IN THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

Case Ref: LON/00BE/LDC/2023/0074

LONDON BOROUGH OF SOUTHWARK Applicant

- and -

ALL LEASEHOLDERS Respondents

APPLICANT'S AUTHORITIES BUNDLE

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1. *Daejan Investments Ltd v Benson* [2013] 1 W.L.R. 854
2. *Jastrzembski v Westminster City Council* [2013] UKUT
3. *Marshall v Northumberland & Durham Property Trust* [2022] UKUT 92 (LC)
4. *Holding & Management (Solitaire) v Leaseholders of Sovereign View* [2023] UKUT 174 (LC)
5. Section 20 of the Landlord and Tenant Act 1985
6. Service Charges (Consultation Requirements) (England) Regulations 2003
7. Service Charges & Management – Chapter 11 – Consultation Requirements

Supreme Court

*Daejan Investments Ltd *v* Benson and others

[2013] UKSC 14

2012 Dec 4;
2013 March 6

Lord Neuberger of Abbotsbury PSC, Lord Hope of Craighead DPSC, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Sumption JJSC

Landlord and tenant Covenant Service charge Landlord proceeding with building work without first giving all required information on competing tenders to tenants Tenants applying for determination of service charge payable Tribunal finding landlord in breach of statutory requirement to consult with tenants before carrying out works Tribunal refusing landlord's application to dispense with consultation requirements Whether decision on dispensation to be made by reference to actual prejudice suffered by tenants or to extent of culpability of landlord Whether open to tribunal to make dispensation order on terms Landlord and Tenant Act 1985 (c 70) (as amended by Commonhold and Leasehold Reform Act 2002 (c 15), s 151), ss 20(1), 20ZA(1) Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987), Sch 4, Pt 2, para 4(5)

The landlord was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants under long leases which provided for the payment of service charges. The landlord gave the tenants notice of its intention to carry out major works to the building. It obtained four priced tenders for the work, each in excess of £400,000, but then proceeded to award the work to one of the tenderers without having given tenants a summary of the observations it had received in relation to the proposed works or having made the estimates available for inspection. The tenants applied to a leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985[1], as inserted, for a determination as to the amount of service charge which was payable, contending inter alia that the failure of the landlord to provide a summary of the observations or to make the estimates available for inspection was in breach of the statutory consultation requirements in paragraph 4(5) of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[2] so as to limit recovery from the tenants to £250 per tenant, as specified in section 20 of the 1985 Act and regulation 6 of the 2003 Regulations in cases where a landlord had neither met, nor been exempted from, the statutory consultation requirements. The landlord applied to the tribunal under section 20(1) of the Act for an order that the paragraph 4(5) consultation requirements be dispensed with, and proposed a deduction of £50,000 from the cost of the works as compensation for any prejudice suffered by the tenants, which offer they refused. The tribunal held that the breach of the consultation requirements had caused significant prejudice to the tenants, that the proposed deduction did not alter the existence of that prejudice, and that it was not reasonable within section 20ZA(1) of the Act, as inserted, to dispense with the consultation requirements.

[1] Landlord and Tenant Act 1985, s 20(1), as substituted: see post, para 8.
S 20ZA(1), as inserted: see post, para 9.

[2] Service Charges (Consultation Requirements) (England) Regulations 2003, Sch 4, para 4(5): 'The landlord shall . . . (a) obtain estimates for the carrying out of the proposed works; (b) supply, free of charge, a statement . . . setting out— (i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and (ii) where the landlord has received observations to which . . . he is required to have regard, a summary of the observations and his response to them; and (c) make all of the estimates available for inspection.'

The Upper Tribunal (Lands Chamber) dismissed the landlord's appeal and the Court of Appeal upheld the Upper Tribunal's decision.

On the landlord's further appeal—

Held, allowing the appeal (Lord Hope of Craighead DPSC and Lord Wilson JSC dissenting), that the purpose of a landlord's obligation to consult tenants in advance of qualifying works, set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003, was to ensure that tenants were protected from paying for inappropriate works or from paying more than would be appropriate; that adherence to those requirements was not an end in itself, nor was the dispensing jurisdiction under section 20ZA(1) of the 1985 Act a punitive or exemplary exercise; that, therefore, on a landlord's application for dispensation under section 20ZA(1) the question for the leasehold valuation tribunal was the extent, if any, to which the tenants had been prejudiced in either of those respects by the landlord's failure to comply; that neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation was a relevant consideration for the tribunal; that the tribunal could grant a dispensation on such terms as it thought fit, provided that they were appropriate in their nature and effect, including terms as to costs; that the factual burden lay on the tenants to identify any prejudice which they claimed they would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted; that once a credible case for prejudice had been shown the tribunal would look to the 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 tenants fully for that prejudice; and that, accordingly, since the landlord's offer had exceeded any possible prejudice which, on such evidence as had been before the tribunal, the tenants would have suffered were an unqualified dispensation to have been granted, the tribunal should have granted a dispensation on terms that the cost of the works be reduced by the amount of the offer and that the landlord pay the tenants' reasonable costs, and dispensation would now be granted on such terms (post, paras 42, 44, 46–47, 50–51, 54, 58–59, 61, 67, 71, 81–86).

Per Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Sumption JJSC. (i) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted (post, para 45).

(ii) Any concern that a landlord could buy its way out of having failed to comply with the consultation requirements is answered by the significant disadvantages which it would face if it fails to comply with the requirements. The landlord would have to pay its own costs of an application to the leasehold valuation tribunal for a dispensation, to pay the tenants' reasonable costs in connection of investigating and challenging that application, and to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal would adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue (post, para 73).

Decision of the Court of Appeal [2011] EWCA Civ 38; [2011] 1 WLR 2330 reversed.

The following cases are referred to in the judgments:

Camden London Borough Council v Leaseholders of 37 Flats at 30–40 Grafton Way (unreported) 30 June 2008, Lands Tribunal

Cooke v Secretary of State for Social Security [2001] EWCA Civ 734; [2002] 3 All ER 279, CA

Egerton v Jones [1939] 2 KB 702; [1939] 3 All ER 899, CA

Factors (Sundries) Ltd v Miller [1952] 2 All ER 630, CA

Howard v Fanshawe [1895] 2 Ch 581
Paddington Basin Developments Ltd v West End Quay Estate Management Ltd [2010] EWHC 833 (Ch); [2010] 1 WLR 2735
R (Cart) v Upper Tribunal (Public Law Project intervening) [2011] UKSC 28; [2012] 1 AC 663; [2011] 3 WLR 107; [2011] PTSR 1053; [2011] 4 All ER 127, SC(E)
Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC 1; [2012] ICR 389; [2012] 2 All ER 905, SC(Sc)

The following additional cases were cited in argument:

Cadogan v McGirk [1996] 4 All ER 643, CA
Eltham Properties Ltd v Kenny [2008] L & TR 238
John v Rees [1970] Ch 345; [1969] 2 WLR 1294; [1969] 2 All ER 274
Martin v Maryland Estates Ltd [1999] 2 EGLR 53, CA
Stenau Properties Ltd v Leek [2011] UKUT 478 (LC); [2012] L & TR 350, UT

APPEAL from the Court of Appeal

On 14 July 2006 the first to fourth tenants, Jack Benson, David Lapes, Paul Wallder and Allenspring Ltd, applied to the Leasehold Valuation Tribunal under section 27A of the Landlord and Tenant Act 1985 (as inserted by section 155(1) of the Commonhold and Leasehold Reform Act 2002) for a determination as to the amount of service charges payable by them to the landlord, Daejan Investments Ltd, in respect of Queens Mansions, 59 Queens Avenue, Muswell Hill, London N10 which comprised a block of shops and flats, five of which flats were held under long leases by the tenants, raising the question whether the landlord had complied with the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) in respect of works to the block which had commenced on 3 October 2006 and, if not, whether the tribunal should dispense with compliance. On 22 November 2007 the landlord applied under section 20ZA of the 1985 Act, as inserted, for dispensation from the consultation requirements contained in section 20 of the Act, that application naming as respondents the first to fourth tenants and, additionally, the fifth tenant, Alastair Gray. By decisions dated 11 March 2008 (LON/00AP/LSC/2006/0246) and 8 August 2008 (LON/00AP/LSC/2007/0076) the tribunal (Miss A Seifert, Mr M A Matthews, Mr L G Packer) determined that the landlord had failed to comply with the Regulations in respect of those works and declined to conclude that it was reasonable to dispense with the consultation requirements and made no order under section 20ZA(1), with the consequence that the landlord failed to recover £270,000 from the tenants in respect of works carried out and was limited to recovering £250 from each tenant.

The landlord appealed against those decisions. On 27 November 2009 the Upper Tribunal (Lands Chamber) (Carnwath LJ and Mr N J Rose FRICS) [2010] 2 P & CR 116 dismissed the appeal.

By an appellant's notice dated 21 December 2009 and pursuant to permission granted by the Upper Tribunal (Mr N J Rose) on 13 January 2010, the landlord appealed. By a respondent's notice dated 24 February 2010 the first to fourth tenants sought to uphold the decision of the Upper Tribunal. On 28 January 2011, the Court of Appeal (Sedley, Pitchford and Gross LJJ) [2011] 1 WLR 2330 dismissed the appeal and refused permission to appeal.

A On 27 June 2011, and by further order dated 1 August 2011, the Supreme Court (Lord Hope of Craighead DPSC, Lord Mance and Lord Wilson JJSC) allowed an application by the landlord for permission to appeal on terms that the tenants would not be responsible for the landlord's costs in any event, pursuant to which it appealed. The issues for the Supreme Court to decide, as set out in the parties' agreed statement of facts and issues, were B (1) whether the financial consequences of dispensation were relevant to the grant or refusal of dispensation under section 20ZA(1); (2) the correct approach to prejudice allegedly suffered by a tenant in consequence of the landlord's failure to comply with the consultation requirements; and (3) whether an offer by the landlord to claim through the service charge less than the whole cost of works was relevant to the grant or refusal of dispensation under section 20ZA(1).

C The facts are stated in the judgments of Lord Neuberger of Abbotsbury PSC and Lord Wilson JSC.

Nicholas Dowding QC and *Stephen Jourdan QC* (instructed by *GSC Solicitors LLP*) for the landlord.

Philip Rainey QC and *Jonathan Upton* (instructed by *Excello Law*) for the first to fourth tenants.

D *James Fieldsend* (instructed by *Jaffe Porter Crossick LLP*) for the fifth tenant.

The court took time for consideration.

6 March 2013. The following judgments were handed down.

E **LORD NEUBERGER OF ABBOTSBURY PSC** (with whom **LORD CLARKE OF STONE-CUM-EBONY** and **LORD SUMPTION JJSC** agreed)

1 Almost all long leases of flats contain an obligation on the landlord (or a service company) to provide services, such as repairing the exterior and common parts of the block, and a concomitant obligation on the tenants to pay service charges, i e a specified proportion of the cost of F providing such services. The right of a landlord to recover such service charges obviously depends on the terms of the particular lease, but, since 1972, Parliament has imposed certain statutory requirements and restrictions on a landlord, which impinge on its ability to recover service charges.

2 The current statutory requirements are contained in the Landlord and G Tenant Act 1985, which has been frequently amended, most relevantly for present purposes by the Commonhold and Leasehold Reform Act 2002. All references hereafter to sections are to sections of the 1985 Act as amended, unless the contrary is stated.

3 Section 20(1) provides that unless certain 'consultation requirements are (a) 'complied with' by the landlord (or service company), or (b) 'dispensed with' by the leasehold valuation tribunal ("LVT"), the H landlord cannot recover more than a specified sum in respect of works for which the service charge would otherwise be greater. The issue on this appeal concerns the width and flexibility of the LVT's jurisdiction to dispense with the consultation requirements, and the principles upon which that jurisdiction should be exercised.

The statutory provisions

4 Sections 18 to 30 are in a portion of the 1985 Act headed 'Service charges". Section 18 (as amended by section 41 of and paragraph 1 of Schedule 2 to the Landlord and Tenant Act 1987) is headed 'Meaning of 'service charge and 'relevant costs' . Subsection (1) defines 'service charge as being 'an amount payable by a tenant of a dwelling . . . for . . . repairs, maintenance . . . the whole or part of which varies . . . according to the relevant costs". Section 18(2) defines 'relevant costs' as 'the costs . . . incurred . . . in connection with the matters for which the service charge is payable".

5 Section 19 is headed 'Limitation of service charges: reasonableness". Subsection (1) provides that relevant costs

> 'shall be taken into account in determining the amount of a service charge . . . (a) only to the extent that they are reasonably incurred, and (b) . . . only if the . . . works are of a reasonable standard.'

6 Section 20 is headed 'Limitation of service charges: consultation requirements", and section 20ZA is headed Consultation requirements: supplementary". By virtue of section 20(3)(4)(a)(5) and section 20ZA(2), section 20 applies where the cost of qualifying works exceed 'an appropriate amount set by regulations". Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 sets that amount at a sum which results in the service charge contribution of any tenant to the cost of the relevant works being more than £250.

7 The centrally relevant provisions for present purposes are to be found in sections 20(1) and 20ZA(1).

8 Section 20(1) states that:

> 'the relevant contributions of tenants are limited in accordance with subsection (6) . . . unless the consultation requirements have been either— (a) complied with in relation to the works . . . or (b) dispensed with in relation to the works . . . by (or on appeal from) a [LVT].'

9 Section 20ZA(1) provides that:

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

10 Section 20(2) defines 'relevant contribution' as being, in effect, the amount due under the service charge provisions in respect of the works, and section 20(7) limits the contribution to £250 per flat: see regulation 6 of the 2003 Regulations.

11 The 'consultation requirements' are defined in section 20ZA(4) as being 'requirements prescribed by regulations", which section 20ZA(5) states may in particular include provisions requiring the landlord' to take certain steps. Those steps include providing details of the proposed works to the tenants, obtaining estimates, inviting the tenants to propose possible bidders, and having regard to the tenants' observations on the proposed works and estimates.

A **12** The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the 2003 Regulations. A summary of those requirements were helpfully agreed between the parties in the following terms (which I have slightly abbreviated):

Stage 1: Notice of intention to do the works

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

Stage 2: Estimates

C The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about estimates

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

Stage 4: Notification of reasons

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

13 Sections 20A to 20C set out certain further 'Limitation[s] of service charges", and sections 21 to 23A give rights to tenants and impose obligations on landlords with respect to the provision of information about service charges. Sections 26 to 30 contain other ancillary provisions with
F regard to service charges.

The factual background

14 Queens Mansions ("the building") is a building in Muswell Hill, north London, the freehold of which is owned by Daejan Investments Ltd ("Daejan"), the appellant in this appeal. The building consists of shops on the ground floor and seven flats on the upper floors. Five of the seven flats
G are held under long leases, and each of those leases is held by a respondent to this appeal (collectively 'the respondents"). Each lease includes an obligation on the landlord to provide services, including the repair and decoration of the structure, exterior, and common parts of the building. Each lease also includes an obligation on the tenant to pay a specified fixed proportion of the cost of providing, inter alia, the services which the
H landlord is obliged to provide.

15 The five respondents were, at all material times, members of the Queens Mansions Residents Association ("QMRA"), which is chaired by Ms Marks, who is the partner of one of the respondents. The building is managed by Highdorn Co Ltd, which, like Daejan, is part of the Freshwater

group of companies, and which carries on business under the name of Freshwater Property Management ("FPM"). A

16 By early 2005, it was clear that major works were required to the building, and, in February that year, FPM told the respondents and QMRA that Daejan intended to carry out such works. Three weeks later, FPM sent QMRA a specification in respect of the proposed works. Thereafter, pursuant to a request from Ms Marks, FPM appointed Robert Edward Associates ("REA"), who had been advising QMRA on the proposed works, as contract administrator. B

17 In his judgment at para 98, Lord Wilson JSC has given a fairly full account as to what then happened. A briefer summary is as follows.

18 REA prepared a fresh specification, which was sent to QMRA and the respondents on 30 August 2005, a few weeks after a stage 1 notice of intention to carry out works had been sent, on 6 July 2005. This specification was then the subject of discussion with Ms Marks, some of whose observations were then incorporated into the specification. C

19 Following that, tenders were sought, and priced tenders were received by REA from four contractors. In a fairly full report sent to the respondents on 6 February 2006, REA stated that two of those tenders appeared to be the most competitive. One was from Rosewood Building Contractors ("Rosewood"), who had quoted £453,980 for a 24-week contract period; the other was from Mitre Construction Ltd ("Mitre"), who had quoted £421,000 for a 32-week contract period, although its tender did not comply entirely with the tender directions. The respondents and QMRA were only provided with the priced specification submitted by Mitre and not that submitted by Rosewood. D

20 During 2006, Ms Marks was pressing FPM for the opportunity to inspect the priced tenders, and, although this request had not yet been satisfied, FPM was indicating a preference for instructing Mitre. In the meantime, in a letter of 14 July 2006, Ms Marks made a large number of fairly detailed points about the proposed works ("the works) to FPM, making it clear that those points were provisional until she had seen all the priced tenders. FPM purportedly served stage 3 notices on QMRA and the respondents on 14 June and on 28 July 2006, each of which stated when the priced estimates could be inspected. However, such estimates were not available for inspection by the respondents or QMRA until 31 July 2006. E F

21 Before the estimates were inspected, the respondents and QMRA were informed by Daejan (orally on 8 August and by letter two days later) that the contract for the works had been awarded to Mitre, and, at least by implication, that the statutory consultation process had accordingly ended. It appears that this information was, in fact, inaccurate, but it was never corrected. Despite this, there were some further communications between Ms Marks and FPM about the works. G

22 It appears that it was, in fact, only on 11 September 2006 that Daejan contracted for the works with Mitre, and this was formally communicated to the respondents and QMRA 16 days later. On 3 October 2006, Mitre started carrying out the works, and completed them, albeit apparently late and not without criticisms from the respondents and QMRA. H

A *The procedural history*

23 On 14 July 2006, four of the respondents applied to the LVT for a determination of the service charges payable under their respective leases for the period between 1994 and 2007 (as they were entitled to do under section 27A). Those proceedings were concerned with the respondents' allegations of failures on the part of Daejan in relation to (i) the provision of services B over 14 years, and (ii) the works. Inevitably, a number of issues and sub-issues were raised. Of those issues, only one is directly relevant to the present appeal. It is what the LVT called 'Issue 10 , which was whether Daejan had complied with the requirements of Part 2 of Schedule 4 to the 2003 Regulations ("the requirements") in relation to the works.

24 Following a hearing and determination on a preliminary point, there C was an eight-day hearing which took place in disconnected periods between February and November 2007 (partly explained by illness of counsel). Thereafter, the LVT issued its decision on 11 March 2008. Crucially for present purposes, the LVT concluded on Issue 10 that Daejan had failed to comply with the stage 3 requirements in two respects. First, neither of the purported stage 3 notices contained any 'summary of observations". Secondly, 'the estimates were not available for inspection as stated [in either D notice], and were only inspected on 11 August". It is also worth mentioning that the LVT considered, under what it called 'Issue 11 , a number of criticisms of the works, which were being carried out during the hearing, and dismissed almost all of them.

25 There was then a further, one-day, hearing before the LVT, devoted to the issue of whether the requirements should be dispensed with in relation E to the works pursuant to sections 20(1)(b) and 20ZA(1). Daejan relied on the fact that, if it had been free to enforce the service charge provisions in all the leases held by the respondents, it would be entitled to recover just under £280,000 in total from the respondents by way of service charge payments in respect of the works, whereas, if no dispensation was granted, it would be limited to recovering service charges of £250 per respondent in respect of the F works, i e a total of £1,250.

26 On 8 August 2008, the LVT issued its decision that it should not dispense with the requirements in relation to the works. The LVT observed in para 98 that it was 'matter of speculation what comments may or may not have been made by Ms Marks and [the respondents] and how this may have influenced the carrying out of the major works had they had the opportunity to comment having seen all the estimates". It had earlier said in G paras 86–87 that 'the failure by Daejan to comply with the . . . [requirements] [had] caused substantial prejudice to the respondents", and 'that it was a matter of great concern to Ms Marks . . . that Daejan had not provided copies of all the estimates . The LVT continued, at para 90:

> 'the cutting short of the consultation period, by indicating . . . that the decision had been made to award the contract to Mitre . . . removed from H the leaseholders the opportunity to make observations on the estimates to which landlord was obliged to have regard. This opportunity to make informed comment on these matters was central to the consultation process. It had been stressed in correspondence how important this was to the leaseholders.'

27 The LVT concluded in paras 96–98 that:

> 'Although this was not a case where the landlord made no attempt to comply with the . . . Regulations, and some extra-statutory consultation was carried out . . . this did not make good the landlord's omission in failing to provide the estimates and an opportunity to make observations . . . The tribunal considers that the fact that they did not have this opportunity amounts to significant prejudice.'

28 The LVT then referred at para 99 to a proposal from Daejan that

> 'if, contrary to [its] submissions, the tribunal considered that there has been prejudice to the [respondents], the tribunal should consider the fair figure to compensate [them] for any prejudice, such sum to be deducted from the cost of the eventual charge when calculating the service charges for the works .

During the course of the hearing, Daejan had proposed a deduction of £50,000, which it had described as more than generous , but which had not been accepted by the respondents. The LVT rejected this proposal at para 101, saying that 'there was no explanation of [how] the figure of £50,000 could be regarded as generous or as sufficient compensation for the prejudice suffered". It also said at para 103 that 'the offer does not alter the existence of substantial prejudice to the leaseholders".

29 Daejan appealed to the Upper Tribunal (Lands Chamber) (Carnwath LJ and Mr N J Rose FRICS) [2010] 2 P & CR 116, which rejected the appeal. The Upper Tribunal agreed with the LVT that Daejan had failed to comply with the stage 3 requirements in the two respects identified by the LVT.

30 However, the Upper Tribunal considered that the failure to include a summary of observations in the stage 3 notice was a relatively minor breach, which caused no prejudice to the respondents, as 'there [was] no reason to think that [it] would have assisted' them, because they all knew what observations Daejan had received about the proposed works: see paras 47–48.

31 Daejan's more important failure, according to the Upper Tribunal in para 52, was the fact that 'the consultation process was for all practical purposes curtailed", a finding which had been open to the LVT. The Upper Tribunal was, however, troubled by the LVT's finding that the respondents had suffered any consequential prejudice. Only one specific item was seen to be of any weight, namely the respondents' preference for Rosewood over Mitre, but, as the Upper Tribunal pointed out, this was based on evidence two years after the event, and it was hard to see why it could not have been raised by the respondents during the period of consultation which Daejan had allowed.

