudice:

> " it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant. If the works are relatively straightforward and have only recently been carried out, a tenant may be able to prove financial prejudice by obtaining a cheaper quote from another contractor. In other cases, particularly where the works are extensive, it may be necessary to obtain expert evidence from a quantity surveyor. Where the tenants were not given the requisite opportunity to make representations about proposed works to the landlord, the tenants have to identify what they would have said. In some cases it may be necessary for the tenant to instruct a surveyor to assist identify what could have been said".

162. The Authors of "*Service Charges and Management*" , however, leave open the question whether "relevant prejudice" is limited to financial prejudice in terms of unreasonable costs or costs incurred in the provision of services, or in the carrying out of works, which fall below a reasonable standard. The Authors comment:

> If so, these appear to be issues of reasonableness susceptible to challenge under Landlord and Tenant Act 1985 s.19. One must ask what, if any, additional protection Landlord and Tenant Act 1985 s.20 confers on a tenant. If financial prejudice is not so limited, other prejudice may be capable of being assessed in monetary terms. For example, if the inconvenience of a contract period overrunning can amount to "relevant prejudice" in circumstances where, had they been consulted, the tenants would have nominated a contractor with an excellent track record of completing works on time, the Appropriate Tribunal may grant dispensation on condition that the recoverable costs are reduced by an amount equivalent to damages for nuisance".

163. The Tribunal finds the following facts in relation to the Applicant's failure to consult the six sub-leaseholders at 32 Arundel Street:

a) The sub-leaseholders at 32 Arundel Street were, on the face of it, being required to contribute to the costs of the fire safety works in excess of £300,000 with professional fees. The overwhelming majority of those costs related to works at Arundel House for which the sub-leaseholders had no liability to contribute under their leases.

b) The Applicant's reasons for not consulting with the leaseholders were the urgent nature of the works and the threat of enforcement action by the Council and the Hampshire Fire Service. These reasons did not apply to 32 Arundel Street because there had been no visit by those bodies to the property.

c) Ms Walheim did not identify in the condition report urgent or extensive fire safety works for 32 Arundel Street which were programmed for 2018. Ms Walheim also highlighted that there was no requirement for a fire detection system at 32 Arundel Street if a stay put policy applied.

d) The Applicant throughout the programme of works has treated the sub-leaseholders of 32 Arundel Street as if they were in an equivalent position with the sub-leaseholders at Arundel House, which clearly they were not.

164. The Tribunal is satisfied that if the sub leaseholders at 32 Arundel Street had been given the opportunity to consult they would have pointed out to the Applicant that they were not liable for the overwhelming majority of the costs of the fire safety works, and that the Council and Fire Service had expressed no concerns about the safety of 32 Arundel Street.

165. The Tribunal is also satisfied that the sub-leaseholders would have drawn the Applicant's attention to the stay put policy in respect of the limited works proposed for 32 Arundel Street.

166. The Applicant did not challenge the case put forward on behalf of the sub-leaseholders at 32 Arundel Street.

167. The Tribunal holds that its findings in 163-166 constitute relevant prejudice within the meaning ascribed in the *"Daejan"* decision. Further the Tribunal does not consider that the imposition of conditions would mitigate the prejudice suffered by the failure to consult. **The Tribunal, therefore, refuses to grant dispensation from consultation on the fire safety works in respect of the sub-leaseholders at 32 Arundel Street.**

168. Turning next to the position of the sub-leaseholders at Arundel House. The decision in "*Daejan"* places the obligation upon the sub-leaseholders to establish in the first instance a credible case for prejudice. Mr Nunn took the lead in preparing a statement of case for the sub-leaseholders of Arundel House on which he gave evidence. Mr Bowker's cross examination of Mr Nunn revealed that Mr Nunn did not have a good grasp of the case, and that he had not properly addressed the question of relevant prejudice in the context of the dispensation application.

169. The statement of case together with the evidence of Mr Lewer and the written submissions of individual leaseholders highlighted

potential areas of prejudice: whether the development of the fourth floor increased the costs of the fire safety works; the absence of competitive tendering for the works; the inability of the leaseholders to comment on the specification; whether the contractors had the necessary expertise; the lack of urgency; and the overruns in the programme of works.