32 None the less, at para 61, the Upper Tribunal said that the LVT was 'entitled to regard this as a [case involving a] serious breach, rather than a technical or excusable oversight , as the respondents' 'right to make further representations [at stage 3] was nullified". The Upper Tribunal also said that it was not for the respondents to show prejudice, but for Daejan to show that they had suffered no prejudice, as a result of Daejan's default, and that, in that connection, it was 'enough that there was a realistic possibility that further representations might have influenced' Daejan's

A decision to engage Mitre rather than Rosewood. The Upper Tribunal said that it 'had not found this an easy case", because 'the evidence of actual prejudice is weak". None the less, at para 62, it decided that, as the LVT was the primary decision-maker, its decision to reject Daejan's application to dispense with the requirements in relation to the works should be respected, as it was a view which the LVT had been 'entitled' to
B arrive at.

33 Daejan was given permission to appeal to the Court of Appeal, on terms that it would not seek its costs if the appeal succeeded. The court (Sedley, Pitchford and Gross LJJ) [2011] 1 WLR 2330 dismissed the appeal, for reasons principally given by Gross LJ.

34 In his judgment, Gross LJ concentrated on what he considered to have been the three principal points which had been debated. First, he held
C in para 59 that 'the financial effect of the grant or refusal of dispensation [on the individual landlord and tenants] is an irrelevant consideration when exercising the discretion under section 20ZA(1)". Secondly, in paras 66–67, he held that the LVT had not erred in treating Daejan more harshly than if it had been a landlord controlled or owned by the lessees. Thirdly, in para 72, Gross LJ accepted Daejan's contention that 'significant prejudice to the
D tenants is a consideration of first importance in exercising the dispensatory discretion under section 20ZA(1)".

35 However, in the following paragraph, Gross LJ said that Daejan's failure in this case 'constituted a serious failing and did cause the tenants serious prejudice", and he echoed the LVT and Upper Tribunal in saying that this was not a technical, minor or excusable oversight . He also said that the LVT was entitled not to speculate on what would have happened if there
E had been no breach, on the ground that the respondents' 'loss of opportunity (to make further representations and have them considered) . . . itself amount[ed] to significant prejudice". In para 76, in agreement with the Upper Tribunal, Gross LJ doubted that the LVT would have been entitled to accede to Daejan's offer to reduce the chargeable amount by £50,000, and that, anyway, the LVT was entitled to reject that proposal.

F 36 Sedley LJ delivered a short concurring judgment, and Pitchford LJ agreed with both judgments.

37 Daejan was given permission to appeal to this court on terms similar to those which were imposed when permission was given to appeal to the Court of Appeal.

G *The issues on this appeal*

38 In the light of the arguments which have been addressed to us, it appears to me that three questions of principle arise, and need to be answered, before deciding how to resolve this appeal. Those questions are: (i) The proper approach to be adopted on an application under section 20ZA(1) to dispense with compliance with the requirements; (ii) Whether the decision on such an application must be binary, or whether the LVT can
H grant a section 20(1)(b) dispensation on terms; (iii) The approach to be adopted when prejudice is alleged by tenants owing to the landlord's failure to comply with the requirements.

39 I propose to consider those three questions (which inevitably overlap to some extent) in turn, and then to address the resolution of this appeal.

The proper approach to dispensing under section 20ZA(1)

40 Section 20ZA(1) gives little specific guidance as to how an LVT is to exercise its jurisdiction 'to dispense with all or any of the . . . requirements in a particular case. The only express stipulation is that the LVT must be 'satisfied that it is reasonable' to do so. There is obvious value in identifying the proper approach to the exercise of this jurisdiction, as it is important that decisions on this topic are reasonably consistent and reasonably predictable. Otherwise, there is a real risk that the law will be brought into disrepute, and that landlords and tenants will not be able to receive clear or reliable advice as to how this jurisdiction will be exercised.

41 However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.

42 So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. This view is confirmed by the titles to those two sections, which echo the title of section 19.

43 Thus, the obligation to consult the tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works. Mr Rainey QC and Mr Fieldsend for the respondents point out that sometimes the tenants may want the landlord to accept a more expensive quote, for instance because they consider it will lead to a better or quicker job being done. I agree, but I do not consider that it invalidates my conclusion: loss suffered as a result of building work or repairs being carried out to a lower standard or more slowly is something for which courts routinely assess financial compensation.

44 Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.

45 Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position

A that the legislation intended them to be—i e 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 B 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.

C **47** Furthermore, it does not seem to be convenient or sensible to distinguish in this context, as the LVT, Upper Tribunal and Court of Appeal all thought appropriate, between a serious failing' and a technical, minor or excusable oversight", save in relation to the prejudice it causes. Such a distinction could lead to an unpredictable outcome, as it would involve a subjective assessment of the nature of the breach, and could often also depend on the view one took of the state of mind or degree of culpability of D the landlord. Sometimes such questions are, of course, central to the inquiry a court has to carry out, but I think it unlikely that it was the sort of exercise which Parliament had in mind when enacting section 20ZA(1). The predecessor of section 20ZA(1), namely the original section 20(5), stated that the power (vested at that time in the County Court rather than the LVT) to dispense with the requirements was to be exercised if it was E 'satisfied that the landlord acted reasonably". When Parliament replaced that provision with section 20ZA(1) in 2002, it presumably intended a different test to be applied.

48 The distinction could also, I think, often lead to uncertainty. Views as to the gravity of a landlord's failure to comply with the requirements could vary from one LVT to another. And questions could arise as to the relevance of certain factors, such as the landlord's state of mind. F The present case provides an example of the possible uncertainties. In para 99 of his judgment, Lord Wilson JSC understandably expresses a very unfavourable view of Daejan's failure in this case. However, to some people it might seem that Daejan's failure in the present case was not a 'serious failing", given that (i) the evidence of any resulting prejudice to the respondents is weak, (ii) Daejan adhered fully to stages 1 and 2, and to a G significant extent to stage 3, (iii) Daejan did consult the respondents, through both REA and FPM, (iv) Daejan did some things which went beyond the requirements (e g employing REA at Ms Marks's request), and (v) Daejan did give summary details of the tenders even though it did not accord the respondents sight of the tenders themselves. So, too, views may differ as to whether Daejan should be blamed for not taking up the time of the LVT with attempts to excuse its failures, and as to whether it was H an innocent misunderstanding or flagrant incompetence which caused Daejan's representatives to tell the LVT that the contract had been placed with Mitre weeks before it had been. (None of those points undermines the basic fact that there was an undoubted failure by Daejan to comply with the requirements.)

49 I also consider that the distinction favoured in the tribunals below could lead to inappropriate outcomes. One can, for instance, easily conceive of a situation where a 'minor or excusable oversight' could cause severe prejudice, and one where a gross breach causes the tenants no prejudice. For instance, where the landlord miscalculates by a day, and places a contract for works a few hours before receiving some very telling criticisms about the proposed works or costings. Or, on the other hand, where the landlord fails to get more than one estimate despite being reminded by the tenants, but there is only one contractor competent to carry out undoubtedly necessary works.

50 In their respective judgments, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of the requirements, and in that they were right. That is the main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1). And it is fair to the courts below to add that where the landlord is guilty of a serious failing' it is more likely to result in real prejudice to the tenants than where the landlord has been guilty of a technical, minor or excusable oversight .

51 It also follows from this analysis that I consider that Daejan is wrong in its contention that the financial consequences to the landlord of not granting a dispensation is a relevant factor when the LVT is considering how to exercise its jurisdiction under sections 20(1)(b) and 20ZA(1). In that, I agree with the views of the courts below (although it can be said that such consequences are often inversely reflective of the relevant prejudice to the tenants, which is, as already mentioned, centrally important). It also seems to me that the nature of the landlord is not a relevant factor either, and I think that was the view of the Court of Appeal as well.

52 As already indicated, I do not agree with the courts below in so far as they support the proposition that sections 20 and 20ZA were included for the purpose of 'transparency and accountability", if by that it is intended to add anything to the two purposes identified in section 19(1)(a)(b). It is true that that proposition may arguably receive some support from Lewison J in *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] 1 WLR 2735, para 26. However, I consider that there are no grounds for treating the obligations in sections 20 and 20ZA as doing any more than providing practical support for the two purposes identified in section 19(1). The sections are not concerned with public law issues or public duties, so there is no justification for treating consultation or transparency as appropriate ends in themselves.

Is the LVT faced with a binary choice on a section 20ZA(1) application?

53 The respondents contend that, on an application under section 20ZA(1), the LVT has to choose between two simple alternatives: it must either dispense with the requirements unconditionally or refuse to dispense with the requirements. If this argument is correct, then as the Upper Tribunal held, and the Court of Appeal thought probable, it would not have been possible for the LVT in this case to grant Daejan's section 20ZA(1) application on the terms offered by Daejan, namely to reduce the aggregate of the sum payable by the respondents in respect of the works by £50,000.

A **54** In my view, the LVT is not so constrained when exercising its jurisdiction under section 20ZA(1): it has power to grant a dispensation on such terms as it thinks fit—provided, of course, that any such terms are appropriate in their nature and their effect.

55 In the absence of clear words precluding the LVT imposing terms, I consider that one would expect it to have power to impose
B appropriate terms as a condition of exercising its power of dispensation. The circumstances in which an application could be made are, as already mentioned, potentially almost infinitely various, and, given the purpose of sections 20 and 20ZA, it seems unlikely that the LVT's powers could have been intended to be as limited as the respondents suggest.

56 More detailed consideration of the circumstances in which the jurisdiction can be invoked confirms this conclusion. It is clear that a
C landlord may ask for a dispensation in advance. The most obvious cases would be where it was necessary to carry out some works very urgently, or where it only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the requirements on terms which required the landlord, for instance, (i) to
D convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) five days instead of 30 days for the tenants to reply.

57 Further, consider a case where a landlord carried out works costing, say, £1m, and failed to comply with the requirements to a small extent (e g in accidentally not having regard to an observation), and the tenants establish that the works might well have cost, at the most, £25,000 more as a result of
E the failure. It would seem grossly disproportionate to refuse the landlord a dispensation, but, equally, it would seem rather unfair on the tenants to grant a dispensation without reducing the recoverable sum by £25,000. In some cases, such a reduction could be achieved by the tenants invoking section 19(1)(b), but there is no necessary equivalence between a reduction which might have been achieved if the requirements had been strictly
F adhered to and a deduction which would be granted under section 19(1)(b): see the next section of this judgment.

58 Accordingly, where it is appropriate to do so, it seems clear to me that the LVT can impose conditions on the grant of a dispensation under section 20(1)(b). In effect, the LVT would be concluding that, applying the approach laid down in section 20ZA(1), it would be 'reasonable' to grant a dispensation, but only if the landlord accepts certain conditions. In the
G example just given, the condition would be that the landlord agrees to reduce the recoverable cost of the works from £1m to £975,000.

59 I also consider that the LVT would have power to impose a condition as to costs—e g that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1).

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

61 However, in my view, that does not preclude the LVT from imposing, as a condition for dispensing with all or any of the requirements under section 20(1)(b), a term that the landlord pays the costs incurred by the tenants in resisting the landlord's application for such dispensation. The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a freestanding order for costs, which is what paragraph 10 of Schedule 12 to the 2002 Act is concerned with. To put it another way, the LVT would require the landlord to pay the tenants' costs on the ground that it would not consider it 'reasonable' to dispense with the requirements unless such a term was imposed.

62 The case law relating to the approach of courts to the grant to tenants of relief from forfeiture of their leases is instructive in this connection. Where a landlord forfeits a lease, a tenant is entitled to seek relief from forfeiture. When the court grants relief from forfeiture, it will often do so on terms that the tenant pays the costs of the landlord in connection with the tenant's application for relief, at least in so far as the landlord has acted reasonably: see eg *Egerton v Jones* [1939] 2 KB 702, 705–706, 709. However, if and in so far as the landlord opposes the tenant's application for relief unreasonably, it will not recover its costs, and may even find itself paying the tenant's costs, as in *Howard v Fanshawe* [1895] 2 Ch 581, 592.

63 As Mr Dowding QC, for Daejan, pointed out, in *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630, the tenant was legally aided and the court was precluded by statute from making an order for costs against him, but the Court of Appeal held that there was none the less jurisdiction to require him to pay the landlord's costs as a condition of being granted relief from forfeiture. As Somervell LJ explained it, at p 633D–F, the liability under such a condition was 'not an order to pay costs in the ordinary sense , but a payment of a sum equal to the costs as a condition of relief .

64 Like a party seeking a dispensation under section 20(1)(b), a party seeking relief from forfeiture is claiming what can be characterised as an indulgence from a tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence.

The correct approach to prejudice to the tenants

65 Where a landlord has failed to comply with the requirements, there may often be a dispute as to whether, and if so to what extent, the tenants would relevantly suffer if an unconditional dispensation was accorded. (I add the word 'relevantly", because the tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.)

66 It was suggested by Mr Rainey and Mr Fieldsend that the determination of such a question would often involve a very difficult

A exercise (or 'an invidious exercise in speculation' as Gross LJ [2011] 1 WLR 2330, para 73 put it in the Court of Appeal) and would frequently be unfair on the tenants. It may occasionally involve a difficult exercise, but the fact that an assessment is difficult has never been regarded as a valid reason for the court refusing to carry it out (although in some cases disproportionality may be a good reason for such a refusal). While each B case must, inevitably, be decided on its particular facts, I do not think that many cases should give rise to great difficulties.

67 As to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given C that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption JSC said during the argument, if the tenants D show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to E accept that the tenants had suffered prejudice.

68 The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to F do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. G But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the requirements.

69 Apart from the fact that the LVT should be sympathetic to any points H they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint

is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord.

Overview of the analysis so far

70 Before turning to the disposition of this appeal, it is worth considering the effect of the conclusions I have reached so far.

71 If a landlord fails to comply with the requirements in connection with qualifying works, then it must get a dispensation under section 20(1)(b) if it is to recover service charges in respect of those works in a sum greater than the statutory minimum. In so far as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the requirements have been satisfied, and they will not be getting something of a windfall.

72 On the approach adopted by the courts below, as the Upper Tribunal said at the very end of its judgment, [2010] 2 P & CR 116, para 62, requiring the landlord to limit the recoverable service charge to the statutory minimum in a case such as this 'may be thought disproportionately damaging to the landlord, and disproportionately advantageous to the lessees". That criticism could not, it seems to me, be fairly made of the conclusion I have reached.

73 However, drilling a little deeper, if matters rested there, the simple conclusion described in para 71 could be too favourable to the landlord. It might fairly be said that it would enable a landlord to buy its way out of having failed to comply with the requirements. However, that concern is, I believe, answered by the significant disadvantages which a landlord would face if it fails to comply with the requirements. I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the LVT for a section 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.

74 All in all, it appears to me that the conclusions which I have reached, taken together, will result in (i) the power to dispense with the requirements being exercised in a proportionate way consistent with their purpose, and (ii) a fair balance between (a) ensuring that tenants do not receive a windfall because the power is exercised too sparingly and (b) ensuring that landlords are not cavalier, or worse, about adhering to the requirements because the power is exercised too loosely.

The resolution of this appeal

75 Turning now to this case, I consider that the LVT, the Upper Tribunal, and the Court of Appeal adopted the wrong approach to Daejan's section 20ZA(1) application. That is because (i) they took into account the

A gravity (as they saw it) of the failure to comply with stage 3 of the requirements, not only in the prejudice it may have caused to the tenants, but as a free-standing matter, (ii) they considered that the mere possibility of prejudice, apparently however speculative, and in the absence of any evidence to support its existence, would be enough to preclude the grant of a dispensation, and (iii) (in the case of the Upper Tribunal and the Court of B Appeal) they did not consider (or doubted) that it was open to the LVT to grant a dispensation on terms, and (in the case of the LVT) they did not address the question whether the £50,000 offered by Daejan exceeded any relevant prejudice which the tenants could establish.

76 In adopting their approach, the courts below based themselves in part on the reasoning in the Upper Tribunal's decision in *Camden London Borough Council v Leaseholders of 37 Flats at 30–40 Grafton Way* C (unreported) 30 June 2008. That case may have been rightly decided, but, if so, it was for the wrong reasons.

77 As explained above, the correct question which the LVT should have asked itself was, whether the respondents would suffer any relevant prejudice, and, if so, what relevant prejudice, as a result of Daejan's failure, if the section 20(1)(b) dispensation was granted unconditionally. On the D basis of the evidence before the LVT, it seems to me, substantially in agreement with the Upper Tribunal, that it is highly questionable whether any such prejudice at all would have been suffered. The only 'specific prejudice' identified by the Upper Tribunal was in relation to what the LVT called in para 98 of its decision a matter of speculation , namely that the respondents lost the opportunity of making out the case for using Rosewood to carry out the works, rather than Mitre.

E 78 Mr Rainey and Mr Fieldsend make the additional points that (i) the respondents were deprived of their right to be consulted properly, and (ii) it was difficult for the respondents to identify any relevant prejudice that they would suffer if Daejan was entitled to recover a service charge based on the full cost of the works. I have already dealt with these points in general terms. As to (i), the right to be consulted in accordance with sections 20 and 20ZA F is not a freestanding right.

79 As to (ii), difficulty is not a good argument in itself, and the LVT should in any event be sympathetic to the respondents on any credible allegation of relevant prejudice. In any event, it is clear from the first decision of the LVT that, even after Daejan's and the respondents' respective experts had met and agreed a number of items, there were still many items of G dispute which were contested by the respondents before the LVT on issue 11: the respondents were therefore well able to identify any complaints they had in relation to the works.

80 That leaves the issue whether it is possible for this court to conclude that the £50,000 offer by Daejan was sufficient to compensate the tenants for any relevant prejudice they suffered in this case. Given that the LVT did not address this issue properly, there is, at least on the face of it, a strong case for H saying that that is an issue which should be remitted, on the ground that we cannot fairly decide it. However, on closer examination of the facts, I am of the view that we can fairly decide the issue, and that we should therefore do so. This view is based on two reasons, which, when taken together, seem to me to establish that it would be pointless to remit the case.

81 First, the tenants do not appear to have identified to the LVT any relevant prejudice which they suffered, or may have suffered, as a result of Daejan's failure to comply with the requirements. As mentioned, the Upper Tribunal described the evidence of any such prejudice as 'weak". In this court, no contention as to the existence of possible relevant prejudice was advanced by Mr Rainey or Mr Fieldsend, save that they suggested that (i) Rosewood may have agreed to carry out the works for some £11,000 less than the contract sum ultimately agreed with Mitre, and (ii) they relied on the fact that Mitre overran the six-month contract substantially. As to (i), I am not sure where the £11,000 comes from, but it is substantially less than the £50,000 offered by Daejan. As to (ii), I would have thought that the prejudice has to be measured as at the date of the breach of the requirements, and anyway there was no attempt to show that Rosewood would have been any quicker or to quantify any prejudice.

82 Secondly, the tenants had been given a substantial opportunity to comment on the proposed works, and took full advantage of that opportunity. REA's detailed tender report of February 2006 was based on Mitre's detailed tender, and resulted in a very detailed response from Ms Marks in July 2006. I agree with Mr Dowding QC that it is hard to see what further submissions or suggestions the respondents could have presented if Daejan had complied fully with the requirements. Again, no argument appears to have been advanced at any level of these proceedings on behalf of the tenants that any specific points, which had not been made, would or might have been made if Daejan had fully complied with the requirements.

83 There appears to have been no evidence called before the LVT, and no suggestion made to the LVT, the Upper Tribunal or the Court of Appeal or indeed this court, to support the contention that the tenants suffered relevant prejudice worth as much as £50,000 as a result of Daejan's failure to comply with the requirements. If they were to justify resisting the LVT accepting Daejan's proposal, it was, in my judgment, incumbent on the tenants to advance some credible evidence and some rational argument which established that they had suffered, or at least may well have suffered such relevant prejudice.

84 Accordingly, although there was an undoubted, albeit partial, failure by Daejan to comply with stage 3 of the requirements, the relevant prejudice to the respondents of granting the dispensation could not be higher than the £50,000 discount offered by Daejan. The fact that the £50,000 can fairly be said to have been plucked out of the air is irrelevant: the essential point is that it exceeds any possible relevant prejudice which, on the evidence and arguments put before it, the LVT could have concluded that the respondents would suffer if an unqualified dispensation were granted.

85 In those circumstances, as there are no other relevant factors in this case, it seems to me that the LVT ought to have decided that Daejan's application for a dispensation under section 20(1)(b) should be granted on terms that (i) the respondents' aggregate liability to pay for the works be reduced (presumably on a pro rata basis) by £50,000, and (ii) Daejan pay the reasonable costs of the respondents in so far as they reasonably tested its claim for a dispensation and reasonably canvassed any relevant prejudice which they might suffer.

A **86** I would accordingly allow this appeal, set aside the orders below, and grant the dispensation under section 20(1)(b) on the terms indicated.

LORD HOPE OF CRAIGHEAD DPSC (dissenting)

87 I am, with respect, unable to agree with the approach that Lord Neuberger of Abbotsbury PSC has taken to this case. I think that the issues which I wish to raise are sufficiently important to justify taking a second B look at what he says. They also affect how I think this appeal should be disposed of.

88 The fundamental point of principle to which I would attach greater importance is that the issues to which section 20ZA(1) of the Landlord and Tenant Act 1985, as amended, directs attention have been entrusted by the statute to an expert tribunal. The leasehold valuation tribunal ("the C LVT") amply qualifies for that description, both in respect of the expertise and experience of its members and in respect of its familiarity with the subject matter. Questions such as whether or not a landlord's breach or departure from the consultation requirements was 'serious or was 'technical, minor or excusable' (see para 47, above) are questions of fact and degree. Questions of that kind are best left to its judgment. So too are D questions as to whether a breach or departure is sufficiently serious to justify refusal of a dispensation or whether an offer to reduce the chargeable amount is acceptable. The wording of section 20ZA(1) adopts this approach. It is open-ended and unqualified. It leaves these matters to the tribunal's determination.

89 This is an area of tribunal law and practice where it has been recognised, out of respect for the tribunal's expertise, that judicial E restraint should be exercised: see Baroness Hale of Richmond JSC's observations* in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, paras 15–17; *R (Cart) v Upper Tribunal (Public Law Project Intervening)* [2012] 1 AC 663, para 49; and *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389, para 35. The context for the exercise of that restraint is usually a challenge to the lawfulness of F the decision on the ground, for example, that it was based on an error of law. In my opinion, however, judicial restraint is just as much in point where, as here, an appellate court is prescribing limits on the way the expert tribunal is to perform the tasks as to issues of fact that have been delegated to it by the statute.

90 I would be reluctant, therefore, to rule out the possibility that a LVT may lawfully refuse dispensation simply on the ground of the G seriousness of the breach or departure. It is true that the end to which the consultation requirements are directed is the protection of tenants in relation to service charges. But I do not agree that there is a factual burden on the tenants in every case to identify some element of relevant prejudice (by which I understand Lord Neuberger PSC to mean financial prejudice or other disadvantage that can be quantified) that they would or might suffer if H dispensation were to be given before it would be open to the LVT to refuse to dispense: see paras 67–69.

91 I can accept that it would almost always be appropriate for the tribunal to require the tenants to provide some indication of the respects,

* *Reporter's note.* In *Cooke's* case the judge was Hale LJ.

if any, in which they would be prejudiced. That would, of course, be so if the breach or departure appeared to be technical, minor or excusable. It would be necessary then for some relevant prejudice to be inquired into and identified. So too as cases are encountered on an ascending scale of gravity. But I do not think that it is fanciful to assume that there could be extreme cases where the breach or departure was so serious, or so flagrant, that it would on that ground alone not be 'reasonable", as section 20ZA(1) puts it, to dispense with the consultation requirements. In my opinion it should be, and is, open to the tribunal to take that view in the interests of preserving the integrity of the legislation, and to do so without conducting any such inquiry.

92 For these reasons I am unable to agree with the conclusion in para 47 that the LVT, the Upper Tribunal and the Court of Appeal were wrong to hold that it should be open to the LVT to distinguish, in the exercise of its judgment, between breaches or departures according to their level of seriousness, without having first to consider the amount of prejudice they may cause or may have caused. Of course, these two things may run together. But I do not think that it would be right for us in this court, relatively remote as we are from the day to day business of the tribunals, to hold that to separate the two can never be appropriate. It seems to me that this rather more cautious, less prescriptive, approach is consistent with the conclusion that is reached in para 74, that the power to dispense with the consultation requirements should be exercised in a proportionate way that is consistent with their purpose. It is also more consistent with the language of the section, which does not place any limits on the way the tribunal may exercise the power that is given to it to make the determination. All it says is that the tribunal must be satisfied that it is reasonable to dispense with the requirements.

93 I would hold that judicial restraint has a part to play, too, in an examination of the question whether the LVT was entitled to decline to accept Daejan's offer to reduce the chargeable amount by £50,000. It rejected the proposal on the ground that there was no explanation of how that figure could be regarded as generous or as sufficient compensation for the prejudice suffered. Neither the Upper Tribunal nor the Court of Appeal thought it right to reverse the LVT on this point, holding that it was entitled to reject the proposal. I agree that the essential point is that the figure suggested should exceed, or at least be commensurate with, any possible prejudice which the respondents would suffer if an unqualified dispensation were to be granted: see para 84.

94 The LVT did not express its reasoning in that way. But I am not prepared to assume from this that the proposal was rejected simply because it was a figure plucked out of the air. The question whether or not an explanation was required from Daejan was one for the judgment of the expert tribunal. It was for it, after all, to decide whether or not to accept the proposal. It was for it to determine, as a matter of fact, whether it had been properly quantified. I am not persuaded that its decision to reject the proposal was based on an error of law that would entitle this court to interfere with it. As Lord Wilson JSC says in para 117, it was entitled in its discretion to decline to accept a reduction without knowing the proportion which it bore to the overall cost of the works.

A **95** For these reasons, and for those given by Lord Wilson JSC with which I am in full agreement, I would dismiss the appeal and affirm the order of the Court of Appeal.

LORD WILSON JSC (dissenting)

96 I respectfully disagree with central aspects of the exposition by Lord Neuberger of Abbotsbury PSC of the principles to be applied by the LVT in B its determination of an application that it should dispense with one or more of the requirements specified in the Schedules to the 2003 Regulations. I have had greater hesitation about the proper disposal of the actual appeal but I have concluded that this court should dismiss it.

97 When in 2002 it inserted into the 1985 Act the new section 20 and the additional section 20ZA, and when it accepted the 2003 Regulations C made thereunder, Parliament made various provisions about a landlord's consultation with a tenant in relation to proposed works of a specified character for which, through the service charge, the tenant would later be required to pay. On the face of them, the provisions seem to impact severely upon the landlord; and the severity is in my view testament to the importance which Parliament attached to his compliance with the requirements. Thus dispensation with them is available only if the LVT is D satisfied (i e by the landlord) that it is reasonable to grant it (section 20ZA(1)); even if so satisfied, the LVT has a discretion in that, under that subsection, it then 'may' grant the dispensation; and, in the absence of compliance or dispensation, the contribution of the tenant to the cost of such works is limited to £250 irrespective of the size of the cost: section 20(1)(3)(5) and regulation 6. Lord Neuberger PSC's conclusion at E para 47 that the gravity of the landlord's non-compliance with the requirements is relevant to dispensation not of itself but only in so far as it causes financial prejudice to the tenant seems to me to subvert Parliament's intention. The concern which he expresses at paras 47 and 48 about the difficulties which would confront the LVT in making reasonably consistent assessments of the gravity of breaches is not one which I share. His conclusion at para 50 that real prejudice to the tenant should normally F be the sole consideration for the LVT seems to me to depart from the width of the criterion ("reasonable") which Parliament has specified. His inevitable further conclusion at para 67 that the 'factual burden lies on the tenant to prove such prejudice seems to me, as a matter of reality, to reverse the burden of proof which Parliament has identified. And in my view the hypothetical exercise in which his conclusions require the parties to G engage (and upon which they require the LVT to adjudicate) fails to recognise the complications which often attend a comparison of, for example, one estimate with another in terms not just of overall cost but of individual costings, of the proposed starting date for the works, of the period of the works to which the rival contractors will commit themselves and of their perceived capacity to perform the works satisfactorily. Whether the H burden which Lord Neuberger PSC casts upon the tenant is one which he can often discharge seems to me to be very doubtful.

98 First, however, I wish in the following respects to amplify the summary of the facts helpfully given by Lord Neuberger PSC at paras 14–22:

(a) In August 2005, in response to Daejan's stage 1 notice, four of the five respondents nominated Rosewood as their preferred contractor.

(b) In its report to Daejan dated 30 November 2005, REA, the contract administrator, (i) analysed the four tenders which Daejan had received and appended a comparative schedule of the individual costings of three of them, including Rosewood; (ii) noted that Rosewood had offered to reduce its quotation from £454,000 to £432,000, which therefore became only £11,000 higher than that of the contractor, namely Mitre, for which Daejan had at all times indicated a provisional preference; (iii) observed that the contract period proposed by Rosewood was 24 weeks, whereas that proposed by Mitre was 32 weeks; (iv) indicated that the choice was between Rosewood and Mitre; (v) suggested that Rosewood's tender was the most complete and possibly the more realistic; (vi) said that it could vouch for Rosewood as a quality contractor but that Daejan could presumably vouch analogously for Mitre; and (vii) concluded that, were it to reduce its contract period to 24 weeks (which indeed it subsequently did), Mitre should be awarded the contract.

(c) In February 2006 Daejan forwarded to the respondents copies of Mitre's tender and of REA's report on the tenders.

(d) But the respondents also wanted to see a copy of Rosewood's tender. Apart from reference to it in the schedule of individual costings, REA's report had made only 'general observations upon its tender over one page.

(e) On five separate occasions between January and July 2006 the respondents in vain asked Daejan for a copy of Rosewood's tender.

(f) Daejan admits that its first stage 3 notice, dated 14 June 2006, did not comply with some of the requirements. Its main defect was to fail to refer to Rosewood's tender in breach of paragraph 4(8) of Part 2 of Schedule 4 to the 2003 Regulations.

(g) So Daejan served a second stage 3 notice dated 28 July 2006. In the notice Daejan said (as required by paragraph 4(5)(c)) that Rosewood's tender was available for inspection. Moreover, in accordance with paragraph 4(10)(c)(iii) and regulation 2(1), which require that a tenant be allowed 30 days in which to make observations, it also stated that, subject to any observations made by the respondents, it proposed to award the contract to Mitre but that it would not do so prior to 31 August 2006.

(h) Meanwhile, on 17 July 2006, four of the respondents had applied to the LVT for a determination of their liability to pay service charges to Daejan for each year since 1994. For the then current year, namely 2006, the respondents explained in their application that the issue related to major works costing £600,000 and that one of the questions for determination by the tribunal would be 'was the consultation process properly carried out?'

(i) At the LVT's pre-trial review, held on 8 August 2006, there was a remarkable development: for Daejan's solicitor announced that the contract had already been awarded to Mitre. By letter to Daejan, written later that day, the respondents referred to the solicitor's announcement and protested about it.

(j) Daejan wrote two letters to the respondents dated 10 August 2006. It did not deny that its solicitor had made the announcement. On the contrary, in one letter it appeared to confirm that Mitre had been awarded the contract. In the other letter, however, it said only that Mitre would be awarded the contract.

(k) It transpires that Daejan awarded the contract to Mitre only on 11 September 2006. But it had made clear to the respondents on 8 and

A 10 August that it had made its decision to do so. Thereafter, and although on 11 August they finally received a copy of Rosewood's 50-page tender, the respondents reasonably concluded (as the LVT found) that it would be futile for them to accede to Daejan's previous invitation to make observations prior to 31 August. Indeed Daejan never suggested otherwise.

99 Thus, to speak plainly, Daejan aborted the stage 3 consultation. Having correctly invited the respondents to make observations by 31 August
B 2006, it made clear on and after 8 August that the decision had been made. Even more extraordinarily, Daejan made it clear at a hearing before a tribunal which was beginning to investigate whether, among other things, it had consulted the respondents in compliance with the requirements. In my view the LVT was clearly entitled to conclude that the opportunity for the respondents to make informed observations on the rival tenders prior to
C 31 August had been central to the consultation process. Notwithstanding positive aspects of the earlier stages of the consultation to which Lord Neuberger PSC refers at para 48, the sudden termination of the process, which Daejan never sought to reverse nor even to explain, represented, as both of the tribunals and the Court of Appeal all concluded, serious non-compliance with the requirements.

D 100 In my view therefore this appeal requires the court to consider the LVT's proper treatment of serious non-compliance with the requirements when invited to dispense with them. What financial prejudice did the respondents suffer from Daejan's termination of their opportunity to make submissions, in particular, of course, submissions in favour of Rosewood? Albeit without access to Rosewood's tender, they had already made extensive submissions. The LVT concluded that the REA report had raised
E numerous points which might have been clarified by the respondents' access to all the relevant tenders. It was an unsurprising conclusion. Nevertheless the Upper Tribunal was correct to observe that the LVT had not elaborated upon it. Moreover, at all four stages of these proceedings, Daejan has been at pains to make the point that, in their evidence before the LVT, the respondents never identified specific aspects of Rosewood's tender to which, had the consultation not been terminated, they would have referred in their
F intended observations. In that this is an appeal on a point of law from, originally, the exercise of a discretionary jurisdiction, it is worthwhile to note that, in its conclusions, the LVT expressly addressed the point before concluding that it was speculative. But it remains Daejan's strongest point. If, as Lord Neuberger PSC considers, the respondents are now to be told that, when they opposed the dispensation, the initial burden had been on
G them to prove that the termination caused significant financial prejudice to them, the conclusion must indeed be that they failed to discharge it.

101 But is the gravity of non-compliance relevant to whether dispensation is reasonable irrespective of consequential financial prejudice?

102 In giving a negative answer to this question Lord Neuberger PSC refers to what one might call the basic jurisdiction, conferred on the LVT by
H sections 19 and 27A of the 1985 Act, to determine the limit of a service charge by reference to whether the underlying costs were reasonably incurred by the landlord and whether the services thereby provided, or the works thereby carried out, were of a reasonable standard. He suggests at paras 42 and 52 that the requirements set out in section 20 and in the 2003 Regulations are intended only to reinforce the purposes behind

sections 19 and 27A and to give practical support to them; and he proceeds to suggest at para 44 that the LVT should therefore focus upon whether non-compliance with the 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 upon whether the non-compliance has in that sense caused prejudice to the tenant. A

103 With great respect, I consider that the legislative history of the requirements for consultation runs counter to the above suggestion. What I have described as the basic jurisdiction, now exercised under sections 19 and 27A of the 1985 Act, originated in section 124(1) of the Housing Act 1974 through its insertion of section 91A into the Housing Finance Act 1972. The jurisdiction was then conferred only on the High Court or the county court; it applied only to flats and to certain types of tenancy; but otherwise it was described in terminology quite similar to the present: section 91A(3). It was by the same insertion that Parliament introduced an embryonic requirement for consultation: section 91A(1). That subsection provided that, in case of any dispute about the recoverability of a service charge thereunder, evidence of the views of the tenant obtained during the requisite consultation should be admitted. There was no express provision about the effect of a landlord's failure to conduct the consultation; but it was clearly intended that a tenant could also deploy such a failure in a dispute with the landlord before a court which was exercising the basic jurisdiction to determine whether an amount or a standard was reasonable. In other words the section inserted in 1974 into the 1972 Act made the link which Lord Neuberger PSC perceives in the current legislation. B C D

104 But Parliament replaced section 91A of the 1972 Act by provisions contained in Schedule 19 to the Housing Act 1980. By paragraphs 2 and 3, it reiterated the basic jurisdiction. By paragraph 5, it amplified the requirements for consultation. By paragraph 4, it provided that, unless the requirements had been complied with or dispensed with, the excess of a landlord's costs above a prescribed amount should not be recoverable through the service charge. And, by paragraph 6, it provided that, if satisfied that 'the landlord acted reasonably", the court had power to dispense with a requirement. E F

105 The pattern of provisions contained in paragraphs 1–6 of Schedule 19 to the 1980 Act has broadly been maintained to date. Those paragraphs were replaced by sections 18 to 20 of the Landlord and Tenant Act 1985. The basic jurisdiction was then placed into section 19. The consultation jurisdiction was then placed into section 20; and, by subsection (5), the threshold criterion for exercise of the power to grant dispensation with the requirements, namely that 'the landlord acted reasonably", was retained. By section 151 of the Commonhold and Leasehold Reform Act 2002, the consultation jurisdiction was changed into its present form by the substitution of section 20, the insertion of section 20ZA and the making thereunder of the 2003 Regulations. In order to underline the distinction between the basic jurisdiction in section 19 and the consultation jurisdiction in section 20, the headnote of the former referred to 'reasonableness' whereas that of the latter referred to 'consultation requirements". G H

A 106 The pattern of provisions introduced by the 1980 Act and maintained to date is important for present purposes. For the link which Lord Neuberger PSC perceives in the current legislation seems to me to have been broken by that Act. Non-compliance with a requirement for consultation was no longer simply a factor to be weighed in the exercise of the basic jurisdiction. An independent sanction was attached to it, namely that, unless the requirement was dispensed with, the costs incurred by the B landlord in the specified circumstances and above the statutory limit were irrecoverable through the service charge. They were irrecoverable even if they had been reasonably incurred and had been incurred in the provision of services, or in the carrying out of works, to a reasonable standard, i e even if there was no scope for them to be disallowed in the exercise of the basic jurisdiction. Even if, in that respect, the tenant had suffered no prejudice, C they were irrecoverable. Such was the free-standing importance which Parliament has for 33 years attached to compliance with the requirements.

107 I therefore agree with the analysis of Lewison J in *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] 1 WLR 2735, para 26:

> 'there are two separate strands to the policy underlying the regulation D of service charges. Parliament gave two types of protection to tenants. First, they are protected by section 19 from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Second, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a E qualifying long term agreement and the consultation process has not been complied with or dispensed with. It follows that the consultation provisions are imposed for an additional reason; namely, to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement. As Robert Walker LJ observed in *Martin & Seale v Maryland* F *Estates Ltd* (1999) 32 HLR 116, 125 in relation to a previous version of the consultation requirements: Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants, that tenants may not know what is going on, what is being done, ultimately at their expense.'

108 The statutory changes wrought by the 2002 Act, which, together G with the Regulations, came into force in 2003, not only enabled the LVT to exercise each of the service charge jurisdictions but altered the threshold criterion for exercise of the power to grant dispensation with the requirements. The criterion was no longer whether the landlord had acted reasonably but whether it was reasonable to dispense with the requirements: section 20ZA(1), as inserted into the 1985 Act. The new criterion was therefore wider and, no doubt, more favourable to the landlord. It certainly H included appraisal of any financial prejudice suffered by the tenant as a result of the non-compliance, being an aspect which could be said only with great difficulty, if at all, to have been embraced in the old criterion. On any view the focus of the old criterion had been the gravity of the landlord's non-compliance. What, however, I find impossible to conclude is that the

change in effect banished consideration of what had previously been the focus: the words of the new criterion are inapt to yield such a conclusion.

109 In August 2002, just after the 2002 Act had received royal assent, the Office of the Deputy Prime Minister published a consultation paper in relation to a draft of the Regulations, entitled *Revised Procedures for Consulting Service Charge Payers about Service Charges*. In Chapter 4 it explained:

> 3. The dispensation procedure is intended to cover situations where consultation was not practicable (e g for emergency works) and to avoid penalising landlords for *minor* breaches of procedure which do not adversely effect service charge payers' interests.' (Emphasis supplied.)

The paragraph tends to confirm my view that substantial non-compliance with the requirements is, without more, intended to entitle the LVT, in the exercise of its discretion, to refuse to dispense with them in order, in Lord Hope of Craighead DPSC's phrase at para 91, to preserve the integrity of the legislation. Lord Neuberger PSC points out at para 46 that the requirements leave untouched the fact that it is the landlord who decides what works should be done and what amount should be paid for them. What, however, the requirements recognise is surely the more significant fact that most if not all of that amount is likely to be recoverable from the tenant.

110 In *Camden London Borough Council v Leaseholders of 37 Flats at 30–40 Grafton Way* (unreported) 30 June 2008, the Lands Tribunal (George Bartlett QC, President, and Mr N J Rose FRICS) dismissed Camden's appeal against the LVT's refusal to dispense with the stage 3 requirements. Camden had prepared the requisite statement, including the offer to afford inspection of the tenders, but had failed to send it to the tenants and had proceeded to enter into the contract. The Lands Tribunal, at para 35, described Camden's error as gross. I agree; and I do not perceive much difference between a landlord's total failure to send the statement and its sending a statement which, after 11 days, it deprives of all further significance. The Lands Tribunal concluded:

> 'The extent to which, had [the tenants] been told of the estimates, [they] would have wished to examine them and make observations upon them can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice.'

111 The above analysis by the Lands Tribunal in the *Grafton Way* case, namely that a substantial failure of a landlord to consult in compliance with the requirements could, in itself, amount to significant prejudice to a tenant, was adopted by the Court of Appeal in the present case (Gross LJ [2011] 1 WLR 2330, para 73(iii)). For reasons already given, I am not persuaded that a failure of that gravity needs to be described as amounting to 'prejudice' to the tenant. I consider, with respect, that it is reasonable for Lord Neuberger PSC adopt a narrower definition of the word 'prejudice", to be calculated only in monetary terms and by reference to the likely ultimate outcome of a duly conducted consultation. But the semantics are unimportant. I believe that, along with any prejudice in that narrower sense (which I accept will often be a matter of prime importance), the LVT should weigh the gravity of the non-compliance with a requirement in determining whether to dispense with it.

A **112** In the present case the LVT did so.

113 The LVT also proceeded to reject Daejan's contention that it was relevant for it to consider the size of the difference between the amounts recoverable from the respondents in the event of dispensation on the one hand and of its refusal on the other. Here too the LVT made no error. In this respect I agree with Lord Neuberger PSC at para 51 that the size of the difference is irrelevant.

B **114** It remains only to consider whether the LVT fell into error in its rejection of Daejan's offer to accept the attachment to a grant of dispensation of a condition that it should reduce the cost of the works to be charged to the respondents by £50,000.

115 I agree with Lord Neuberger PSC that it is open to the LVT to attach a condition of that character; and I regard it as valuable for the C LVT that this court should so rule. In making provision for the consequences of non-compliance with the requirements, Parliament will have had in mind the established ability of a court or tribunal to attach conditions to its exercise of a discretion: for example a condition that undertakings be given by an applicant before it grants a freezing order; or a condition which (so this court was told) the LVT itself already sometimes attaches to the grant of an adjournment, namely that the applicant for it, whom the tribunal has no D power actually to order to pay the costs thrown away, should nevertheless do so. Lord Neuberger PSC also explains at para 56 that urgent applications for dispensation in advance of carrying out the works may be particularly suited to be granted on conditions.

116 Nevertheless I regard the exercise of the jurisdiction to attach a condition to the grant of dispensation with a requirement as not being E without difficulty. Consequential prejudice to the respondents in the narrow sense of that word will sometimes arise not from works which might have been done more cheaply but, for example, from works which, for good reason, should have been conducted at somewhat greater expense or which were conducted over an unreasonably long period or which did not extend to everything that was reasonably required to be done; prejudice of that sort F may be hard to quantify in monetary terms. My own view, namely that the gravity of the non-compliance remains relevant independently of prejudice, makes the identification of an appropriate figure harder still. So it seems to me that, as Lord Hope DPSC suggests in paras 88 and 93, considerable latitude is to be afforded to the LVT, as the specialist decision-maker, in relation to its determination whether to accept a landlord's offer or to reject it outright or, in rejecting it, to identify some higher figure which, if offered, G it would accept as a condition of a grant of dispensation. Appeals from these aspects of the exercise of the LVT's discretion should not lightly be permitted to proceed.

117 Had the LVT in the present case concluded that it had no jurisdiction to incorporate Daejan's offer into a condition attached to a grant of dispensation, it would have made an error of law which would have H required re-exercise of its discretion at an appellate level. But it did not so conclude. It was the Upper Tribunal which, at para 40, wrongly concluded that the LVT had no such jurisdiction; and it was the Court of Appeal which, at para 76(i), overcautiously doubted whether the jurisdiction existed. Before the LVT, by contrast, the parties agreed that it existed and the LVT proceeded on that basis. It is important to note that, having embarked

on the works in October 2007, Mitre was still engaged upon them at the time of the LVT's hearing of Daejan's application for dispensation in March 2008 and probably at the time of its decision in August 2008. The evidence does not permit a conclusion to be drawn about the reasons for the overrun. At all events the LVT's expressed reason for rejecting Daejan's offer of a reduction of £50,000 was that it was impossible to assess it in the light of the cost of the works already undertaken and of the estimated cost of the works still to be undertaken, as to neither of which had Daejan adduced evidence. The gravity of Daejan's non-compliance with the requirements made the LVT's appraisal of any offer extremely difficult. But it was in any event entitled, in its discretion, to decline to accept the offered reduction without knowing the proportion which it bore to the overall cost of the works.