170. Mr Bowker argued that the sub-leaseholder's list of grievances did not cross the threshold of a credible case of relevant prejudice. Mr Bowker contended that the sub-leaseholders should have called expert evidence to establish a prima facie case that a significant proportion of the costs of the fire safety works was attributable to the development on the fourth floor. Mr Bowker pointed out that the sub-leaseholders had obtained no alternative quotations for the fire safety works[4]. Mr Bowker stated that none of the sub-leaseholders at Arundel House had quantified the financial loss arising from the Applicant's failure to consult, unlike Mr Weller of Flat 5, 32 Arundel House.

171. The Tribunal, however, is entitled to view the sub-leaseholders' case sympathetically particularly if the landlord's failure to consult was egregious.

172. The Tribunal found that Mr Gray had made no effort to engage with the consultation process and waited until the service of the service charge demands in June 2018 before he communicated with the leaseholders about the proposed works. Further the Tribunal considers there were opportunities at the beginning when Mr Gray was first appointed and after completion of the urgent matters in February 2018 for him to consult with leaseholders about the proposed works or to apply then for dispensation of some or all of the requirements[5].

173. Mr Jones for Mr Mills suggested the application for dispensation was potentially abusive which if correct may provide a valid ground for refusing dispensation even though it would not strictly fall within the realms of "financial" prejudice as envisaged in the "*Daejan"* decision. Although Mr Jones' submissions were made on behalf of the sub-leaseholders at 32 Arundel Street, it was prompted by concerns expressed by the Tribunal in the hearing about the manner in which the Applicant had conducted the proceedings which applied to the Respondents in their entirety.

174. The Tribunal is satisfied that the application for dispensation was prompted by the furore of the leaseholders to the demands issued in June 2018. The Tribunal notes that Mr Gray and Ms Parkyn insisted initially that the charges were due and payable which they knew was incorrect because there had been no consultation with the

[4] The costs of the fire marshals were not the subject of the dispensation application.

[5] See sub-paragraphs 136(m) and (o).

leaseholders in respect of the fire safety works. Further when the application for dispensation was made it was presented on the basis that lives were in imminent danger and that it should be listed as matter of urgency. The Tribunal considers that the Applicant's conduct compromised the preparation of the sub-leaseholders' case in two respects. First the sub-leaseholders' focus was on the amount of service charge demanded rather than on the issue of relevant prejudice as posed by the dispensation application. Second the Applicant asked the Tribunal to treat the application for dispensation as urgent which reduced the time available to the sub-leaseholders to take advice and examine their options.

175. The Tribunal reminds itself that the dispensing jurisdiction is not a punitive or exemplary exercise and that the egregiousness of the Applicant's failure to consult only comes into play if the sub-leaseholders have discharged the factual burden of presenting a credible case of relevant prejudice.

176. The Tribunal finds that the sub-leaseholders for Arundel House have not substantiated their allegations of relevant prejudice with evidence of financial loss. Further they have not identified with any precision the representations they would have made if they had been given the opportunity to consult. The Tribunal is satisfied that the sub-leaseholders of Arundel House have not discharged the factual burden of establishing a credible case of relevant prejudice. **The Tribunal, therefore, grants the application for dispensation for the fire safety works in so far as it affects the sub-leaseholders of Arundel House.**

177. The Tribunal's decision on the dispensation application, however, does not deprive the sub-leaseholders of Arundel House of their right to challenge the reasonableness of the costs incurred on the fire safety works. Further the Tribunal's concerns about the Applicant's conduct of the case is a matter that can be addressed when consideration is given to the question of the Applicant's recovery of its legal costs under section 20C which is governed by different criteria of "just and equitable".

Service Charge for the Fire Safety Works and Fire Marshals.

178. On 18 June 2018 the Applicant demanded service charges from the head leaseholders of the residential and commercial units at Arundel House and 32 Arundel Street and the sub-leaseholders of the residential units at Arundel House for their contributions to a total budget of £552,097.

179. The Applicant sent a demand to the head leaseholder of 32 Arundel Street but not to the six sub-leaseholders there. The Applicant received a demand in its capacity of head leaseholder for the residential units at Arundel House. The Applicant also required JDI

Developments to pay a service charge for the residential units on the fourth floor of Arundel House.

180. The budget provided a sum of £336,652 for the fire safety works which included a sum of £90,000 for the cost of the fire marshals. The costs of the fire safety works were charged under Area 1 of the budget, which meant that a contribution to the costs of those works were demanded from the residential units, the commercial units and JDI Developments under the Airspace lease.

181. On 16 July 2018 the Applicant applied under section 27A of the 1985 Act for the Tribunal to determine the payability of the maintenance works under the lease and the reasonableness of the costs to be incurred [47].