118 I conclude that the LVT made no error of law in refusing Daejan's application for dispensation with the requirements; that the Upper Tribunal and the Court of Appeal were correct in determining not to set its refusal aside; and that this court should determine likewise.

Appeal allowed.

COLIN BERESFORD, Barrister

Supreme Court

*Smith and others *v* Ministry of Defence

Ellis and another *v* Same

Allbutt and others *v* Same

2013 Jan 24 — Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Mance JJSC

APPLICATIONS by the claimants in the first case and the defendant in the second and third cases for permission to appeal from the decision of the Court of Appeal [2012] EWCA Civ 1365; [2013] 2 WLR 27

Permission to appeal was given.

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0284 (LC)
LT Case Number: LRX/149/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – consultation regulations – whether procedural irregularity due to LVT determining issue not raised by appellant – whether in any event 2009 notice of intention invalid – whether earlier notice of intention valid in respect of later works – whether dispensation from consultation requirements properly granted – appeal allowed in part but refused in respect of dispensation – cross appeal allowed – ss 19, 20 and 20ZA of Landlord and Tenant Act 1985

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN CHRISTOPHER KONSTANTY JASTRZEMBSKI Appellant

and

WESTMINSTER CITY COUNCIL Respondent

Re: 3 Turner Road,
Erasmus Street
London
SW1P 4DZ

Before: Her Honour Judge Karen Walden-Smith
and
Mr Andrew Trott FRICS

Sitting at:43-45 Bedford Square, London WC1B 3AS
on 21 May 2013

The appellant in person
Ms Nicola Muir, instructed by Judge & Priestley LLP, for the respondent

The following cases are referred to in this decision:

Regent Management Ltd v Jones [2010] UKUT 369 (LC)
Birmingham City Council v Keddie & Hill [2012] UKUT 323 (LC)
Arrowdale Ltd and Coniston Court (North) Hove Ltd [2007] RVR 39
Westbourne Ltd v Spink [2008] PCLCS 251
Beitov Properties Ltd v Martin [2012] UKUT 133 (LC)
Daejan Investments Limited v Benson & Ors (2010) P & CR 116 (CA); *Daejan Investments Ltd v Benson & Ors* [2013] 1 WLR 854 (SC)
Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Company Ltd [2011] UKUT 349 (LC)

DECISION

Introduction

1. The appellant, Mr Christopher Jastrzembski, is the long leasehold owner of the property at Flat 3, Turner House, Erasmus Street, London SW1P 4DZ ("the property"). By virtue of the provisions of clause 3 and the Ninth Schedule to his Lease, the appellant covenanted to pay "a fair and reasonable proportion of the reasonably estimated amount" required to keep Turner House in good repair. The appellant issued an application to the Leasehold Valuation Tribunal pursuant to the provisions of section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") on 11 February 2011 seeking a determination as to the reasonableness of an estimated service charge of £9,199.15 for the cost of major works and his liability to pay that estimated service charge.

2. The LVT determined that the estimated service charge was reasonable and that the appellant was liable to pay the respondent landlord, Westminster City Council. The hearing took place on 20 June 2011 and the decision was issued on 27 July 2011.

3. The issue that is before this Tribunal is whether the respondent had complied with their consultation requirements pursuant to the provisions of section 20 of the 1985 Act ("the section 20 notice").

4. It was the appellant's contention before the LVT that the section 20 notice served by the respondent in 2009 with respect to works under contract reference Q102 had not been served upon him. The respondent's contention was that it had. That was a conflict of fact between the appellant and respondent which was not resolved by the LVT. Instead, the LVT took a point of its own motion by determining that the 2009 notice was invalid by reason of it "inviting observations to be sent to someone no longer involved" (paragraph 38 of the decision).

5. The LVT went on to determine that a section 20 notice that had been served upon the appellant by the respondent in 2007 with respect to works under contract reference M111 was a "perfectly good notice". Further, if wrong about that, the LVT held that they would have granted dispensation pursuant to the provisions of section 20ZA of the 1985 Act.

6. The appellant sought permission to appeal from the LVT on 10 August 2011. That application for permission was refused on the grounds that it was mere repetition of the appellant's case before the LVT and that the appellant simply did not agree with the LVT's decision.

7. The appellant renewed his application to the Upper Tribunal (Lands Chamber) pursuant to the provisions of section 175 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

8. Permission to appeal was granted by Her Honour Judge Alice Robinson on 30 January 2012, limiting the appeal to the following:

> "1. It is arguable that the LVT erred in law when concluding that a consultation notice (M111) sent two years before a later invalid notice (Q102) which related to a greater works contract and identified substantially lower estimated service charge costs was a valid notice for the purpose of section 20 of the LTA 1985 and the later works the subject of the invalid notice.
>
> 2. Further, when deciding to exercise its discretion to dispense with the consultation requirements of s.20 and concluding that the tenant had suffered no prejudice it is arguable that the LVT failed to have proper regard to the above facts or the tenant's arguments as to the reasonableness of the works the subject of the invalid notice."

9. The respondent submitted a respondent's notice seeking to cross-appeal with respect to the validity of the 2009 consultation notice and seeking, in the alternative, that there should be an order dispensing with that notice.

10. On 4 May 2012, George Bartlett QC, the former President, gave permission to cross appeal on whether:

> (1) there was a procedural irregularity that substantially prejudiced the respondent council through their having no opportunity to call evidence in relation to the arrangements made for the collation of observations and the forwarding of such observations to the respondent;
>
> (2) the LVT erred in determining that the 2009 notice was invalid because it invited observations to be sent to someone no longer involved in the project.

The former President made it clear, in granting permission, that the hearing before the Tribunal would be way of review and that any issues of fact would need to be remitted to the LVT.

The Issues

11. The matters subject to review on this appeal, and the order in which they need to be dealt with, are as follows:

> (i) Whether there was a procedural irregularity by the LVT raising the issue that the 2009 section 20 notice was invalid by reason of it including an address on the notice of a party no longer involved: an issue not raised by the appellant but by the LVT of its own motion;

(ii) Whether, in any event, the LVT erred in determining that by inviting observations to be sent to a party no longer involved, that made the 2009 notice invalid;

(iii) If the 2009 notice is invalid, did the LVT err in determining that the 2007 notice was valid;

(iv) Did the LVT err in determining that the notice requirements under section 20 should be dispensed with in any event under section 20ZA.

12. It was urged upon us by counsel for the respondent that if we determined that the requirements of section 20 of the 1985 Act should be dispensed with, then all other issues would fall away. We have come to the conclusion that it is necessary to first determine the other matters, in the order set out above.

Procedural Irregularity

13. The LVT determined that the 2009 notice was invalid as it had invited observations to be sent to someone who was no longer involved in the project, namely "The Project Manager at Fredricks, Hearl & Gray, 10 Penrhyn House, St Marks Hill, Surbiton, Surrey KT6 4PW".

14. The appellant had not raised that alleged irregularity in his application to the LVT and it was an issue that was raised for the first time at the hearing on 20 June 2011 by the LVT itself.

15. The respondent had, consequently, not been prepared for that issue and was thereby denied the opportunity to call any evidence with respect to any arrangements that were in place, or could have been put in place, to ensure that any observations sent to the address included on the notice were sent on to the respondent.

16. The Lands Chamber of the Upper Tribunal has recently had to deal with a number of cases where the LVT have taken issues which were not between the parties and made determinations where the parties have not been given the opportunity to deal with the issues raised, and have thereby been denied a fair hearing.

17. The difficulty was succinctly set out by His Honour Judge Mole QC in *Regent Management Ltd v Jones* [2010] UKUT 369 (LC) where he said (at paragraph 29):

> "The LVT is perfectly entitled, as an expert Tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it

> is a new point which the Tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

It is a matter of natural justice to give both parties an opportunity of making submissions and, if necessary, producing evidence necessary in order that the LVT can properly deal with a decision.

In *Birmingham City Council v Keddie & Hill* [2012] UKUT 323 (LC) His Honour Judge Nigel Gerald said (at paragraph 15):

> "Applications are commenced by the landlord or tenant issuing a *pro-forma* application form prescribed by the Residential Tribunal Property Service which requires that details of the questions relating to service charge expenditure requiring resolution by the LVT be set out. If they are not sufficiently set out, as is often the case, the LVT will at the pre-trial review order that the applicant serve a statement of case giving full particulars of precisely what it is in issue and why. The respondent will be ordered to serve a statement of case setting out its case to which the applicant will usually be given an opportunity to respond if he so wishes by serving a statement of case in reply.
>
> Those documents … set out the nature and scope of the issues in dispute. They operate to limit the issues in respect of which the parties must produce evidence in support of their respective cases. They also operate to define the issues in respect of which they seek resolution by the LVT. They therefore serve five functions. First, to identify the issues. Secondly, to enable to parties to know what issues they must address their evidence to. Thirdly, to vest the LVT with jurisdiction, and focus the LVT's attention on what needs to be resolved. Fourthly, setting the parameters of, and providing the tools within which, the LVT may case manage the application. Fifthly, by confining the issues requiring resolution to what is actually (as distinct from what might theoretically be) in dispute between the parties they will be assured economical and expeditious disposal of their dispute whilst also promoting efficient and economical use of judicial resources at the first instance and appellate levels."

18. In *Arrowdale Ltd and Coniston Court (North) Hove Ltd* [2007] RVR 39, the Lands Tribunal, the former President and Mr N J Rose FRICS, said (at paragraph 23):

> "It is entirely appropriate that, as an expert tribunal, a leasehold valuation tribunal should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly it must give reasons for its decision."

To that statement of law, His Honour Judge Reid QC added in *Westbourne Ltd v Spink* [2008] PCLCS 251 (at paragraph 12) that:

> "…an LVT must not reach a conclusion on the basis of a point or argument which has never been raised by the parties or put to the parties by the Tribunal."

19. The LVT had raised a point during the course of the hearing that had not troubled the appellant and was, therefore, not something that the respondent had opportunity to argue fully as a matter of law, and was given no opportunity to call evidence on the point. There was, therefore, a breach of natural justice and the decision is, for that reason, procedurally irregular. Further, to echo the former President in *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC) (at paragraph 13):

> "… it is in my view generally inappropriate for a tribunal to take on behalf of one side in what is a party and party dispute a purely technical point, by which I mean a point that does not go to the merits or justice of the case. …"

20. If this were the only issue before the Tribunal then we would be remitting the case to the LVT to determine this issue: giving the respondent the opportunity to call evidence and the appellant the opportunity to call evidence in rebuttal (if appropriate). However, it is not the only issue and it is also necessary to determine whether, the LVT was in any event in error by determining the notice was invalid because it invited observations to be sent to a party no longer involved.

Was the 2009 Notice Invalid?

21. The proposed major works were qualifying works for which a public notice was not required under the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the regulations"). Therefore Part 2 of Schedule 4 to the regulations applied. Regulation 1 of Part 2 provides:

> 1.(1) The landlord shall give notice in writing of his intention to carry out qualifying works –
>
> (a) to each tenant; and
>
> (b) where a recognised tenants' association represents some or all of the tenants, to the association.
>
> (2) The notice shall –
>
> (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
>
> (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
>
> (c) invite the making, in writing, of observations in relation to the proposed works; and
>
> (d) specify –
>
> (i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

22. The notice therefore requires the respondent to set out, in general terms, the works to be carried out and the reasons for those works; to invite comments, specifying the address to which observations may be sent; and to specify that there is a relevant period for sending those observations and to identify when that period ends.

23. If no address for observations were included on the notice then that would be an error in the notice. However, there is no requirement as to what the address must be (for example it does not specify that it must be the address of the landlord; the landlord's managing agent; or landlord's project manager). It is simply an address for service of the observations and such an address was provided.

24. It was, in our judgment, wrong for the LVT to determine that the provision of an address of a party no longer involved in the works made the notice invalid. Construction of the regulations does not permit such an interpretation, and the LVT did not have any evidence before it to suggest that any observations made by the appellant, or other consultees, would not reach the respondent.

25. The LVT was in error in concluding that the notice was invalid because it invited observations to be sent to someone no longer involved in the project.

26. The LVT ought to have determined the issue of fact raised before it – namely whether the 2009 notice had been served upon the appellant. We will deal below with the issue of whether there ought to have been a dispensation of the necessity to serve a notice pursuant to the provisions of section 20ZA of the 1985 Act.

Was the 2007 notice valid for the purpose of the 2009 works?

27. Having (wrongly) determined that the 2009 notice was invalid by reason of giving the address of a party no longer involved in the proposed works for the purpose of making observations, the LVT then proceeded to determine that the notice served upon the appellant on 25 July 2007 with respect to "the redecoration and repair of the exterior and common parts of Maclise, Millais, Mulready, Rossetti, Ruskin, Stubbs and Turner Houses" for Major Works Contract M111 was a valid notice for the purpose of the "Redecoration and repair of the exterior and the common parts of Rossetti, Ruskin, Stubbs and Turner Houses" for Major Works Contract Q102.

28. The appellant informed us in the course of oral submissions that the validity of the 2007 notice for the purpose of the 2009 works was not a matter that had been raised prior to the hearing on 20 June 2011. That submission was not something contradicted in the oral hearing before us, although it is a point mentioned in the skeleton argument of the respondent.

29. The issue of the validity of the 2007 notice was plainly not something that the appellant was going to raise either in his application or his statement of case: he was simply arguing that, as a matter of fact, the 2009 notice had not been served on him.

30. The respondent, in its statement of case to the LVT dated 6 May 2011, simply says as follows on the service of the notice of intention:

> "**Was the section 20 Notice of Intention dated 8 May 2008 (sic) served upon the Applicant?**
>
> 4. The Notice of Intention dated 8 May 2008 (sic) was hand delivered to the Applicant's premises and posted through his letterbox. A copy of the Notice is attached to this Statement of Case together with a delivery report prepared by the Respondent's Housing Officer, Shabana Begum which shows in respect of the Applicant's property at 3 Turner House a tick identifying that the Notice was delivered."

31. It does not seem to us surprising that the respondent did not set out in the respondent's notice that the 2007 notice was valid for the purpose of the 2009 works as it does not appear to be something the respondent was arguing for. In the statement of Annelie Sernevell, the Estate Director of the Millbank Estate Management Organisation, ("MEMO") dated 31 May 2010, put before the LVT, she says as follows:

> "I recall that in May 2009 major works consultation took place in respect of proposed works to the Estate. I am the principal officer managing the major works and oversee all aspects of the consultation, procurement, tendering and contract management of the works. I was aware following my review of the files that there had been a proposed major works scheme under Contract M111 and that a Section 20 Notice of Intention dated 25 July 2007 had been served upon leaseholders. At that stage the major works consisted of redecoration and repair of the exterior and common parts of seven blocks on the Estate including Turner House. I understand that such scheme did not proceed although subsequently it was reduced in scope by limiting the proposed works to only three blocks. I am aware that Section 20 Notice of Intention dated 25 July 2007 was served and I attach a copy to this witness statement together with a copy letter from Mr Jastrzembski to me dated 24 April 2010 in which he confirms in the second paragraph that he received the Notice dated 25 July 2007.
>
> I remember considering this matter and the reduced scope of works and asking whether a new Notice was to be served. I was informed that a new Notice was to be served although in my mind it need not have been served because the actual works to the blocks remain the same…"

This indicates that, while she considered the 2007 notice to be sufficient, she was directed to serve a further notice by an unspecified other person. Ms Muir, on behalf of the respondent, contended that the respondent was serving the 2009 notice as a "belt and braces" measure. We do not take that to be the effect of what is set out in Ms Sernevell's statement. It is clear that those directing Ms Sernevell did consider it to be a necessary step as we must assume that the respondent council would not unnecessarily expend resources in this way.

32. It does not appear that the respondent was seeking to contend, when going into the hearing before the LVT, that it did not matter whether the 2009 notice had been served or not, as the 2007 notice was valid for the purpose of the 2009 works. The remainder of the statement of Ms Sernevell (paragraphs 6 to 9) deal with service of the 2009 notice.

33. The validity of the 2007 notice for the purpose of the 2009 works only arose because the LVT took the point that the 2009 notice was invalid. We have already found that the LVT had erred in reaching that finding, and that the LVT thereby denied the respondent the right to deal properly with that point as it had been raised of the LVT's own motion without the respondent having the opportunity to either provide evidence or make full legal submissions on the matter. That was a breach of the respondent's right to natural justice, as we have set out above.

34. In the same way, the appellant could not have been expected to deal with the argument that the 2007 notice was a valid notice for the purpose of the 2009 works as that was not something being contended for by the respondent but raised by the LVT at the hearing. While the appellant acknowledged service of the 2007 notice, and there was evidence before the LVT that he confirmed receipt of the 2007 notice in his letter to the respondent dated 24 April 2010, he was not given the opportunity to call any other evidence with respect to why he would contend that the 2007 notice was not valid for the purpose of the 2009 works.

35. We have formed a clear impression from the submissions of the appellant before us that, had the appellant been aware that he needed to counter an argument that the 2007 notice was valid for the 2009 works, he would have been calling evidence to show how, as secretary of the Millbank Estates Residents' Association ("MERA"), he campaigned against the 2007 notice and that, according to him, it was his campaigning that led to the removal of Rossetti, Ruskin, Stubbs and Turner Houses from the original major works. We cannot judge whether the appellant is justified in the submissions he had made, as we are reviewing the decision of the LVT and not rehearing the matter. It does seem to us that the appellant's right to contest these points was removed and, as with the respondent, his right to natural justice interfered with.

36. We should state at this stage that, subsequent to hearing oral submissions on 21 May 2013, a satellite issue has arisen with respect to whether MERA was a recognised tenants' association. At the hearing, Ms Muir submitted that MERA was not a recognised tenants' association as the Millbank Estate, including Turner House, is managed on behalf of Westminster City Council by a Tenants' Management

Organisation (MEMO): a recognised tenants' association for the purposes of section 29 of the 1985 Act. The appellant failed to counter that submission at the hearing, but did so by way of a written communication after the hearing. That communication was referred to the respondent by the Tribunal and we have now had reasonably detailed written submissions by both the appellant and the respondent, and counter-submissions by the appellant.

37. In our judgment, whether MERA was a recognised tenants' association or not is not relevant to our determination. We are reviewing the decision of the LVT; we are not conducting a rehearing. It is not for us to determine these issues of fact. If it is necessary for a factual determination to be made as to whether MERA was or was not a recognised tenants' association (and we are not convinced that it is necessary), it will be necessary for evidence to be called and for there to be cross-examination of witnesses as there is a clear conflict of evidence of between the parties. That is not a matter for this Tribunal.

38. The only relevance of MERA is that the appellant contends that, as secretary of MERA, he was campaigning against the major works that were contained within the 2007 notice and that he was successful in that campaign. The respondent contends that the appellant had ample opportunity to produce evidence of representations or observations he made, whether as an individual or as secretary of MERA, both at the LVT and before this Tribunal, and he failed to do so.

39. Again, this Tribunal is reviewing the decision of the LVT; it is not rehearing the case. This is not the appropriate forum for an analysis of the evidence. In any event, it appears to us that the appellant has produced sufficient documentary evidence, and put forward sufficiently compelling submissions, to indicate that he did object to the works set out in the 2007 notice under the guise of being the secretary of MERA. Further, we find that by reason of the LVT raising the invalidity of the 2009 notice of its own motion in breach of the respondent's right to natural justice, the LVT also raised the issue of the validity of the 2007 notice of its own motion and thereby breached the appellant's right to natural justice as he was not, contrary to what is said in the letter dated 29 May 2013 from Judge & Priestley LLP on behalf of the respondent, given "ample opportunity to produce any evidence he had of any representations or observations he made" in relation to the 2007 works.

40. The principal finding of the LVT subject to appeal is that the 2007 notice was a valid notice for the purpose of the 2009 works. The respondent contends that the LVT was correct to come to that conclusion. The appellant contends that the 2007 notice was not valid for the 2009 works: it referred to the wrong contract, for the wrong properties and was two years out of date.

41. The respondent contends that the fact that the works were proposed for Turner House under contract Q102 rather than M111 did not affect the effectiveness of the notice of intention in any way as any observations made in respect of contract M111 would be relevant to contract Q102. We accept that the fact that the identification of the

contract is altered does not, in itself, invalidate the notice. In our judgment, whether the 2007 notice remains valid for the 2009 works is dependent upon a number of factors. What needs to be determined is whether regulation 1 of Part 2 of Schedule 4 to the regulations is satisfied by virtue of the 2007 notice.

42. The regulations only require the works to be described in general terms. It is contended by the respondent that the 2007 notice complies with this requirement as it describes the works as "Redecoration and repair of the exterior and the common parts". The difference between the two contracts is that the 2007 contract was for seven blocks, while the 2009 contract was for four blocks and while the general description of works to those four blocks is the same, it seems to us that the reduction of the extent of the works to be carried out (given the reduced number of blocks) means that the contract Q102 works were not described in the 2007 notice.

43. The respondent contends that any contractor nominated for contract M111 would have been invited for contract Q102. There is no evidence before us to support that contention. Given the time that passed between the two notices, and particularly in light of the change in the economic situation between 2007 and 2009, we cannot accept that the same contractors would necessarily have been asked to tender.

44. We are mindful of the fact that we are reviewing the decision of the LVT and not substituting our own decision. In *Daejan Investments Limited v Benson & Ors* (2010) P & CR 116, Carnwarth LJ (as he then was), sitting as a member of the Upper Tribunal (Lands Chamber), said (at paragraph 61):

> "… It is common ground that we can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led to a result which was clearly wrong."

The failure of the 2007 notice to correctly describe the extent of the works, by not accurately describing the property, has to be viewed in the context that two years passed between the serving of that notice and the proposal to carry out the 2009 works to the four blocks, including Turner House.

45. The respondent contends there is no time limit specified in the regulations between the date of the service of the notice of intention and the commencement of the works. The respondent places reliance upon *Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Company Ltd* [2011] UKUT 349 (LC) for support for the proposition that the passage of time of two years did not invalidate the notice. We did not find any assistance in that case which was considering the relevant provisions of the Commonhold and Leasehold Reform Act 2002 and Leasehold Valuation Tribunals (Procedure) Regulations 2003 with respect to the right to manage.

46. While we accept that there is no specified time limit for the service of the notice, there needs to be some consideration as to what is an appropriate time. If the respondent was correct in its contention that there is no time limit and, so long as a notice of intention was served at some point before the works commenced, the

provisions of the regulations would be satisfied, then a notice could (in principle) be served 10 or 20 years before the works were due to be carried out. One indication of the appropriate time period between service of the notice of intention and the works is the time specified for providing observations or suggestions for contractors. That is specified on the notice as being 30 days. While we do not suggest that the next step must be taken immediately after the expiry of those 30 days, it does give a useful indication of the relevant time periods for the work to be undertaken: months rather than years. It is obvious that the longer the period between the service of the notice of intention and the works, the more changes could have taken place which will impact the way in which a tenant will view the works. For example, there were considerable global economic changes in the two years between 2007 and 2009. Those global changes could have had an impact upon the individual's economic situation and the considerations that an individual might have could change significantly in that two year period.

47. In our judgment, the passage of time between 2007 and 2009, combined with the change in the works caused by the removal of three of the blocks from the contract, means that the LVT failed to properly balance the material factors and that its determination that the 2007 notice was valid for the purpose of the 2009 works was wrong.

Dispensation

48. Having determined that the LVT erred in allowing the respondent to rely upon the 2007 notice and had failed to determine the issue of fact between the parties (namely whether the 2009 notice had been served) while determining an issue that was not between the parties (namely whether the 2009 notice was invalid), it is necessary to consider whether the requirement to serve a notice of intention can properly be dispensed with by virtue of the provisions of section 20ZA of the 1985 Act.

49. Section 20ZA provides that:

> "(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

Consequently, it is necessary to determine whether it was "reasonable" to dispense with the requirement to serve a notice. If so, then the respondent would not need to establish that the 2009 notice was served on 8 May 2009 as it suggests.

50. The LVT found (at paragraph 38 of the decision) that they would have granted dispensation because:

> "the whole scheme operated by the respondent including tenant consultation meetings, invitations to join the contract evaluation panel etc is open and transparent and fully in keeping with the intention and spirit of the legislation and

should not be defeated by failure to clear all technical hurdles. We are also satisfied the applicant suffered no prejudice as he has never said he wished to nominate a contractor and while he has questioned the extent of the works he has not challenged the need for the respondent to carry out the works in accordance with its obligations under the lease."

51. In determining whether there should be dispensation of the consultation requirements, the principles that an LVT needs to take into account following the decision of the United Kingdom Supreme Court in *Daejan Investments Ltd v Benson & Ors* [2013] 1 WLR 854 are:

(1) whether, and if so to what extent, the tenant would relevantly suffer if an unconditional dispensation was granted. The word relevantly in this context refers to a disadvantage that the tenant would not have suffered if the consultation requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted;

(2) the factual burden is on the tenant to identify any relevant prejudice which he claims he would or might have suffered;

(3) once the tenant has shown a credible case for prejudice, the LVT should look to the 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 tenants fully for that prejudice;

(4) that it is not sensible or convenient to distinguish between a serious failing and a technical, minor or excusable oversight, save in relation to the prejudice it causes. The gravity of the landlord's failure to comply, the degree of its culpability, the nature of the landlord and the financial consequences of its failure to comply are not relevant considerations for the tribunal per se; their relevance will depend upon the prejudice which each such factor causes.

(5) that the tribunal could grant dispensation on such terms as it thought fit, providing that they were appropriate in their nature and effect, including terms as to costs.

52. The respondent contends that the appellant accepts that he received the 2007 notice and yet he did not make any observations with respect to the contents of that notice, that he did not nominate a contractor for the works and did not, therefore, suffer any prejudice as the 2007 notice referred to "Redecoration and repair of the exterior and the common parts" of Turner House and others. The appellant does not accept that he failed to make any comment. He has submitted to us that he did make comment with respect to the proposed 2007 works, as secretary of MERA. He says that he was very successful in that campaign against the 2007 works and that three of the blocks were, as a consequence, omitted from the M111 contract.

53. The appellant contends that had he received the 2009 notice then he would have done what he had done when he received the 2007 notice and that he would have called a meeting of MERA and organised a campaign of objection. He says that he would have

objected to any works being done at all until the council had discussed their proposals with MERA. He says that he would have sought guarantees about the costs of the works under the contract Q102 and would have distinguished between those works which were necessary to Turner House and those that were merely desirable.

54. The issue for us to determine is whether, on the basis that the appellant was not served with 2009 notice, that failure prejudiced him in a relevant way. *Daejan* made it clear that it is not appropriate to make a distinction between technical oversights and serious failings: the issue is whether the failure to serve the notice (a technical oversight) caused relevant prejudice to the appellant.

55. After careful consideration of all the matters in this case, we have come to the conclusion that the appellant did not suffer any relevant prejudice by reason of the failure to serve the initial 2009 notice.

56. The appellant was aware that major works were planned to be carried out on Turner House and he attended a consultation meeting on 23 July 2009 at which meeting he made observations with respect to the proposed works. The appellant says that he would have made other, and further, observations had he been in receipt of the 2009 notice but we do consider there is any evidence to support that contention. By letter dated 19 May 2010, when he finally received the notice of intention, the appellant set out the "observations which I would have made by 7/6/09 had the Notice been served or within a month of service (but prior to the Estimate)." He raised a number of issues with regard to the service of the notice; whether there was a reserve fund; the calculation based upon bed spaces; and why the estimated costs for Turner House exceeded more than one-quarter of the whole estimated costs. There was a response to his queries in a letter from the respondent dated 23 June 2010.

57. The appellant did not seek to raise any query with regard to the scope of the works or set out that the works were not necessary in his letter of May 2010. He could have raised such concerns, and nominated an alternative contractor, at any time and he attended the Consultation Meeting on 23 July 2009 at which he was given (together with the other residents) an opportunity to sit on the contract evaluation panel to consider which contractor should be chosen.

58. Even without the service of the 2009 notice, the respondents did consult with the appellant and he did have the opportunity to make observations on the proposed works and nominate a contractor – the very matters that the initial notice is designed to deal with. In the circumstances, we cannot find that the appellant suffered relevant prejudice as is set out in *Daejan* as he was not under a disadvantage that he would not have suffered had the consultation requirements been fully complied with. The appellant was, in our judgment, in the same position he would have been in had the consultation requirements been fully complied with.

Conclusion

59. Our conclusions are, therefore, that:

(i) there was a procedural irregularity by reason of the LVT raising a point about the validity of the 2009 notice which had not been raised by either party;

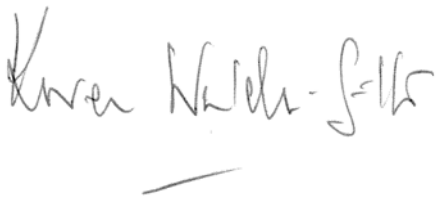
(ii) that the 2009 notice was not, in any event, invalid, as a result of it including a name for observations to be passed to who was someone no longer involved in the contract;

(iii) that the 2007 notice was not a valid notice for the purpose of the 2009 contract; but that

(iv) in all the circumstances of this matter, there was no relevant prejudice to the appellant so that the LVT did not err in determining that that 2009 notice be dispensed with pursuant to the provisions of section 20ZA of the 1985 Act.

60. The appeal is allowed in part (conclusion (iii)) but is refused in respect of the LVT's decision to make a dispensation under section 20ZA of the 1985 Act (conclusion (iv)). The cross-appeal is allowed (conclusions (i) and (ii)).

Dated: 20 June 2013



Her Honour Judge Walden-Smith

A J Trott FRICS
Member

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 92 (LC)
UTLC Case Number: LC-2021-327

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – SERVICE CHARGES – application for dispensation from consultation requirements in respect of works completed urgently – assessment of prejudice to leaseholders – appeal allowed – dispensation granted on conditions

AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MR CAMERON MARSHALL

Appellant

-and-

NORTHUMBERLAND & DURHAM PROPERTY TRUST LIMITED

Respondent

Kelvin Court,
40/42 Kensington Park Road,
London W11

Martin Rodger QC, Deputy Chamber President

16 February 2022

Royal Courts of Justice

Philip Marshall QC, instructed directly, for the appellant
Ms Kimberley Ziya, instructed by Guillaumes LLP, Solicitors, for the respondent

The following cases are referred to in this decision:

Aster Communities v Chapman [2021] EWCA Civ 660

Daejan Investments Ltd v Benson [2013] UKSC 14

Introduction

1. This appeal is against a decision of the First-Tier Tribunal, Property Chamber (the FTT) by which it granted the respondent landlord, Northumberland & Durham Property Trust Ltd, unconditional dispensation from the consultation requirements of section 20, Landlord and Tenant Act 1985 in respect of the replacement of two boilers and ancillary works at Kelvin Court, a block of 16 flats at 40/42 Kensington Park Road, London W11. The FTT granted the dispensation because it was satisfied that the respondent had started the consultation process and had kept the leaseholders of flats in the block informed until the works became sufficiently urgent that the respondent had had to carry them out without waiting for the consultation to be completed.

2. The appellant, Mr Cameron Marshall, is the leaseholder under a long lease of one of the flats in the block. His case is that he was not consulted by the respondent at all, and that dispensation ought to have been refused by the FTT in view of the prejudice caused to him by the respondent's failure to comply with the consultation requirements.

3. The respondent's appeal raises issues about the exercise of the statutory discretion to dispense with consultation in cases of urgency. Those issues were touched on by the Supreme Court in the leading case of *Daejan Investments Ltd v Benson* [2013] UKSC 14 (*"Daejan"*), and the FTT is frequently required to grapple with them.

4. At the hearing of the appeal the appellant was represented by Mr Philip Marshall QC, and the respondent was represented by Ms Kimberley Ziya. I am grateful to them both for their submissions.

The statutory provisions

5. Sections 18 to 23A, Landlord and Tenant Act 1985 ("the 1985 Act") comprise provisions intended to protect residential tenants from having to pay excessive, unreasonable, unexplained, or unexpected service charges. Sections 20 and 20ZA provide protection by requiring landlords (and others entitled to levy service charges) to consult with tenants before they incur the costs of certain qualifying works or enter into certain long term agreements for the provision of services for which a service charge will be payable.

6. The consultation requirements apply if the costs or estimated costs to be incurred in connection with the matters for which the service charge is payable exceed an "appropriate amount" set by regulations. The appropriate amount is the sum which results in the service charge contribution towards the cost of the relevant works required of any tenant being more than £250 (regulation 6, Service Charges (Consultation Requirements) (England) Regulations 2003) ("the 2003 Regulations"). For Kelvin Court, a block of 16 flats where each tenant contributes an equal proportion of the cost of works, the appropriate amount is therefore £4,000.

7. By sub-sections 20(1) and 21(6) and regulation 6 of the 2003 Regulations a landlord failing to comply with the consultation requirements will be unable to recover more than £250 from each of its tenants as their contribution towards the costs of the relevant works unless it

obtains a dispensation from the "appropriate tribunal". In England, the "appropriate tribunal" is the FTT.

8. The basis on which the appropriate tribunal is to exercise the power to dispense with the consultation requirements is provided for by section 20ZA(1), which states:

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

9. The consultation requirements themselves are prescribed by the 2003 Regulations (section 20ZA(4)). The requirements relevant to this appeal are in Part 2 of Schedule 4. Their effect was summarised by Lord Neuberger PSC in *Daejan,* at [12], as follows:

Stage 1: Notice of intention to do the works

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

Stage 2: Estimates

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

Stage 3: Notices about Estimates

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

Stage 4: Notification of reasons

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

Daejan and other guidance on exercising the power to dispense with consultation

10. In *Daejan*, the Supreme Court considered the proper approach to an application for dispensation under section 20ZA. By a majority the Court concluded that securing compliance with the statutory consultation requirements was not an end in itself. Sections

20 and 20ZA were intended to reinforce, and to give practical effect to the twin purposes of section 19 which were to ensure that tenants are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.

11. Lord Neuberger gave the only speech in support of the majority view, with which Lord Clarke and Lord Sumption JJSC agreed. He pointed out, at [40], that section 20ZA provides little guidance on how the dispensing jurisdiction is to be exercised, other than that the tribunal must be "satisfied that it is reasonable to do so". He continued, at [41]:

> "However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."

12. Having identified the purpose of the consultation provisions as being the protection of tenants from (i) paying for inappropriate works or (ii) paying more than would be appropriate, Lord Neuberger explained, at [44]-[45], that the issue on which tribunals should focus when determining an application under section 20ZA(1) was "the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements". If "the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements" dispensation should normally be granted, because, "in such a case the tenants would be in precisely the position that the legislation intended them to be – i.e. as if the requirements had been complied with".

13. Lord Neuberger considered, at [46]-[47], that it would not be right to focus on the seriousness of the breach of the consultation requirements; the only relevance of the extent of the landlord's oversight was "in relation to the prejudice it causes". The overarching question was not whether the landlord had acted reasonably but was whether the tribunal was satisfied that it was reasonable to dispense with compliance.

14. In assessing the prejudice to the tenants if dispensation was granted Lord Neuberger explained, at [65], that it was necessary to take account only of the sort of prejudice which section 20 was intended to protect against:

> "… the only disadvantage of which they could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted."

15. The burden of identifying relevant prejudice would fall on the tenants, but this should not give rise to great difficulties because, as Lord Neuberger explained at [67], "the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically" (at that time the appropriate tribunal was the LVT). He continued, at [68]:

> "The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it."

16. Lord Neuberger considered the issue of urgency when discussing whether a tribunal must simply choose whether to dispense with the consultation requirements or to refuse to do so, or whether it could instead grant a dispensation on conditions. He concluded that the jurisdiction could be exercised on conditions, and said this, at [56]:

> "More detailed consideration of the circumstances in which the jurisdiction can be invoked confirms this conclusion. It is clear that a landlord may ask for a dispensation in advance. The most obvious cases would be where it was necessary to carry out some works very urgently, or where it only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the requirements on terms which required the landlord, for instance, (i) to convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) 5 days instead of 30 days for the tenants to reply."

17. One such condition of dispensation could be to require that the landlord compensate the tenants for any costs they may have incurred in connection with the application under section 20ZA. At [64], Lord Neuberger considered that a landlord seeking dispensation was in a similar position to a party seeking relief from forfeiture, in that they were "claiming what can be characterised as an indulgence from a tribunal at the expense of another party":

> "Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence."

18. Summarising his conclusions, at [71], Lord Neuberger said that:

> "Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as

> service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the requirements have been satisfied, and they will not be getting something of a windfall."

19. Since the FTT issued its decision in this case further relevant guidance on the operation of sections 20 and 20ZA has been provided by the Court of Appeal in *Aster Communities v Chapman* [2021] EWCA Civ 660. In particular, at [44], Newey LJ rejected an argument on behalf of a landlord seeking dispensation that each tenant should be required to show how they would have acted differently if proper consultation had taken place:

> "The consultation for which the 2003 Regulations provide is a group process in which a landlord must supply every tenant with notice of their intention to carry out works and a paragraph (b) statement including, among other things, a summary of observations made by other tenants. More than that, a landlord seeks dispensation against tenants generally. If all tenants suffer prejudice because a defect in the consultation process meant that one of their number did not persuade the landlord to limit the scope or cost of works in some respect, I cannot see why the FTT should be unable to make dispensation conditional on every tenant being compensated. The reduction in the scope or cost of works would have accrued to the benefit of each of them, and so, if dispensation is to be granted against them all, the totality of the prejudice should be addressed."

The facts

20. The leases of flats at Kelvin Court are in a standard form and include, at clause 3(f), a covenant by the landlord to use its best endeavours to provide hot water for heating to the flats from October to April each year and to provide a reasonable supply of hot water for domestic use throughout the year, in each case through the existing apparatus and hot water system. The landlord is entitled to recover from each tenant 7% of the expenses and outgoings identified in the third schedule, amongst which is the expense of periodically inspecting, maintaining, repairing and where necessary replacing the whole of the boilers and other plant and machinery for the supply of hot water to the building.

21. In 2009 the respondent refurbished the main boiler plant room serving the building, replacing the boilers, pumps, pipework and controls. Some elements of earlier installations, probably dating from the 1960s or 1970s, remained. The new installation consisted of three gas fired central heating boilers with a combined maximum heat output of 300kW.

22. In January 2019 the respondent appointed engineering consultants, Integrated Design Associates Limited ("IDA"), to advise following a failure of the heating and hot water system. IDA delivered a comprehensive condition survey and recommendations on 6 February 2019. They reported that only boiler No. 3 was fully operational, and that the master boiler, No. 1, was operating at half capacity and boiler No. 2 was not operating at all. Only 150 kW of capacity was available, which was 50% of the maximum design capacity and less than was required to support the full load of the heating installations. IDA also advised that, contrary to the manufacturers' specifications, the three boilers had been

installed and operated with an open vent; this had caused internal corrosion on the heat exchangers and leaks in the system resulting in power supply failures. The damage was irreversible and all three boilers would need to be replaced. IDA also recommended that the plant for generating domestic hot water be replaced as it dated from the 1960s and presented a legionella risk.

23. IDA suggested that major works, including replacement of all three boilers, be undertaken at the earliest opportunity as the existing system could fail without warning. In the short term boiler No. 2 should be replaced with an equivalent model to maintain heating and hot water until consultation could be undertaken regarding longer term works to replace the remaining plant (including both remaining boilers). IDA suggested that the first phase could be completed by the end of April 2019 if the work was authorised immediately and consultation with tenants was not required. The second more substantial phase of work could follow during the summer months. In an indicative programme of works IDA allowed twenty-eight days for consultation on the second phase of works which it suggested could be completed by 14 August 2019. The suggested budget cost for the phase 1 work was £28,800, and for the phase 2 work it was £86,152, plus IDA's fees of 11% of the cost of works.

24. If the respondent wished to be sure of recovering the cost of the works through the service charge IDA's indicative timetable was unrealistic. The minimum consultation period for each phase of the works was three months, not twenty-eight days, so even if the recommendation was adopted immediately and the design and consultation on both phases proceeded in tandem (which was not what IDA suggested) the full programme of work could not have been completed before the beginning of winter. The best that could have been achieved without an application for dispensation from consultation was for phase 1 to be completed in 2019 with phase 2 to follow during the summer of 2020.

25. Although Mr Marshall QC suggested that no steps were taken until a second boiler failed entirely in June 2019 the documents suggest that some immediate remedial work was undertaken and that Ms Brindell of D&G Block Management ("D&G"), the respondent's managing agent, sought two quotes for the phase 1 works in March 2019. One contractor responded with a quote which was close to IDA's budget figure. Statutory consultation was undertaken in July and September by which time two more tenders had been obtained. A new 100 Kw Ideal Evomax boiler was supplied and installed by the lowest tenderer, N. Carr Engineering Ltd ("NCE"), in November 2019 at a cost of £6,916 plus VAT using a less expensive boiler than originally specified.

26. The appellant completed the purchase of the lease of his flat on 20 December 2019, after the phase 1 work had been carried out. Pre-contract enquiries had previously been made on his behalf and were answered by D&G. In response to a question about section 20 works proposed within the next 2 years he was informed that remedial boiler repairs were due to take place, that there was £20,000 in a reserve fund for major works, and that any additional funds which were required would be collected under the terms of the lease. Copies of the section 20 consultation notices which had previously been served were said to be enclosed with the response. Mr Marshall QC suggested that the information provided by D&G was misleading or incomplete, but I do not think that is a fair criticism. Work to the boilers was already in train when the response was given on 14 October, and further work was

anticipated. The section 20 notices confirmed the respondent's intention to replace all three boilers in two phases.

27. Notice of the appellant's acquisition of the lease was given to D&G on 7 January 2020. Regrettably the agents did not act on that information as they should have done by adding the appellant to future communications intended for leaseholders. Whether because of some direction from their client, or because of a misconception of their own, the agents believed they could not or should not amend their own records to note that the appellant was now the leaseholder until the respondent had approved or acknowledged the assignment of the lease, despite the fact that the assignment was not conditional on any such approval. That error was compounded by the respondent's own delay in acknowledging receipt of the notice of transfer. On 22 January the respondent requested a registration fee of £150 which the appellant refused to pay because the figure specified in the lease was only £10. It was not until 24 February that D&G received a copy of the notice of transfer receipted by their own client and felt able to begin dealing with the appellant. Even then the appellant's name and contact details were not added to the agent's database and he was not finally included as an addressee in emails intended for all leaseholders until 6 April.

28. Important information was communicated to the other tenants in the building before the appellant's interest was finally recognised. D&G notified leaseholders other than the appellant by email on 27 January that the two original boilers were now to be replaced. On 19 February a stage 1 consultation notice was served. Observations on the proposal to install new boilers and associated works and contractor nominations were invited by 25 March. Access to individual flats was also sought to enable chemical disinfection of hot and cold-water pipework to mitigate the risk of bacterial growth associated with inadequate hot water temperature.

29. On 20 February, the day after the stage 1 consultation notice was given, NCE were called to the building to carry out emergency repairs. They found that wiring associated with the master boiler No.1 had burnt out causing the controls on the remaining boilers to be disabled. Boiler No.1 was decommissioned and made safe by the engineers. The only operational boiler providing hot water and heating was now the new boiler installed in 2019.

30. On 21 February IDA advised the respondent that the situation was critical as limited heating was being provided and there was now no backup for the new boiler in the event that it failed. They recommended that the full refurbishment of the plant be pushed forward.

31. As the supply of hot water to the building became more tepid the presence of legionella bacteria was detected on 27 February. On 17 March Ms Brindell sent an email to all tenants, other than the appellant, informing them that to improve water quality a second new boiler was to be installed urgently.

32. In an email to all leaseholders on 3 April Ms Brindell referred to the ongoing section 20 consultation exercise and explained that it was no longer possible to delay placing a contract for a period of months. The work had been simplified and a cost proposal had been provided by "the regular boiler engineers". This was a reference to a quotation provided by NCE on 27 March 2020 to decommission the two remaining original boilers and install a single new

boiler, linking it to the 2019 boiler, at a cost of £15,169 plus VAT. Tenants were informed that the respondent's consultants had advised that the quote was reasonable and competitive and that the scope of the works was appropriate. Installation of the new boiler would commence on 13 April.