182. The works were described as "maintenance works including replacing the fire alarm, installing automatic smoke vents, making statutorily required improvements to fire compartmentation to prevent the likely spread of fire, replacing entrance doors and replacing the carpets amongst other works".

183. The Application named various Respondents which included JDI Developments, and the sub-leaseholders of the residential units at Arundel House and 32 Arundel Street.

184. The Applicant stated in its amended statement of case that it had made the application to seek a determination under section 27A of the 1985 Act in respect of the reasonableness and payability of the cost of the fire safety works carried out at the premises and the costs of the fire marshals at the premises [334].

185. At the hearing Mr Bowker requested the Tribunal to determine whether the amount of costs claimed for the fire safety works and fire marshals were reasonable without determining the persons to and by whom it was payable, and the date and or manner at which it was payable.

186. Mr Bowker submitted that the costs claimed for fire safety works and fire marshals fell within the definition of service charge and relevant costs within sub-sections 18(1) and (2) of the 1985 Act. The costs amounted to a service charge because they were payable by a tenant of a dwelling to the landlord as part of or in addition to rent for repairs and the landlord's costs of management, and the whole or part of the charge may vary with the relevant costs. Further the costs of the fire safety works and of the fire marshals were relevant costs because they were costs incurred or estimated costs to be incurred by the landlord in connection with matters for which the service charge is payable.

187. Mr Bowker stated that under section 27A of the 1985 Act the Tribunal has jurisdiction to determine the amount of the charge

which was payable as a discrete issue which he said followed from the proper construction of section 27A(1)(a-e). Mr Bowker submitted that the list of variables in (a-e) were in the alternative and that the Tribunal had jurisdiction to determine one of the five variables without deciding on the other four variables.

188. Mr Jones for the sub-lessees at 32 Arundel Street pointed out that the Applicant in its amended statement of case expressly required the Tribunal to determine the reasonableness and payability of the costs of fire safety works and fire marshals.

189. Mr Jones said that the Tribunal's jurisdiction under section 27A was limited to the determination of the payability of a service charge and by whom and in what amount it should be paid. According to Mr Jones, the Tribunal has no jurisdiction to determine the reasonableness of relevant costs in the abstract and that it could only determine reasonableness as part of a process resulting in a determination of who pays what amount in service charges.

190. Mr Jones added that the Tribunal's jurisdiction to consider reasonableness is limited to the reasonableness of relevant costs which were costs incurred in connection with matters for which the service charge is payable. Mr Jones stated that in the case of the sub-leaseholders at 32 Arundel Street, their service charges are payable only in connection with works done or services provided for their building. It, therefore, followed that the Tribunal could not determine the reasonableness of the relevant costs without determining the scope of the works/services for which the sub-leaseholders at 32 Arundel Street had to pay.

191. Mr Jones added that even if the Tribunal had jurisdiction to answer the question which the Applicant now wished to put before it, the Tribunal should decline to do so. Mr Jones submitted that the statutory mechanism under section 27A was designed to produce a clear practical answer to the question of who pays how much to whom and how the payment was made. According to Mr Jones, to set about an enquiry which was not designed to produce an immediate answer to those questions invited delay, additional cost and significant duplication of effort. Finally Mr Jones contended that a determination on the reasonableness of the works carried out to the estate generally did not begin to answer the relevant questions: what are the costs of works/services for which the sub-leaseholders of 32 Arundel Street must pay and are such costs reasonable.

192. The Tribunal considers that Mr Jones' submissions have equal application to the sub-leaseholders of Arundel House. The Tribunal itself raised the question with Mr Bowker at the outset of the hearing its concerns about whether it had jurisdiction to determine the question of the reasonableness of the amount claimed for the fire safety works and for the fire marshals in isolation of the other issues of by whom and to whom it is payable and when or how a service

charge is payable. The Tribunal's concerns were directed at all the Respondents to the application.

193. The Tribunal accepts that the most common issue that it is asked to determine under its section 27A jurisdiction is the amount which is payable as a service charge, and that it is rare to be asked to determine the other issues at the same time. This is because in the majority of the cases that come before the Tribunal the amount claimed as a service charge is certain, and that there is no dispute about the identities of the persons to whom and by whom the service charge is payable.

194. This was not so with this Application. The Applicant was unable to state the amount payable by the various categories of residential sub-leaseholders, and, therefore, the amount payable as a service charge within the meaning of section 18 of the 1985 Act.

195. The Applicant indicated in the service charge budget for year ended 31 December 2018 that the amount claimed for fire safety works, fire marshals and professional fees was payable by all units including the commercial ones. The Applicant was, therefore, asking the Tribunal to determine the reasonableness of an amount that the Applicant said was payable by residential and commercial tenants. The Applicant did not suggest how the amount should be broken down between the two types of tenants. The Tribunal has no jurisdiction to decide the amount that should be paid by commercial tenants. The Tribunal considers that its jurisdiction under section 27A of the 1985 was not engaged in this Application because the Applicant failed to propose an amount that qualified as a service charge, namely an amount payable by the residential tenants.

196. Further the Tribunal is satisfied that under section 27A it is required to determine whether a service charge is payable, and that its jurisdiction is not fulfilled if it deals solely with the reasonableness of an amount payable by commercial and residential tenants without deciding the liability of the residential tenants. In this respect the Tribunal endorses Mr Jones' submission that it could only determine reasonableness as part of a process resulting in a determination of who pays what amount in service charges.

197. **The Tribunal holds for the reasons given in paragraphs 192 to 196 that it has no jurisdiction to make a determination in isolation on the reasonableness of the amount claimed by the Applicant for fire safety works, professional fees and fire marshals.**

198. **In the alternative the Tribunal decides that the conduct of the case by the Applicant is contrary to the overriding objective and amounts to an abuse of process** for the following reasons:

a) The Applicant applied on the basis that the works were urgent and that the costs of the works were likely to be significant. The Applicant requested that the case be listed within seven days.

b) At the case management hearing on 16 August 2018 the Tribunal learnt that the majority of the works had been carried out and that a demand for service charges had been sent to the sub-leaseholders at Arundel House.

c) The Applicant was required to submit an amended statement of case for the hearing.

d) At the hearing the Applicant departed from its amended statement of case, and requested the Tribunal to restrict its determination to the reasonableness of the amount claimed.

e) The Applicant also failed to make clear in its statements of case whether the application was for estimated costs or for actual costs. This is best summed up by Counsel's skeleton: "to determine the cost of that work has been or will be reasonably incurred is or will be reasonable in amount and is or will be payable"[6]. This means that there is uncertainty about which test of reasonableness to apply (sub section 19(1) or 19(2) of the 1985 Act).

f) The Applicant throughout these proceedings has sought to disassociate them from the demand for the service charge issued 18 June 2018. The Applicant did not refer to the demand in its various permutations of its statement of case, and did not include the demands in the hearing bundle. Mr Gray produced them on the second day of the hearing in response to the Tribunal's concerns about their absence.

g) The Applicant's failure to base its case on the demands has added another level of confusion with the proceedings. The Tribunal is satisfied that the sub-leaseholders' discontent with the demands prompted the Applications to the Tribunal. Further the Tribunal considers the sub-leaseholders had an expectation that the proceedings would determine their liability under the demands, despite Mr Nunn's assertions to the contrary. The Tribunal places weight on the joint statement of case signed by the sub-leaseholders of Arundel House and 32 Arundel Street which makes representations on the legality of the demands, and on all charges not just those related to fire safety works. Finally the Applicant's decision to restrict the proceedings to the costs of the fire safety works means that the demands remain intact.

[6] See paragraph 34 of Skeleton dated 9 November 2018

h) The Applicant has not complied with directions. The Applicant failed to obtain a witness statement from the principal designer or similar person concerned with the development of the nine flats in the roof space on the effect of those works to the existing services of Arundel House. The Applicant did not apply to vary the direction and the reason given at the hearing was that the direction could not be complied with because work was being carried out by JDI Developments. The Applicant, however, adduced no evidence that it had requested the information from JDI Developments. The effect of the roof space development on the condition of Arundel House was a critical part of the dispute.

i) The Applicant chose to continue its case against the sub-leaseholders of 32 Arundel Street despite its concession that the sub-leaseholders were not liable for the costs of the fire safety works at Arundel House.

199. Mr Jones submitted that if the Tribunal found in favour of his arguments of no jurisdiction the appropriate order was for the Tribunal to strike out the application made under section 27A of the 1985. The Tribunal considers that its power to strike out under rule 9 of the Tribunal Procedure Rules 2013 is connected with case management and is not the appropriate order for the circumstances of this case. The Tribunal prefers Mr Jones' earlier formulation of declining to proceed and dismissing the application. **The Tribunal, therefore, declines to proceed with the section 27A application against the Respondents and dismisses the Application.**

200. The Tribunal understands that the Applicant had agreed to suspend the demands for the costs of the proposed works and the fire marshals pending the Tribunal's determination. The Tribunal trusts that the Applicant in view of its decision would withdraw the demands against the residential leaseholders and sub-leaseholders so as to avoid further proceedings initiated by the leaseholders.