33. A formal stage 3 consultation notice was attached to Ms Brindell's email of 3 April but she explained that it was sent "as a matter of course" and that the respondent intended to apply to the FTT for dispensation. The notice stated that no contractor nominations had been received and that the respondent considered the works to be necessary to avoid the total failure of the boiler equipment, to mitigate the risk of legionella and fire and to ensure a continued supply of heating and hot water. The notice was in a standard form and invited observations on the tender by 8 May, although it was clear from the body of the email that the work would have been completed by then.

34. On 6 April Ms Brindell sent a further email to all leaseholders, attaching the same material and suggesting that due to warmer weather then being experienced the central heating could be turned off to improve the supply of hot water. There is a dispute whether this email was sent to Mr Marshall QC (who acted as point of contact for his son in all dealings concerning the flat). The FTT found that it had been sent, and the copy of the email provided by D&G shows Mr Marshall as one of the addressees. Mr Marshall says he did not receive it (although it is possible that it was diverted to a spam or junk folder as it was sent to him at his professional address as one of a number of recipients).

35. Mr Marshall QC first became aware of the communications about the boiler replacement works on 15 April when he received a "dear leaseholder" email from Ms Brindell confirming that the work had commenced. His almost immediate reply confirms that he had had no previous notice and cannot therefore have read the email of 6 April which had been addressed to him at the same address. He expressed himself to be extremely surprised and disappointed that none of the emails which he could now see in a chain going back to 27 January had previously been sent to him.

36. On 22 April Mr Marshall QC requested copies from D&G of the advice provided by IDA and others regarding the repair and replacement of the boilers; the scope of works sent out; the quotes received; and correspondence with NCE. Mr Marshall is correct to say that his request was ignored when Ms Brindell responded to his complaint and that it required a number of further requests and applications to the FTT before the material was disclosed.

The application for dispensation

37. On 18 June 2020 the respondent applied to the FTT pursuant to s.20ZA of the 1985 Act for a dispensation from the consultation requirements in respect of the works carried out in April.

38. In his response filed on 22 October 2020 the appellant opposed the application and requested disclosure of the material he had first asked for in April. He asked again on 29 October. On 10 November the FTT directed that it be produced. Some, but not all, of the material was provided on 18 November and it was only then that Mr Marshall QC had access to the report

prepared by IDA in February 2019 and other material relating to the quote submitted by NCE and comments made on it by IDA. At the request of the appellant a further order was made on 15 December and additional documents were then provided on 4 January 2021.

39. The explanation given by the respondent for its lack of transparency when asked to disclose documents was that the statutory consultation requirements did not require the disclosure of advice from professional consultants. That rather misses the point. The work had been carried out without the statutory consultation procedure having been complied with; the respondent was therefore in the position of a party claiming an indulgence, as Lord Neuberger put it in *Daejan*, and a more cooperative approach was called for.

40. Mr Marshall QC asked that the application for dispensation be considered at a hearing, and the FTT agreed. Apparently in response to this direction the respondent notified the tribunal that it no longer sought any relief against the appellant and that it was prepared to limit the service charge recovery from him to £250. It asked that the application be determined on paper and that dispensation be granted against all other leaseholders. The FTT correctly doubted that it could make such an order, although it later suggested (again correctly) that the parties were free to agree the terms on which the appellant would withdraw his objection.

41. Mr Marshall QC welcomed the respondent's proposal but in a supplementary statement of case filed on 27 November he asked that any dispensation granted should be conditional on the payment of costs incurred in responding to the application. The total sum incurred was said to be £2,200 plus VAT. This was later confirmed in evidence by the appellant in March 2021 when he explained that his father had been retained to act for him and was instructed by his solicitors. He exhibited a fee note which confirmed Mr Marshall QC's fees which by that stage had reached £5,640 (including VAT) and which he explained he was liable to pay.

42. The respondent's response to the appellant's original objection to dispensation pointed out that he had failed to identify any prejudice which he could be said to have suffered as a result of the failure of consultation. To meet that point the appellant filed additional evidence exhibiting advice he had received on 26 January 2021 from Mr Jan Wurszt, a director of Green Flame London, a firm of heating engineers. Having visited the site with Mr Carr of NCE, Mr Wurszt took issue with the scope, cost and quality of the works which NCE had carried out. I will refer to his criticisms in more detail later in this decision. In a third and final statement the appellant said that Green Flame had confirmed to him that they "could have attended to do the required work at short notice in early April 2020 without difficulty".

43. Green Flame's letter of 26 January 2021 was shown by the respondent to NCE, who responded in writing on 9 February. I will refer to this response in greater detail later but, in summary, Mr Carr explained that "there was a lot more work involved in fitting the second boiler due to the electrical and mechanical issues from the existing plant." All the work had been inspected by IDA and no issues had been reported.

44. By the time the application was heard by the FTT a further five leaseholders supported the position taken by the appellant, although none filed any evidence or made a positive case of their own.

The FTT's decision

45. In its decision the FTT first recorded the arguments presented by each party, interspersed with comments of its own. Some of those comments are relevant to the appellant's grounds of appeal.

46. At [18] to [20] of its decision the FTT referred to the respondent's offer partially to withdraw the application and to limit the appellant's contribution to the boiler works to £250. The FTT said that it was surprised that the matter had continued notwithstanding this "very generous gesture of goodwill by the applicant" and suggested "this case could have and indeed should have been resolved at the end of November 2020".

47. Referring to Green Flame's criticism of the design and cost of the work, the FTT pointed out at [23] that neither party had sought permission to rely on expert evidence. The appellant's argument that he had been prejudiced by the failure of consultation was "a new argument as far as the tribunal is concerned" and he "had in effect responded to criticisms of his failure to identify prejudice in his original written objection by using largely self-serving evidence." In any event, the FTT went on, the work had been carried out at the height of the coronavirus pandemic and while the leaseholders were not given the opportunity to seek other contractors to quote, "the position in reality was that it was very difficult to get anybody to quote".

48. The FTT then quoted paragraphs 42 to 74 of the speech of Lord Neuberger PSC in *Daejan*, verbatim and without commentary. It reached its own conclusion at [36] to [44].

49. The FTT first said that it could deal with the matter "in short order" because it had no doubt what the proper decision should be, namely:

> "The proper decision is that the applicants should be given dispensation unconditionally. The reason for this is the urgency of the situation that the applicants found themselves in in March 2020. They were planning to carry out a properly consulted programme of boiler replacements in the building. This was notified to Cameron Marshall before he purchased albeit in short form. The other leaseholders were notified of these proposals and indeed the consultation process had started."

50. The fact that Mr Marshall had not been identified as a new leaseholder and had not been consulted until 6 April was regrettable:

> "However, this cannot found an objection to dispensation. … It cannot be the case that one individual leaseholder can seek to object to this dispensation as a result of the fact that in his individual case he did not receive the relevant early-stage consultation letters. This would be entirely impractical to manage. *Daejan* did not envisage this situation neither did the other case [a reference to the decision of this Tribunal in *Aster Communities v Chapman* which had not yet been considered by the Court of Appeal]."

51. As for the appellant's argument about prejudice:

> "… it fails to engage with the urgency of the situation that faced the applicants at the relevant time…. The applicants were not simply facing the problems associated with unhappy leaseholders who had no heating and hot water they were also facing very real risks as a result of Legionella and a fire risk. Notwithstanding the urgency of the situation the applicants sought to keep the leaseholders informed…. Indeed, they had started the consultation process and the tribunal has found that the statement of estimates was sent to Mr Marshall QC on 6 April 2020. In the face of this urgent situation it is fanciful to suggest that the applicants should have done any more than what they did. Even if Cameron Marshall had had the opportunity to put forward Green Flame as a contractor and even if this would perhaps have affected the ultimate cost of the work this ignores the fact that by March the situation had changed and had become extremely urgent such that the applicants had to act in the way that any reasonable landlord would have acted."

52. The suggestion that dispensation should be conditional was also dismissed:

> "There is no need to impose conditions on the applicants in return for dispensation because they have effectively complied with the sort of conditions that the tribunal might impose i.e. starting the consultation process and keeping the leaseholders informed."

53. The FTT subsequently refused to grant permission to appeal. In its reasons for refusal it made additional observations on the evidence which are relied on by the appellant. In particular, it said this:

> "Further the respondent appears to be acting under the misguided impression that if the full consultation process had taken place, Green Flame would have carried out the work within a short period of time. That of course ignores the fact that the consultation process itself would have taken time and Green Flame would not have been able to carry out the work immediately without dispensation. In any event the evidence from Green Flame was self-serving. It was challenged by the contractor used by the applicant because it was critical of their own professional expertise. Green Flame were seeking to be appointed and had much to gain from being critical."

The grounds of appeal

54. The appellant was granted permission to appeal on fourteen separate grounds. On examination, some of these grounds are trivial or inconsequential, but others go directly to the approach adopted by the FTT, which is said to have been inconsistent with both *Daejan* and *Aster Communities*, and to its appreciation and treatment of the evidence. Rather than list the grounds of appeal I will first identify those which appear to me to be determinative of the appeal.

55. The appellant's first ground of appeal was that the FTT had made a fundamental error in not focussing on the issue of prejudice to the leaseholders. Rather than asking how far the leaseholders were prejudiced by the landlord's failure to comply with the consultation requirements as *Daejan* required, the FTT had determined that a dispensation should be granted because, in view of the urgency of the situation, the landlord had acted reasonably. It had, in effect, applied the approach which the Supreme Court in *Daejan* had decided was wrong in principle. Criticism was also made in the appellant's sixth and seventh grounds of appeal of the approach taken by the FTT to the issue of urgency.

56. The appellant's third ground of appeal was that the FTT had been wrong in principle to approach the application on the basis that failure to consult one leaseholder could not be a sufficient reason for refusing a dispensation. The Court of Appeal in *Aster Communities* had concluded that statutory consultation is a "group process" and that dispensation must be sought against tenants generally. Each tenant was entitled to rely on the possibility that if another tenant had been properly consulted the scope or cost of the works might have been limited.

57. The appellant's fourth and fifth grounds of appeal challenged the FTT's consideration of his case on prejudice. Rather than considering whether the leaseholders had put forward "a credible case of prejudice" and, if they had, then adopting the sympathetic approach indicated by Lord Neuberger in *Daejan* by "resolving in their favour any doubts as to whether the works would have cost less … if the tenants had been given a proper opportunity to make their points", the FTT had been positively unsympathetic and, in particular, had been dismissive of the evidence of Green Flame on unjustified procedural grounds and for reasons of fact which simply misunderstood the sequence of events and were wrong.

58. In response to these criticisms of the FTT's approach Ms Ziya submitted on behalf of the respondent, essentially, that the FTT had properly directed itself as to the correct approach and had been entitled to reach the conclusions it did on the evidence. In particular, it had referred throughout its account of the parties' submissions to the issue of prejudice. As for *Aster Communities* the FTT had not dismissed the possibility that prejudice shown by one leaseholder may be sufficient to justify a refusal of a dispensation applicable to all leaseholders, which was the point considered by the Court of Appeal. The FTT had decided that the appellant had not suffered any prejudice. As an expert tribunal it had been entitled critically to evaluate the material put before it and to conclude that it preferred the evidence relied on by the respondent.

Discussion

59. I have no doubt that the approach taken by the FTT was wrong in principle in three important respects.

60. The FTT's reasoning is contained in summary form at [36], which I have quoted in full in [49] above. It consists of three strands. First, and most importantly, the FTT considered that unconditional dispensation should be granted because of the urgency of the situation in which the respondent had found itself in March 2020. Secondly, the

respondent had intended to carry out a proper consultation exercise and the appellant had been made aware of its intention to replace the boilers before he purchased his lease. And thirdly, the other leaseholders had been notified of the proposals and the consultation exercise had begun. These three points were restated in the following paragraphs along with a number of other points, but none of those seems to me to have contributed to the reasoning underlying the FTT's "short order" determination at [36].

61. The question of prejudice to the leaseholders is missing from the FTT's analysis at [36]. Nor is it mentioned in the subsequent paragraphs. There is no doubt that the FTT was aware that prejudice was an important issue which it ought to consider as it is referred to in its explanation of each party's case. But despite recording the parties' submissions and repeating almost a third of the leading judgment in *Daejan,* at no point in the decision did the FTT formulate any direction for itself or identify in its own words the issues it needed to address in order to determine this case. Had it done so it would necessarily have included the issue of prejudice.

62. The FTT did not systematically identify the steps which the respondent had taken and those which it had omitted and for which it required dispensation. It did not ask itself in terms what was the consequence of those steps not having been complied with. It did not say whether it considered the appellant or any other leaseholder had been caused prejudice by the failure of consultation. Each of these is a serious omission. In this Tribunal's decision in *Aster Communities* ([2020] UKUT 177 (LC)) at [17], HH Judge Bridge explained that, after *Daejan*: "The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice". I agree with Mr Marshall QC's submission that the FTT did not adopt that approach.

63. The FTT's focus was on the urgency of the situation faced by the landlord. It clearly considered, as it said at [39], that by March "the situation had changed and had become extremely urgent such that the applicants had to act in the way that any responsible landlord would have acted". It may have considered this extreme urgency negated any prejudice which might have been caused.

64. Mr Marshall QC submitted that an absence of prejudice cannot be assumed simply because there is a need to undertake work urgently (by which I mean within too short a period to allow the full statutory procedure to be followed). I agree. A proper assessment is required of the consequences of failing to take the particular steps which have been omitted. It must of course be recognised that the landlord is likely to be under contractual or regulatory obligations to provide an essential service or to carry out works to make premises or service installations safe, as it was in this case. But such obligations are part of the background to the whole of the statutory regulation of service charges and cannot be a reason for disregarding the safeguards provided for leaseholders or granting blanket dispensation simply because work was urgent. If in this case the FTT concluded that any possible prejudice was negated by the need to carry out works urgently, it did not say so. But even if it is assumed that that was the FTT's unstated conclusion, I do not think it was in a position to make such an assessment, because it had not first considered what prejudice may have been caused or what, if anything could now be done to mitigate it.

65. I am satisfied that for these reasons the appellant is entitled to succeed on his first ground of appeal.

66. The second strand of the FTT's reasoning, after urgency, was that the respondent had intended to carry out a proper consultation exercise and the appellant had been made aware of its intention to replace the boilers before he purchased his lease. The first of those points refers to the stage 1 notice of intention given to leaseholders other than the appellant on 19 February 2020 (covering the whole of the intended summer programme of works) and possibly also to the notice of NCE's estimate (for more limited work) sent to all leaseholders on 3 April 2020; the second refers to the information provided to the appellant in answer to pre-contract enquiries given in October 2019.

67. The FTT obviously placed some weight on the fact that consultation had already begun. The only passage from *Daejan* which it identified as being of particular significance was at [56], where Lord Neuberger said that the most obvious example of a case where a landlord may need to ask for dispensation in advance was where it was necessary to carry out some works very urgently. In such a case the FTT could impose conditions reducing the statutory consultation periods as a condition of dispensation. That, the FTT considered, was effectively what the landlord had done by beginning and then aborting the consultation. I do not think that is a helpful way of analysing what happened in this case. The respondent did not make an urgent application to the FTT, as it could have done after Legionella was discovered in the period between 17 March, when leaseholders were told that it had decided to install one boiler urgently ahead of the main works to be carried out in the summer, and 3 April when the decision to proceed with NCE's quote appears to have been taken. It is not helpful to assume what directions the FTT might have given, or what conditions it might have imposed, when it was not asked. Moreover the suggestion that the respondent had already followed the sort of steps which the FTT might have laid down as a condition of granting dispensation on an expedited basis overlooks the fact that, whatever information had been supplied to other leaseholders, the appellant was not informed of the need for urgent work until, at the earliest, 6 April 2020, by which time it was too late for him to influence the course of events.

68. In view of the importance it placed on the fact that consultation had commenced before the need for urgency was appreciated, the FTT seems seriously to have underestimated the significance of the respondent's failure to include the appellant as one of the recipients of the stage 1 notice of intention sent on 19 February 2020. While I do not agree with Mr Marshall's complaint that the answers to pre-contract enquiries were misleading, I do agree that they are irrelevant to the issues in the respondent's application for dispensation. They did not describe the scope of the works in any detail and they gave no timescale other than that further work to the boilers was anticipated within two years. They were not in any sense a substitute for statutory consultation and they did nothing to mitigate any prejudice caused by its absence.

69. The stage 1 notice would have been a very important document if it had been sent to all leaseholders, especially if none of them had taken the opportunity to nominate a contractor by 25 March. But it can be of little significance in view of the respondent's refusal at that time to add the appellant to the list of those who needed to be consulted. The FTT needed to assess the prejudice caused by the steps which the respondent failed

to take (including its failure to inform the appellant); what it did instead was to award marks for the limited steps which the respondent did take.

70. *Aster Communities* was not a case in which only one leaseholder was left out of a consultation, or where, as in this case, different leaseholders were consulted to different extents. The decision of the Court of Appeal nevertheless emphasises the importance of giving every leaseholder the chance to have their views taken into account. The FTT had no opportunity to consider the Court of Appeal's decision (which had not yet been published) but its view, at [37], that the failure to consult one leaseholder "cannot found an objection to dispensation" is inconsistent with *Aster Communities* and represents a second error of principle on which the appeal must succeed.

71. The final ground of appeal which it is necessary to consider is the appellant's complaint that the FTT effectively ignored the views expressed by Mr Wurstz of Green Flame about the extent, cost and quality of the work undertaken by NCE. There seems little doubt that the FTT did not give weight to that material, because when it refused permission to appeal it said specifically that "evidence from either Green Flame or N Carr was not a matter that swayed the tribunal in any great direction".

72. The FTT gave a number of reasons for not attending more closely to the debate between Green Flame and NCE. First, it said that neither party had permission to rely on expert opinion evidence (permission to rely on such evidence is required by rule 19(2) of the FTT's procedural rules). The FTT's directions given on 2 October 2020 assumed that the application would be determined on paper, without a hearing, and it gave no direction for exchanges of evidence and no guidance to either party if they wished to refer in their submissions to advice they had received from experts. When the FTT later decided that the application should be determined at a hearing it gave no additional directions. Both parties had notice of the material on which the other wished to rely and there was no good reason why the FTT could not have dispensed with the formal requirement for permission or treated the evidence as evidence of fact (for example, as evidence of what Green Flame might have charged to do the same work).

73. The FTT's second reason for disregarding the views expressed by Mr Wurstz was that the evidence was "self-serving". It used that description in its main decision, at [23], and in its refusal of permission to appeal it explained what it had meant, namely, that "Green Flame were seeking to be appointed and had much to gain from being critical." That explanation was mistaken. The source of the FTT's misunderstanding is probably Green Flame's own letter of 26 January 2021, which contains an error in the narrative of that company's involvement; it is said that Mr Wurstz attended at Kelvin Court on 12 January 2020 to inspect the plant room, whereas he in fact attended a year later, on 12 January 2021. Thus, Green Flame inspected the boiler room and prepared their comments nine months after the work had been completed in April 2020. Its letter was a commentary on the work which had already been done and not an alternative tender. The FTT's characterisation of Mr Wurstz's views as self-serving was therefore not justified.

74. There is accordingly considerable force in the criticism made by Mr Marshall QC of the approach taken by the FTT to the evidence relied on by the appellant to demonstrate

prejudice. Applying the approach taken in Daejan, it was for the appellant to demonstrate "a credible case of prejudice". He sought to do so relying on a document which the FTT dismissed without proper justification. While the weight to be given to any evidence is a matter for the fact finding tribunal, an appellate tribunal can interfere with its conclusions if they have been arrived at based on a fundamental misunderstanding of the facts, as appears to have occurred here in respect of Mr Wurstz's letter. In my judgment the appellant is therefore also entitled to succeed on his fourth and fifth grounds of appeal.

75. In view of the conclusions I have reached so far it is not necessary for me to address the remaining grounds of appeal. For the reasons I have given I allow the appeal and set aside the FTT's decision.

76. Neither party suggested that, if I were to allow the appeal, I should remit the application for dispensation to the FTT for further consideration. The total sum in issue is modest (the difference between the £4,000 the respondent could collect without dispensation and the VAT inclusive cost of the works is less than £15,000) and is likely already to be exceeded by the costs incurred in the proceedings. The appellant does not oppose the grant of dispensation on appropriate terms and both parties made submissions in the course of the appeal on the conditions which could be imposed. Where, on an appeal, the Tribunal sets aside a decision of the FTT, section 12 of the Tribunals, Courts and Enforcement Act 2007 gives the Tribunal the power to re-make the decision and to make any decision which the FTT could make. That is clearly the most appropriate course to adopt in this case.

Re-making the decision

77. Mr Marshall QC asked that dispensation be granted only on the respondent satisfying three conditions: first, that the recoverable cost of the works be limited to the sum of £10,404 (£8,760 plus VAT) suggested by Green Flame as the proper cost of the works in January 2021; secondly, that certain fees be paid (the fee charged by Green Flame of £150 plus VAT; a fee for obtaining a transcript of the proceedings before the FTT; and his own professional fees charged up to the hearing before the FTT on 19 March 2021, totalling £4,700 plus VAT); and finally that the fees charged by the Tribunal in connection with the appeal be reimbursed or paid by the respondent.

78. Ms Ziya submitted that no relevant prejudice had been caused and that dispensation should be granted unconditionally. Any prejudice caused as a result of the failure of consultation should be balanced against the prejudice which would have been caused to the leaseholders if the work had not been undertaken urgently when it was. She also challenged the proposition that the work would have been done more cheaply, or that less work might have been done, if consultation had taken place. It was for the respondent to determine the scope of the work to be undertaken. It had had great difficulty in finding contractors to tender for work at the building and NCE was already familiar with the boilers at Kelvin Court as a result of its involvement in 2019. Ms Ziya suggested that it was unrealistic to suppose that a different firm, without that relevant background knowledge, could have done the same work at a lower cost with the urgency which had been required.

79. Before determining whether or on what condition it would be reasonable to dispense with the consultation requirements it is first necessary to identify the respects in which they were not complied with.

80. A stage 1 consultation notice was given to all but one of the leaseholders on 19 February which included the work in issue, as well as other work. No prospective contractor was nominated by any of those who received the notice. At stage 2, the respondent sought estimates for the work but it was able to obtain only one, from NCE, which meant that it was unable to comply fully with the requirement of stage 3 to supply details of at least two estimates. It did invite observations and notionally allowed a period of 30 days for these to be received, but the reality was that the decision had already been taken, and there was therefore a failure at stage 3 meaningfully to invite observations or to take account of any which might be received. As there was only one estimate and no other contractor had been nominated, there was no requirement to comply with stage 4.

81. The significant failure was the omission at stage 1 to give notice of the intended works to the appellant, making it impossible for him to nominate a contractor or express a view on the scope of the work. The fact that only one of those required to be consulted was missed out does not mean that the omission can be ignored, as is clear from *Aster Communities.* Although the respondent may have intended to follow the required procedure, its failure at the outset to give notice of its intentions to the appellant infected each of the subsequent steps it took.

82. What prejudice can be said to have been caused by the failure to comply fully with the consultation requirements?

83. When answering that question it is necessary to remember that it arises substantially because of the respondent's refusal to treat the appellant as a tenant, and to consult him accordingly, despite having had notice of his interest for six weeks by the time the stage 1 notice was given. In this case the respondent's need for dispensation is not simply a consequence of the urgency of the situation it found itself in. The most significant omission preceded the time when immediate action became required and it was due to the respondent's own failures of administration and misguided instructions to its managing agents. If any tenant is entitled to the sympathetic reception recommended by Lord Neuberger in *Daejan* it is surely one who has been consciously excluded from consultation, as was the appellant.

84. I can see no reason to doubt that, if Mr Marshall had been notified on 19 February of the respondent's intention to install new boilers and had been given the opportunity to nominate a contractor, his immediate reaction would have been very similar to his response in April when he did become aware of what was being proposed. On 15 April he questioned why he had not been informed of the impending works in answer to pre-contract enquiries. On 22 April he requested copies of the technical advice which the respondent had received and identified a number of issues concerning the work carried out in 2009, the wisdom of replacing one boiler as an interim measure in 2019, and the additional costs said to have been generated as a result of not obtaining competitive quotes for the whole package of works and additional fees for the managing agents. In short, he

wished to be fully informed and to have his views properly taken into account, and his approach would have been the same if he had been allowed to participate in the process more than six weeks earlier.

85. Nor is there any reason to think that Mr Marshall would have passed up the opportunity to nominate a contractor within the period of 30 days expiring on 25 March. When it became necessary for the appellant to obtain the advice of an engineer to respond to the charge that he had produced no evidence of prejudice (which was first made in the respondent's statement of case in reply dated 6 November 2021) Mr Marshall was able to identify Green Flame as suitably qualified and arrange for them to undertake an inspection on 12 January 2021. The statutory period of 30 days is intended to be sufficient to enable leaseholders to identify alternative contractors and it is reasonable to assume that Mr Marshall would have nominated Green Flame within that period if he had been given the chance. He might even have done so quite early in that period, perhaps even within one full working week, by 1 March.

86. The respondent had already been advised by its consultants, IDA, on 21 February that the new boiler installed in 2019 was now the only remaining operational boiler and that the situation had become "critical". Following consultations between D&G and IDA about the possibility of splitting the proposed programme of work and installing a single additional boiler, NCE was asked at the end of February to quote for that option. On 4 March Ms Brindell of B&G said that she hoped to receive that quote "very soon" but in the event it was not received until 27 March.

87. Against that background it can safely be assumed that Ms Brindell would have responded favourably to the nomination of Green Flame or another contractor by the appellant early in March. She would have been aware that the consultation requirements called for more than one quote to be obtained and that she was obliged to seek a quote from a potential contractor nominated by a tenant. She clearly wanted to expose NCE to a degree of competition and as can be seen from the fact that on 30 March she asked IDA if they could obtain another urgent comparable quote to compare with NCE's.

88. Almost four weeks elapsed between the earliest date on which a nomination might reasonably have been expected to be made by the appellant, which I take to be 1 March, and the date on which NCE provided its quote, 27 March. It is true, as Ms Ziya pointed out, that it was not always easy to find contractors willing to quote. A year earlier, when D&G sought quotes for the phase 1 works from at least two contractors, they had received only one. In July 2019 Mr Reading of IDA also indicated that most of the contractors he dealt with were not looking for further work at present or were too big to be interested in a job of that scale. It nevertheless seems to me to be perfectly possible that, had the appellant been given the opportunity to nominate a contractor, as he should have been, a contractor nominated by him would have been interested in the work and that two quotes would have been obtained by the end of March instead of the single quote which was actually procured. The prejudice which was the result of the failure to consult properly must therefore be assumed to be such prejudice as was caused by NCE carrying out the work without a second quote having been obtained.

89. The first national lockdown in response to the Coronavirus pandemic was announced on 23 March 2021 but there is nothing in the material put before the FTT or this Tribunal which suggests that public health restrictions delayed the commencement of the work. The restrictions which became law on 26 March did not prohibit essential work being carried out in residential buildings and did not prevent NCE from beginning work on 13 April and proceeding thereafter to complete the installation of the new boiler. There is no reason to assume that an alternative contractor would have been unable to undertake the same work within a similar time. The only positive evidence that Green Flame would have been able to do so consists of a statement by the appellant that he had been informed by the company (in March 2021) that they could have attended at short notice to do the required work in early April 2020. That evidence is very thin, but it cannot be ignored. Ms Brindell's request of IDA on 30 March that they try to obtain a further urgent quote suggests that she considered that a competent engineer would not only be able to provide one before it became impossible to wait any longer but would then also be able to carry out the work without delay.

90. What then would a quote provided by Mr Wurstz of Green Flame have said?

91. It is clear from the letter of 26 January 2021 that when Green Flame inspected the work undertaken by NCE its engineer took the view that less work should have been carried out and that it could have been done at a reduced cost. There were three limbs to that suggestion.

92. First, IDA's initial report of the installation in 2019 had explained that the three boilers installed in 2009 each provided two thirds of the anticipated heat load for the building, so that one boiler could provide backup in the event that another was to fail or be taken off line for maintenance. Mr Wurstz commented that IDA's report "indicates only 2 operational boilers were actually needed" and that in his view "two boilers with 100kw capacity that were operating efficiently ought to have no difficulty in supporting peak load".

93. Secondly, Mr Wurstz considered that the work carried out by NCE had been defective because they were said to have installed flow and return pipes and magna clean filters of the wrong size which meant there was an inadequate flow of water and the efficiency of the new boilers was reduced to approximately 60% of capacity. He recommended upgrading the pipes and magna cleaner filters from the original 22mm and 28mm to 35mm. He considered that this defect justified a discount of 20% on the cost of the work.

94. Thirdly, Mr Wurstz suggested that his company would have been able to carry out the work which was required at a cost of £8,670 plus VAT (that figure was based on NCE's charge for installing the single Evomax boiler in November 2019 plus an additional sum to cover a further flue, new port valve and pump).

95. In total, therefore, instead of NCE's charge of £15,169, Green Flame considered that the necessary work could have been carried out for £8,670 (plus VAT in each case).

96. The first issue raised by Mr Wurstz concerns the scope of the works. It is clear from *Daejan* that if the result of a proper consultation may have been the avoidance of

"unnecessary services" or "inappropriate work" a dispensation should not be granted in respect of the cost of those works or services. The question is therefore whether it is realistic to think that if in March 2020 Mr Wurstz had proposed to replace only one boiler his quotation would have been accepted. I am satisfied that such a proposal would not have been accepted, for the following reasons.

97. Mr Wurstz's interpretation of the findings of the IDA report of February 2018 which proposed the replacement of the boiler installed in 2009 was that the required capacity of the system was 200kW and that the provision of a third 100kW boiler was unnecessary. But that was clearly not the view taken by the author of the report, Mr Reading, nor had it been the approach adopted in 2009 when the previous boiler replacement had taken place.

98. The IDA report was a thorough document whose stated object was to identify "the most appropriate and practicable method to overcome the issues" which had caused the 2009 boilers to fail and to provide "both a short term and long term solution and achieve the most energy efficient solution to the problems identified". The report explained that, when installed, the three 2009 boilers could provide a total output of 300kW and had been configured to work as one energy source, with each boiler operating at below its full capacity. This enabled load and capacity to be maintained using two boilers if one should be unavailable because of maintenance or failure; it also avoided any one boiler being required to work at full capacity. Mr Reading's report described this approach to the design of the system as "that which we would have expected to have found in such an installation" and commented:

> "… we believe the original boiler load proportions identified are those which we would consider to be good design practice both at the time of the original design and specification, [and] in accordance with current good practice guidelines and the recommendations of the Chartered Institute of Building Services Engineers".

The report recommended "replacement boilers of equivalent size complete with redundant standby provisions". An alternative replacement proposal of relying on only two boilers was mentioned but rejected. It would require the separation of the heating and hot water systems and the provision of new independent gas water heaters; "this option would result in the need for only 2 heating boilers rather than 3" and would "offer a number of benefits" but "would not necessarily prove to be a cost effective solution".

99. When commenting on NCE's March 2020 quotation for the replacement of the second boiler Mr Reading specifically advised Ms Brindell that she should "ask the contractor to develop into the design the future installation of a 3rd boiler as this is necessary for there to be redundant capacity in the system to take over the load when a boiler is offline."

100. Mr Wurstz's letter of 26 January 2021 quoted part of the IDA report but did not refer to the statement that the three boiler arrangement was in accordance with current good practice, nor did he suggest that his preferred two boiler approach was compliant with CIBSE recommendations nor explain how it would allow for future maintenance requirements or boiler failure. In view of the advice received by the respondent from its consultant that

provision for a third boiler was both "necessary" and in accordance with the current good practice and CIBSE recommendations there seems to me to be no realistic prospect that a tender provided by Green Flame based on a two boiler solution would have been accepted.

101. Even if it could be said that a body of engineering opinion would have regarded two boilers as sufficient, that was clearly not the view of the respondent's advisers. The respondent was entitled to adopt a design which was likely to provide a higher quality of service to leaseholders and prolong the life of the new apparatus, rather than one which might have been cheaper in the short term. That principle had already been settled and there is no reason to think it would have been revisited, especially in the pressured circumstances of March and April 2020.

102. The second criticism raised by Mr Wurstz was that the NCE had used inappropriately sized flow and return pipes. Mr Marshall QC suggested that this complaint had not been addressed by NCE and ought to be accepted and the sum recoverable for the work limited as a result. I reject that submission, for two reasons.

103. First, as Mr Carr pointed out in his response to Green Flame's letter, the work was inspected by IDA after it was completed and no issue of incorrect sizing of pipes was reported. Of course, that does not exclude the possibility that Mr Wurstz's criticism is justified, but it is relevant to determining whether a dispensation ought reasonably to be granted.

104. Secondly, this issue does not go to the scope of the work but to their quality, and whether they have been carried out to a reasonable standard. Proper consultation with the appellant, and the opportunity for him to propose an additional contractor, would not have avoided the risk of poor workmanship in the installation of the new boiler (if that is what it is). That is highly relevant when considering on what terms dispensation ought to be granted. As Lord Neuberger explained in *Daejan* at [65] "the only disadvantage of which they [the tenants] could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted". I do not intend to suggest that poor workmanship is irrelevant to dispensation, but there must be some basis on which it can be suggested that proper consultation might have avoided it. If, for example, proper consultation would have elicited information that the landlord's proposed contractor was not properly qualified or had a record of providing poor quality work I can see that that might justify a refusal of dispensation, but the suggested performance issue in this case is quite different.

105. The only possible connection between the respondent's failure to consult properly and the quality of the work carried out by NCE is that had an additional estimate been obtained and Green Flame been awarded the contract, the suggested error might have been avoided altogether. But, having concluded that an estimate provided by Mr Wurstz would have been rejected because it would have proposed doing less work than the respondent's consultant considered necessary, any tenuous connection between the failure to consult and the quality of the work undertaken is severed.

106. Mr Marshall QC submitted that the sympathetic approach directed by Daejan meant that any uncertainty about the quality of the work should be resolved in the appellant's favour, but

for the second of the reasons I have just given I do not consider that is correct in principle. It would be unsatisfactory to resolve this issue on the basis of identifying where the burden of proof lay and I am satisfied that it is not necessary to do so. Proper consultation would not have resulted in a different contractor being appointed, or different work being done; there is therefore no need to determine at this stage whether the suggested deficiencies in the quality of the work were real or illusory. If the appellant considers that there is substance in the complaint that poor quality work was carried out by NCE which ought to result in a reduction in the cost charged to leaseholders, that point can be made in a separate application under section 27A, 1985 Act, challenging the amount of the service charge.

107. I should add that Mr Marshall QC's suggestion that there had been no answer to the complaint about the size of the pipes used in the new installation is not necessarily correct. In his letter answering Mr Wurstz's criticisms Mr Carr explained that it had been necessary to adapt the existing manifold to accommodate the new boiler. The manifold connections had been 22mm, but he had combined the two flows and two returns into one and added an extra pump to help with performance. I take this part of Mr Carr's response to be his answer to Mr Wurstz's criticism about the size of the flow and return pipes and I understand Mr Carr's point to be that the sizing of the pipes was dictated by those parts of the system which (for the time being at least) were not being replaced. Whether my understanding is correct, and if it is, whether Mr Carr's point is an answer to Mr Wurstz's complaint, is not something which is possible to resolve on the basis of the very limited material relied on by the parties.

108. The third of Mr Wurstz's criticisms concerns the cost of the works. The estimate provided by NCE was for work to install one new boiler and included the cost of materials at £5,996, electrical works at £3,651, and engineers' labour at £5,040. The engineers' work would take 5 days to complete and the electrical work two and a half days. In the event, NCE also rebuilt and reinstalled boiler No. 3 using parts from two of the original boilers.

109. In his letter of 26 January 2022 Mr Wurstz said that the installation of one new boiler, an additional flue, a new port valve and pump should not have cost more than £8,670. There are two difficulties with that proposition. The first is that it does not take account of all of the work carried out by NCE. The second is that Mr Wurstz did not suggest that NCE's charges were generally unreasonable or expensive; on the contrary, he based his own estimated charges for installing a single boiler on NCE's 2019 charge for the same work. It is also notable that NCE's tender for the installation of the previous boiler in 2019 was less than half of the other tender notified to leaseholders as part of the section 20 consultations in September that year. Those two points provide some confidence that leaseholders are unlikely to have been charged more than was reasonable at least for the part of the work which Green Flame considered was necessary.

110. When NCE's estimate of 27 March 2020 was reviewed by Mr Reading of IDA he raised a number of points concerning the cost of the works, using the 2009 work as a comparator. It appeared to him that the cost of boiler materials, pipework, electrical work and engineer's labour were all higher than he would have expected. He recommended that NCE be asked to explain and provide a more detailed breakdown, and on 1 April Mr Carr responded to the request. He described the work in greater detail than he had in his original quotation and explained that the cost was considerably higher due to the amount of additional work involved. When the previous boiler had been installed in 2019 it had been intended as a

backup and had not necessitated rewiring of all three boilers. This time it would be necessary to make one of the new boilers the lead boiler, which required work to the control panel. Ms Brindell also reported that Mr Carr had explained to her that the boiler installed in 2019 was no longer available and that the quotation included "the next model" (which I assume meant a more expensive model).

111. IDA gave further advice on 2 April. Mr Reading had by now been admitted to hospital suffering from Coronavirus and his fellow director (also a Mr Reading) was advising. He was satisfied with Mr Carr's further explanation of the higher cost of works which, he said, "now appear fair and reasonable".

112. In his response to Mr Wurstz's criticisms Mr Carr provided further details of the work actually carried out. It had included rebuilding boiler No. 3 and "replacing a lot of parts", decommissioning the control panel and rewiring it to make boiler No. 3 the master boiler, decommissioning the whole of the wiring in the plant room and rewiring with new isolators for each of the boilers. In summary, he said, "there was a lot more work involved in fitting the second boiler due to the electrical and mechanical issues from the existing plant".

113. I have already concluded that an opportunity for Green Flame to tender for the work would not have resulted in their being appointed to carry it out. I nevertheless take at face value the suggestion that a tender would have been prepared by Mr Wurstz covering work comparable to that done in 2019 at a cost of £8,670. That tender would not have been accepted for the reasons I have given, but it would have put the respondent's advisers in a stronger bargaining position with NCE. As it was, at the beginning of April 2020 they faced an urgent situation and had only one contractor offering to do the work at what initially at least appeared to them be a surprisingly high cost. It seems to me to be quite likely that a quotation at a significantly lower figure (even if it is partly explained by a lesser amount of work) would have enabled Ms Brindell to negotiate down the price agreed with NCE. I do not think the difference would have been as much as Green Flame suggested, because NCE proposed to carry out additional work associated with the rebuilding of boiler No. 3 and the electrical work, and because the cost of materials seems likely to have been higher than the 2019 figure relied on by Mr Wurstz as his comparator. For the necessarily inexact purpose of determining the terms on which dispensation should reasonably be granted I will assume that, in the more competitive environment which proper consultation may have created, a price of £13,000 plus VAT might realistically have been negotiated (representing a reduction of about 15%).

114. The grant of a dispensation should therefore be conditional on the respondent not seeking to include more than £13,000 (plus VAT) as the cost to be recovered from the leaseholders in respect of the work undertaken by NCE in April 2020.

115. Dispensation should also be conditional on the payment by the respondent of the costs reasonably incurred by the appellant. The FTT was satisfied that Mr Marshall QC was instructed to represent his son and had rendered a fee note to his solicitors for £4,700 plus VAT. The charging rate shown in that fee note is a modest one and much of the work undertaken referred to the preparation of documents, including in relation to disclosure. Having put the appellant to the expense of applications for disclosure it is appropriate that

money paid out should be reimbursed, including the cost of representation at the hearing on 19 March (Mr Marshall QC did not ask for reimbursement of any costs of the appeal other than fees paid to the Tribunal). I agree with Ms Ziya that the cost of a transcript of the proceedings before the FTT ought not to be made a condition of dispensation.

Disposal

116. For these reasons the appeal is allowed and the decision of the FTT is set aside. I am satisfied that in respect of contributions by the leaseholders of Kelvin Court to the work carried out by NCE in April 2020 it is reasonable to dispense with the statutory consultation requirements on terms. Those terms are that:

    1. The relevant costs to be reclaimed through the service charge should be limited to £13,000 plus VAT.

    2. The respondent should reimburse the sum of £150 plus VAT paid by the appellant to Green Flame and £4,700 plus VAT paid to Mr Marshall QC, in each case within 14 days of receiving a receipted copy of the invoice or fee note confirming payment by the appellant.

    3. The respondent should reimburse the fees paid by the appellant to the Tribunal of £495.

117. I will also direct that the hearing fee for the appeal should be paid by the respondent, rather than by the appellant.

Martin Rodger QC

Deputy Chamber President

28 March 2022

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 174 (LC) **UTLC Case Number: LC-2022-638**
via Remote Video Platform

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – SERVICE CHARGES - consultation requirements – dispensation – relevant prejudice to the leaseholders – appropriateness of conditions attached to dispensation

BETWEEN

HOLDING & MANAGEMENT (SOLITAIRE) LIMITED

Appellant

-and-

LEASEHOLDERS OF SOVEREIGN VIEW

Respondent

Re: Sovereign View,
St Paul Steps,
Rotherhithe,
London, SE16

Judge Elizabeth Cooke
25 July 2023
via Remote Video Platform
Decision Date: 27 July 2023

Mr Michael Mullin for the appellant, instructed by JB Leitch Limited
The respondents were not legally represented

The following case is referred to in this decision:

Daejan Investments Limited v Benson [2013] UKSC 14

Introduction

1. This is an appeal by Holding and Management (Solitaire) Limited. It is the freeholder of Sovereign View, a Thames riverside gated estate. The appeal is from a decision of the First-tier Tribunal ("the FTT"), which granted the appellant a dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 in respect of the installation of a fire alarm system, subject to conditions. The appellant says the FTT was wrong to impose those conditions. The respondents all hold long leases at Sovereign View; their names are listed at the end of this decision.

2. The appellant was represented in the appeal by Mr Michael Mullin of counsel, and the respondents by two of their number, Ms Veena Sharma and Mr Chris Simmons. I am grateful to them all for their assistance.

3. Because this appeal is about fire safety works I asked the parties at the hearing if the provisions of the Building Safety Act 2002 apply to Sovereign View, and the answer was less precise than one might have wished. The position appears to be that most, if not all, of the development is not a "relevant building" under the Building Safety Act 2022, but that it is a possible that one block may be of the requisite height to be a "relevant building". It is important that the parties find out if that is the case. Nothing in this decision takes away any protection that may be conferred by the 2022 Act on any of the leaseholders.

The factual background

4. Sovereign View is an estate of 174 flats and houses grouped around five squares. The buildings are of brick with a concrete frame and pitched tile roofs, and are internally partitioned with block walls and plaster board. with solid, carpeted floors and stairs. The residential units are held on long leases which include standard provision for the lessees to pay a service charge.

5. In June 2020 a fire risk assessment commissioned by the appellant reported concerns about fire stopping, and recommended that a further survey be undertaken; the risk was identified as a level 4 risk meaning that action was recommended within three months.

6. In July 2021 a further fire risk assessment reported inadequate fire stopping in the risers and loft spaces. It recommended that either an immediate waking watch should be put in place as "a very short term measure" or simple battery linked smoke detectors should be installed in each flat. After that a fire alarm system should be installed across the estate. In response to that assessment the appellant put in place a waking watch at a cost of £10,000 per week, which has been paid for from the service charges reserve fund. It then obtained three tenders for the installation of a fire alarm system.

7. As is well known, section 20 of the Landlord and Tenant Act 1985 requires landlords to consult leaseholders before carrying out "qualifying works", being work that would cost each leaseholder more than £250 by way of service charges. The consultation requirements did not apply to the waking watch because that is a service, not "works". But the fire alarm installation was well within section 20 territory; the least expensive quotation for the alarm system was over £168,000. On 2 August 2021 the appellant began the consultation process

by sending initial notices to the leaseholders. But the consultation proceeded no further; on 20 August 2021 the appellant accepted the cheapest quotation for the alarm system. In a zoom meeting with the residents it explained that it was going to apply to the FTT for a dispensation from the consultation requirements, which it did. It argued that a dispensation should have been granted because the work had to be done urgently in order to bring the expenditure on the waking watch to an end.

8. Once the new alarm system was installed the waking watch was discontinued, having been in place for three months.

The decision of the FTT

9. The various responses submitted to the FTT by the leaseholders in response to the application reveal entirely understandable concerns; the leaseholders were troubled by the delay between the risk assessment carried out in 2020 and the next one a year later; they were very unhappy about the installation of the waking watch, when battery operated alarms would have been cheaper; they did not accept that a waking watch was the safest option; they were very unhappy that a waking watch had been set up without consultation and then relied upon as justifying the application for a dispensation.