201. The Tribunal's decision does not prevent the Applicant from sending fresh demands in accordance with the leases on the actual costs incurred in the relevant service charge year.

Costs

Section 20C Applications

202. The Applicant did not oppose the Application made by the sub-leaseholders of 32 Arundel Street for an order preventing the Applicant from recovering its legal costs through the service charge under section 20C of the 1985 Act.

203. The Applicant, however, objected to an order under section 20C being made in favour of the sub-leaseholders of Arundel House. Mr Bowker argued that the sub-leaseholders should have instructed a solicitor and a surveyor. According to Mr Bowker this was one case which merited professional representation, and in his view would have saved time and money by narrowing the issues and focussing on those issues that mattered. Mr Bowker was critical of the sub-leaseholders for their failures to obtain alternative quotations and provide clear written and oral evidence about financial prejudice.

204. The Tribunal, however, is satisfied that the Applicant's conduct of the proceedings bore some responsibility for the shortcomings in the case presented by the sub-leaseholders of Arundel House. The Tribunal found at paragraph 174 that the Applicant's conduct compromised the preparation of the sub-leaseholders' case in two respects. First the sub-leaseholders' focus was on the amount of service charge demanded rather than on the issue of relevant prejudice as posed by the dispensation application. Second the Tribunal treated the application for dispensation as urgent at the Applicant's request which reduced the time available to the sub-leaseholders to take advice and examine their options. The Tribunal has also dismissed the application to determine the service charge for the fire safety works and fire marshals against all Respondents.

205. **Given the above findings the Tribunal is satisfied that it just and equitable to make an order under section 20C of the 1985 preventing the Applicant from recovering the costs of these proceedings through the service charge against the residential sub-leaseholders of Arundel House and those of 32 Arundel Street.**

Legal Costs incurred by Mr Mills of Flat 3 of 32 Arundel Street

206. Mr Mills' solicitors submitted a statement costs in the sum of £21,217.00 plus VAT.

207. Mr Bowker acknowledged that the Supreme Court in *Daejan* had decided that where a landlord had not complied with the consultation regime, a tenant can be expected to be awarded its costs insofar as they were incurred in reasonably investigating and establishing non-compliance with the Regulations, investigating or seeking to establish prejudice, and investigating and challenging the landlord's application for dispensation.

208. Mr Bowker indicated without formally conceding the point that the Applicant did not oppose Mr Mills' application for costs in principle. The Applicant, however, wished to reserve its position for the purpose of any appeal on the point and at this stage to restrict its submissions to quantum only.

209. Mr Bowker for the Applicant made the following points:

- A simple statement of costs is not suitable for costs of £25,000 incurred on a three day hearing.

- A rate of £380 plus VAT for a grade A solicitor is excessive. In Mr Bowker's view the case was suitable for a grade B fee earner specialising in landlord and tenant work and charging an hourly rate of about £200 plus VAT.

- Twelve hours attending Mr Mills by letter was excessive.

- Five hours attending others was unexplained.

- There was duplication of work on the documents as between solicitor and counsel.

- There was no challenge to Counsel's fees of £2,000 (advice), and £7,000 (hearing).

210. Mr Bowker stated that if the bill of costs was reduced having regard to the above factors, a proportionate bill would be in the region of £10,000 plus VAT.

211. Mr Jones urged the Tribunal to assess the costs summarily, stating that a detailed assessment would delay resolution of the costs issue and involve significant additional costs. Mr Jones did not consider costs of about £21,00 plus VAT disproportionate for a three day hearing. In Mr Jones' view, the substantial nature of the proceedings and the importance to Mr Mills justified the involvement of Grade A fee earner and it was reasonable for Mr Mills to use the solicitor he did because of their longstanding relationship. Mr Jones did not accept there had been significant duplication of work on documents between solicitor and counsel. Finally Mr Jones considered the Applicant's suggestion that the management of the case required only five hours of solicitor's time hopelessly unrealistic.

212. The Tribunal proceeds on the basis that it is entitled to make an order for costs in favour of Mr Mills in accordance with the principles set out in the Supreme Court decision in *Daejan*. Although Mr Bowker has reserved the Applicant's position on any potential appeal, Mr Bowker acknowledged in the hearing that the Tribunal was not constrained by its limited costs jurisdiction when considering an award of costs in favour of leaseholders defending a dispensation application.

213. The Tribunal observes that there is no guidance on the assessment of leaseholder's costs incurred in dispensation proceedings. Counsel have assumed that the principles of CPR 44 apply to such costs orders. The Tribunal considers that this is an appropriate way to

proceed, particularly as the same principles apply to the assessment of costs orders under rule 13 of the Tribunal Procedure Rules 2013.

214. The Tribunal is not persuaded that it is necessary to submit the statement of costs to a detailed assessment. The Tribunal notes that there is no presumption against summary assessment in relation to costs where hearings last more than one day. In any event the Applicant is not challenging Counsel's hearing fee which was the main cost arising from the three day hearing.

215. The Applicant's principal dispute is with the solicitor's costs. The Applicant states that the hours spent by the solicitor attending his client were excessive and that the time spent on attendance on others was not explained. The Applicant also alleged there was duplication of work between solicitor and counsel.

216. The Tribunal considers that a key feature in its summary assessment of the costs is the Applicant's conduct of the proceedings. The Tribunal has found that the Applicant initially treated Mr Mills as if he was in an equivalent position to the sub-leaseholders of Arundel House when patently he was not. The Applicant should have ascertained Mr Mills' liability under the lease before making the applications to the Tribunal. The Applicant compounded its error by choosing to continue its case against the sub-leaseholders of 32 Arundel Street despite its concession that the sub-leaseholders were not liable for the costs of the fire safety works at Arundel House, and then presenting no meaningful case against them at the hearing. In the Tribunal's view the Applicant should have avoided a substantial part of the costs incurred on Mr Mill's behalf by taking a decision early on not to proceed against Mr Mills and his fellow sub-leaseholders at 32 Arundel House. The Tribunal is satisfied that the time spent by Mr Mills' solicitors was not unreasonable when viewed in the prism of the Applicant's conduct of the proceedings.

217. The Tribunal, however, agrees with the Applicant that this case was suitable for a competent grade B solicitor specialising in landlord and tenant law. The Tribunal also considers it appropriate to apply the hourly rate for a grade B solicitor practising in London 3 band which is the home address of Mr Mills rather than a solicitor practising in the Portsmouth area. The Tribunal fixes an hourly rate of £220 for a grade B solicitor. This reduces the costs to £16,161 plus VAT.

218. The Tribunal standing back considers that a figure of £16,161 is proportionate to the issues raised in the case. **The Tribunal orders the Applicant to pay costs of £16,161 plus VAT to Mr Mills within 56 days.**

Costs of the Hearing on 3 September 2018

219. At the adjourned hearing of the dispensation application on 3 September 2018, the Tribunal indicated that it was minded to order the landlord to pay the costs of the leaseholders in respect of loss of earnings and travel expenses who attended the hearing in accordance with rule 13(1)(b) of the Tribunal Procedure Rules 2013.

220. Mr Weller, Mr Peter Lewer and Mr David Lewer submitted a claim for costs. Mr Bowker did not challenge the Tribunal's power to make such an order but contended that Mr Weller, and Mr Peter Lewer had not provided the necessary evidence to substantiate loss of earnings. Mr Bowker argued that the Tribunal should not entertain the application made by Mr David Lewer because it was made outside the 28 day time limit.

221. The Tribunal is satisfied that Mr Weller substantiated his loss of earnings. Mr Weller attached a letter from his employer, Fasset Ltd, giving his hourly rate and the hours worked plus receipts for parking in Portsmouth and Havant.

222. The Tribunal finds that the Applicant acted unreasonably in respect of its conduct of the hearing on 3 September 2018 for the reasons set out in paragraph 46. The Applicant has not challenged the legal basis for making a costs order for loss of earnings and travel expenses of the leaseholders who attended the hearing on 3 September 2018 and who have submitted a valid claim substantiated by documentary evidence.

223. **The Tribunal determines that the Applicant shall pay costs of £205.33 to Mr Weller and the travel costs of £41.85 to Mr Peter Lewer in respect of the hearing on 3 September 2018 within 56 days. The Tribunal makes no order in favour of Mr David Lewer because his application was made outside the 28 day time limit.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are 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.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  (a) the person by whom it would be payable,
  (b) the person to whom it would be payable,
  (c) the amount which would be payable,
  (d) the date at or by which it would be payable, and
  (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20ZA

(1) 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 agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section-

"qualifying works" means works on a building or any other premises.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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 or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.