10. The FTT said this:

> "23. It is obviously the correct thing to do for a landlord to seek to upgrade the fire safety of buildings. … Obviously if works are urgent it is not feasible to go through the consultation process in full. In the present case the consultation was started but not completed. The Applicants decided unilaterally to appoint a waking watch at considerable expense to the leaseholders. The tribunal is concerned that this decision was made unilaterally and without considering potential alternative options. The waking watch was in place for a period of three months at a cost of 10,000 pounds a week. The alternative measure of battery operated alarms would patently have been a lot cheaper.
>
> 24. Waking Watch has been the "go to" solution for many landlords concerned about the immediate risk of fire. Usually this is in buildings similar to Grenfell Tower where the risk of fire is caused by inappropriate and dangerous cladding. This was not the case here. The blocks in the scheme are of varying sizes. None of them were the height of Grenfell Tower or other larger social housing blocks. The issue was compartmentation rather than cladding. This should have been evident as an issue much earlier. The Respondents were advised to investigate it within 3 months and did not do so. Indeed, the identification of service access as a means of spread of fire is not a new concept and arguably the Respondents should have investigated the issue much earlier. If the investigation works had been carried out within the three months as advised the remainder of the year could have been used to carry out a proper consultation exercise. If the resultant report had recommended a Waking Watch then a short consultation on this issue would have been appropriate. …
>
> 25. [Counsel for the landlord] was anxious to distinguish the waking watch from the rest of the works but they were part and parcel of the works to deal with the

> potential fire risk. The cost of waking watch does constitute a significant financial prejudice to the leaseholders. If matters had been properly dealt with by the Applicants they would have carried out some consultation in relation to the use of waking watch. This is not a case in which the leaseholders could be criticised for failing to put up cheaper suppliers of waking watch because in this case it was questionable whether a waking watch was required at all when there were much cheaper alternatives.
>
> 26. Accordingly whilst recognising that the fire safety works had to be carried out notwithstanding the failure to properly consult the Tribunal considers that the dispensation must be made conditional on the waking watch scheme being funded by the Applicants and not through the service charge and on the costs of the current proceedings not being recovered from the service charges."

11. So the appellant got its dispensation but on two conditions, and it appeals the imposition of those conditions. I discuss them in turn.

The waking watch condition

12. Section 20ZA of the 1985 Act gives the FTT power to dispense with the consultation requirements, and the Supreme Court in *Daejan Investments Limited v Benson* [2013] UKSC 14 is authority for the way in which the FTT's discretion is to be exercised. At paragraph 44 Lord Neuberger said this:

> "44. Given that the purpose of the [consultation requirements] is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
>
> 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. …
>
> 50. In their respective judgments, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of the [consultation requirements], and in that they were right. That is the main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1).

13. The question for the FTT, then, in deciding whether to grant a dispensation was whether the leaseholders would suffer any prejudice *as a result of* the failure to consult. I emphasise those words; as Lord Neuberger pointed out at paragraph 65, that is the relevant prejudice and no other:

> "The tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the [consultation requirements] had been fully complied with, but which they will suffer if an unconditional dispensation were granted."

14. It was also made clear in *Daejan* – and the parties agree – that the FTT is entitled to impose a condition on the grant of a dispensation. At paragraph 54 of the Supreme Court's judgement Lord Neuberger said that the FTT:

> "has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect."

15. He went on to give examples of appropriate conditions, for example that the landlord carry out a limited version of the consultation process, or that where consultation would have led to a reduction in the cost of the work by, say £25,000 (because an observation that a leaseholder would have made would have saved the landlord some money) the FTT might impose a condition that that £25,000 would be irrecoverable from the leaseholders. He went on:

> "I also consider that the LVT would have power to impose a condition as to costs – eg that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1)."

16. I come back to the point about costs later. But was the condition that the landlord pay for the costs of a waking watch an appropriate condition in the present case?

17. Mr Mullin for the landlord argued that it was not. He pointed to the FTT's words in its paragraph 25: "The cost of waking watch does constitute a significant financial prejudice to the leaseholders." That is not a relevant prejudice; it was not caused by the failure to consult.

18. Ms Sharma and Mr Simmons in response reiterated the respondents' view that the waking watch was part and parcel of the one set of works, as the FTT said. They stressed their concerns about the delay in getting the second fire risk assessment, and then the rush to put a waking watch in place without any consultation – which they said if not legally required is good practice – and then the use of the waking watch as a justification for the landlord's failure to consult. Had the landlord taken action when advised to do so in June 2020 there would have been ample time to consult. The installation of the waking watch immediately after the risk assessment was premature and unnecessary. In any event, consultation on the fire alarm would not have taken more than a month or two and so could still have been completed in the summer of 2021. As it was, the landlord selected the cheapest option without regard for maintenance costs and a proper analysis should have been carried out.

19. As to that latter point, Mr Mullin pointed out in response that the works were commissioned almost immediately after the tenders were obtained and on the basis that the chosen contractor could complete the work much sooner than the others. The work was commissioned on 21 August 2021; to delay that point until completion of the consultation would have cost £10,000 per week, and the consultation has to take at least 60 days because

of the time that has to elapse between the stages. Any saving in choosing a different contract would have wiped out by the waking watch cost, and so it was in the leaseholders' interests for the fire alarm work to proceed as fast as possible. I accept Mr Mullin'' arguments about that point.

20. Nevertheless, the respondents' indignation is understandable. From their point of view, a waking watch was put in place which in their opinion was unnecessary, and then it was relied upon by the appellant as justification for the urgency of the fire alarm works.

21. But even if it were true – and the FTT made no finding to that effect – that the waking watch was unnecessary, that would not have been a justification for refusing a dispensation from consultation about the fire alarm. As the Supreme Court made clear in *Daejan*, the consultation requirements are not an end in themselves; they can be dispensed with if there is no relevant prejudice to the leaseholders, meaning prejudice that arose because of the lack of consultation rather than for any other reason. The FTT can impose conditions upon the dispensation; but those conditions must be relevant and appropriate. Relevant conditions would address the relevant prejudice to the leaseholders.

22. I agree with the respondents that paragraph 50 of the Supreme Court's decision in *Daejan* indicates that other considerations might be relevant to the grant or refusal of a dispensation. But even if the waking watch was unnecessary, that is not relevant to the question whether or not the dispensation should be granted; it is not the role of the FTT in considering a dispensation application to penalise the appellant for other aspects of its conduct. The claim that the waking watch was unnecessary would of course be highly relevant to a challenge to service charges on the basis that the costs incurred by the landlord in setting the waking watch were unreasonable, pursuant to the FTT's jurisdiction under section 27A of the Landlord and Tenant Act 1985.[1] But if (which has not been decided) the waking watch was unnecessary that was irrelevant to the application for a dispensation; equally therefore a condition relating to payment for the waking watch was an irrelevant condition.

23. The leaseholders' concern about the delay in getting the second fire risk assessment is also understandable, but it is difficult to see that matters would have turned out differently if the second assessment had been obtained within three months of the first. The recommendation would no doubt have been the same even if the assessment had been carried out sooner, and the action taken by the appellant might well have been the same. Even if that is not the case, the delay is irrelevant because the issue for the FTT was whether the leaseholders had suffered relevant prejudice as a result of the failure to consult about the fire alarm.

24. All that said, the FTT imposed the condition not because of any judgment about the merits of the landlord's decision to impose a waking watch, nor because of the delay, but because it regarded the waking watch as "part and parcel of the works to deal with the potential fire risk" (paragraphs 23 to 26 of its decision, quoted above) and took the view that "if matters had been properly dealt with" the landlord would have consulted about the waking watch, despite the fact that there was no legal obligation for it to do so. That erroneous consideration led the FTT to impose an irrelevant condition on the dispensation, namely that the landlord

[1] The fact that the waking watch has, I am told, been paid for out of the reserve fund makes no different to the leaseholders' ability to challenge the reasonableness of the cost: *Eshraghi and others v 7/9 Avenue Road (Londhon House) Limited* [2020] UKUT 208 (LC).

was to fund the waking watch. In effect the FTT punished the landlord for failing to carry out a consultation which it was not obliged to carry out.

25. I set aside the FTT's decision insofar as it imposed a condition on the dispensation that the landlord was to pay for the waking watch.

The costs condition

26. The FTT also required, as a condition of dispensation, that the landlord would not seek to recover its legal costs in the dispensation from the leaseholders by way of service charge. The reasons FTT gave for imposing the costs condition (in its paragraphs 23 to 26, quoted above) were the same as those given for the inappropriate condition about the waking watch and the condition appears therefore to have been intended as a further expression of disapproval of the landlord's failure to consult about the waking watch. On that basis the costs condition was inappropriate and is set aside.

27. I have to consider whether the Tribunal should substitute its own decision that a similar costs condition should be imposed, in circumstances where it is clear that the respondents have not suffered any relevant prejudice as a result of the failure to consult.

28. In *Daejan*, as we saw, the Supreme Court contemplated that a relevant condition for dispensation might be that the landlord would pay the leaseholders' costs of the dispensation application. Some further explanation was added at paragraph 61:

> "The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a free-standing order for costs, which is what para 10 of Schedule 12 to the 2002 Act is concerned with. To put it another way, the LVT would require the landlord to pay the tenants' costs on the ground that it would not consider it "reasonable" to dispense with the Requirements unless such a term was imposed.

29. In the present case the condition imposed was not that the appellant pay the leaseholders' costs but that it should be unable to recover its own as a service charge under the lease. The appellant argues that that would be inappropriate since the landlord was not seeking an indulgence. The haste to get the fire alarm in, without consulting, was in order to stop the cost of the waking watch, which was accruing at the alarming rate of £10,000 a week. It was in the leaseholders' interest that the landlord obtain the dispensation, and the costs incurred in getting the dispensation (despite their opposition) were for their benefit. So, said Mr Mullin, the landlord should not be penalised by being prevented from recovering its costs as a service charge.

30. There is some force in that submission. Another way of looking at it is to bear in mind that this was a case where the leaseholders suffered no relevant prejudice from the absence of consultation. In that circumstance, would it be right to impose a condition that took away the landlord's contractual right to recover its costs from the leaseholders, whether only in favour of the 17 respondents or (as the FTT seems to have decided) in favour of all 174 leaseholders in the development? I am not convinced that it would be appropriate in circumstances where, whoever in the end pays for the waking watch, it was clearly sensible

and in everyone's interests to get the fire alarm system installed; in that sense this was not a petition for an indulgence but a matter of practical importance for all concerned.

31. Accordingly, I decline to impose any condition upon the dispensation about the payment of costs.

Conclusion

32. I have set aside the two conditions imposed by the FTT, and have declined to impose any condition in their place. The dispensation is therefore unconditional.

Judge Elizabeth Cooke

27 July 2023

List of Respondents

1. Benjamin Chang
2. Chris Simmons
3. Constantin Bounas
4. David Lawrence
5. Jean Baptiste Faure
6. John Pereira
7. Julie Cleeveley
8. Kate Hatfield
9. Oliver McTernan
10. Paul Gallegos
11. Pratima Washan
12. Surita Photay
13. Tara Farrell
14. Tiago Vasconcelos
15. Veena Sharma
16. William Gallegos
17. Nicolae Raulet

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Landlord and Tenant Act 1985 c. 70
s. 20 Limitation of service charges: consultation requirements

Law In Force With Amendments Pending

View proposed draft amended version

Version 3 of 4

1 July 2013 - Present

Subjects
Landlord and tenant

Keywords
Consultation; Landlords' duties; Service charges; Statutory instruments
[

20 Limitation of service charges: consultation requirements

(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] .

(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.

]1

Notes

1 Ss.20-20ZA substituted for s.20 subject to savings specified in SI 2003/1986 art.3(2)-(7) and SI 2004/669 art.2(d)(i)-(vi) by Commonhold and Leasehold Reform Act 2002 c. 15 Pt 2 c.5 s.151 (July 26, 2002 in relation to England for the purpose of making regulations as specified in SI 2002/1019 art.2(c); January 1, 2003 in relation to Wales for the purpose of making regulations as specified in SI 2002/3012 art.2(c); October 31, 2003 in relation to England otherwise as specified in SI 2003/1986 art.3(1) and subject to savings in art.3(2)-(7) thereof; March 30, 2004 in relation to Wales otherwise as specified in SI 2004/669 art.2(d) and subject to savings in art.2(d)(i)-(iv) thereof)

2 Words substituted by Transfer of Tribunal Functions Order 2013/1036 Sch.1(1) para.50 (July 1, 2013: substitution has effect subject to transitional provisions and savings specified in SI 2013/1036 art.6(3) and Sch.3)

This Statutory Instrument has been printed to correct errors in the paragraph numbering within the Schedules to the SI of the same number and is being issued free of charge to all known recipients of that Statutory Instrument.

STATUTORY INSTRUMENTS

2003 No. 1987

LANDLORD AND TENANT, ENGLAND

The Service Charges (Consultation Requirements) (England) Regulations 2003

Made - - - -	*4th August 2003*
Laid before Parliament	*11th August 2003*
Coming into force - -	*31st October 2003*

The First Secretary of State, in exercise of the powers conferred by sections 20(4) and (5) and 20ZA(3) to (6) of the Landlord and Tenant Act 1985 [M1], hereby makes the following Regulations:

Marginal Citations

M1 1985 c. 70. Section 20 was substituted, and section 20ZA inserted, by section 151 of the Commonhold and Leasehold Reform Act 2002 (c. 15). *See also* paragraph 4 of Schedule 7 to that Act for modifications relevant to sections 20 and 20ZA associated with the right to manage under Chapter 1 of Part 2 of that Act. The functions of the Secretary of State under sections 20 and 20ZA are, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), **article 2**; *see* the entry in Schedule 1 for the Landlord and Tenant Act 1985. *See also* section 177 of the Commonhold and Leasehold Reform Act 2002.

Citation, commencement and application

1.—(1) These Regulations may be cited as the Service Charges (Consultation Requirements) (England) Regulations 2003 and shall come into force on 31st October 2003.

(2) These Regulations apply in relation to England only.

(3) These Regulations apply where a landlord—

(a) intends to enter into a qualifying long term agreement to which section 20 of the Landlord and Tenant Act 1985 applies [M2] on or after the date on which these Regulations come into force; or

(b) intends to carry out qualifying works to which that section [M3] applies on or after that date.

Marginal Citations

M2 *See* section 20ZA(2) and regulations 3 and 4 of these Regulations.

M3 *See* section 20(3) and regulation 6 of these Regulations. For the application of section 20, as originally enacted, in transitional cases, see article 3 of the Commonhold and Leasehold Reform Act 2002 (Commencement No. 2 and Savings) (England) Order 2003 (S.I. 2003/1986 (c. 82)).

Interpretation

2.—(1) In these Regulations—

"the 1985 Act" means the Landlord and Tenant Act 1985;

"close relative", in relation to a person, means a spouse or cohabitee, a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, step-parent, step-son or step-daughter of that person;

[F1"cohabitee", in relation to a person, means a person who is living with that person as if they were a married couple or civil partners;**]**

(a) a person of the opposite sex who is living with that person as husband or wife; or

(b) a person of the same sex living with that person in a relationship which has the characteristics of the relationship between husband and wife;

"nominated person" means a person whose name is proposed in response to an invitation made as mentioned in paragraph 1(3) of Schedule 1 or paragraph 1(3) of Part 2 of Schedule 4; and "nomination" means any such proposal;

[F2"public notice" means notice **[**F3published, pursuant to the Public Contracts Regulations 2015, on the UK e-notification service (as defined by those Regulations)**]]**;

"relevant period", in relation to a notice, means the period of 30 days beginning with the date of the notice;

"RTB tenancy" means the tenancy of an RTB tenant;

"RTB tenant", in relation to a landlord, means a person who has become a tenant of the landlord by virtue of section 138 of the Housing Act 1985 (duty of landlord to convey freehold or grant lease), section 171A of that Act (cases in which right to buy is preserved), **[**F4section 180 of the Housing and Regeneration Act 2008**]** or section 16 of the Housing Act 1996 (right of tenant to acquire dwelling) M4 under a lease whose terms include a requirement that the tenant shall bear a reasonable part of such costs incurred by the landlord as are mentioned in paragraphs 16A to 16D of Schedule 6 to that Act (service charges and other contributions payable by the tenant) M5;

"section 20" means section 20 (limitation of service charges: consultation requirements) of the 1985 Act;

"section 20ZA" means section 20ZA (consultation requirements: supplementary) of that Act;

"the relevant matters", in relation to a proposed agreement, means the goods or services to be provided or the works to be carried out (as the case may be) under the agreement.

(2) For the purposes of any estimate required by any provision of these Regulations to be made by the landlord —

(a) value added tax shall be included where applicable; and

(b) where the estimate relates to a proposed agreement, it shall be assumed that the agreement will terminate only by effluxion of time.

F1 Words in reg. 2(1) substituted (2.12.2019) by The Civil Partnership (Opposite-sex Couples) Regulations 2019 (S.I. 2019/1458), reg. 1(2), **Sch. 3 para. 67**

F2 Words in reg. 2(1) substituted (31.1.2006) by The Public Contracts Regulations 2006 (S.I. 2006/5), reg. 1(1), **Sch. 7 para. 3** (with reg. 49)

F3 Words in reg. 2(1) substituted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **14(2)** (with Sch. para. 3, 4)

F4 Words in reg. 2(1) inserted (1.4.2010) by The Housing and Regeneration Act 2008 (Consequential Provisions) (No. 2) Order 2010 (S.I. 2010/671), art. 1(2), **Sch. 1 para. 34** (with Sch. 2); S.I. 2010/862, art. 2

Marginal Citations

M4 Section 138 of the Housing Act 1985 (c. 68) is applied in relation to section 171A by section 171C. Sections 171A and 171C were inserted by the Housing and Planning Act 1996 (c. 52), **section 8**. *See also* the Housing (Extension of Right to Buy) Order 1993 (S.I. 1993/2240) and the Housing (Preservation of Right to Buy) Regulations 1993 (S.I. 1993/2241). Section 138 is applied in relation to section 16 of the Housing Act 1996 (c. 52) by section 17 of that Act. *See also* the Housing (Right to Acquire) Regulations 1997 (S.I. 1997/619).

M5 *See also* section 139 and Parts 1 and 3 of Schedule 6 to the Housing Act 1985. Paragraphs 16A to 16D in Part 3 of Schedule 6 were inserted by the Housing and Planning Act 1986 (c. 63), **section 4(4)**.

Agreements that are not qualifying long term agreements

3.—(1) An agreement is not a qualifying long term agreement [M6]—

(a) if it is a contract of employment; or

(b) if it is a management agreement made by a local housing authority [M7] and—

(i) a tenant management organisation; or

(ii) a body established under section 2 of the Local Government Act 2000 [M8]**[**[F5]or section 1 of the Localism Act 2011**]**;

(c) if the parties to the agreement are—

(i) a holding company and one or more of its subsidiaries; or

(ii) two or more subsidiaries of the same holding company;

(d) if—

(i) when the agreement is entered into, there are no tenants of the building or other premises to which the agreement relates; and

(ii) the agreement is for a term not exceeding five years.

(2) An agreement entered into, by or on behalf of the landlord or a superior landlord—

(a) before the coming into force of these Regulations; and

(b) for a term of more than twelve months,

is not a qualifying long term agreement, notwithstanding that more than twelve months of the term remain unexpired on the coming into force of these Regulations.

(3) An agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, which provides for the carrying out of qualifying works for which public notice has been given before the date on which these Regulations come into force, is not a qualifying long term agreement.

(4) In paragraph (1)—

"holding company" and "subsidiaries" have the same meaning as in the Companies Act 1985 [M9];

"management agreement" has the meaning given by section 27(2) of the Housing Act 1985 [M10]; and

"tenant management organisation" has the meaning given by section 27AB(8) of the Housing Act 1985 [M11].

F5 Words in reg. 3(1)(b)(ii) inserted (28.3.2012) by The Localism Act 2011 (Consequential Amendments) Order 2012 (S.I. 2012/961), art. 1(2), **Sch. 1 para. 7**

Marginal Citations

M6 *See* the definition in section 20ZA(2) of the Landlord and Tenant Act 1985, inserted by section 151 of the Commonhold and Leasehold Reform Act 2002.

M7 *See* section 38 of the Landlord and Tenant Act 1985 and section 1 of the Housing Act 1985.

M8 2000 c. 22.

M9 1985 c. 6. Definitions of "holding company" and "subsidiary" are in section 736. That section and section 736A were substituted for the original section 736 by the Companies Act 1989 (c. 40), **section 144(1)**.

M10 1985 c. 68. Section 27(2) was substituted by S.I. 2003/940.

M11 Section 27AB was inserted by the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28), **section 132**. *See also* regulation 1(4) of the Housing (Right to Manage) Regulations 1994 (S.I. 1994/627).

Application of section 20 to qualifying long term agreements

4.—(1) Section 20 shall apply to a qualifying long term agreement if relevant costs [M12] incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

(2) In paragraph (1), "accounting period" means the period—

(a) beginning with the relevant date, and

(b) ending with the date that falls twelve months after the relevant date.

(3) **[**[F6]Subject to paragraph (3A), in**]** the case of the first accounting period, the relevant date is—

(a) if the relevant accounts are made up for periods of twelve months, the date on which the period that includes the date on which these Regulations come into force ends, or

(b) if the accounts are not so made up, the date on which these Regulations come into force.

[[F7](3A) Where—

(a) a landlord intends to enter into a qualifying long term agreement on or after 12th November 2004; and

(b) he has not at any time between 31st October 2003 and 12th November 2004 made up accounts relating to service charges referable to a qualifying long term agreement and payable in respect of the dwellings to which the intended agreement is to relate,

the relevant date is the date on which begins the first period for which service charges referable to that intended agreement are payable under the terms of the leases of those dwellings.**]**

(4) In the case of subsequent accounting periods, the relevant date is the date immediately following the end of the previous accounting period.

F6 Words in reg. 4(3) substituted (12.11.2004) by The Service Charges (Consultation Requirements) (Amendment) (No. 2) (England) Regulations 2004 (S.I. 2004/2939), regs. 1(1), **2(a)**

F7 Reg. 4(3A) inserted (12.11.2004) by The Service Charges (Consultation Requirements) (Amendment) (No. 2) (England) Regulations 2004 (S.I. 2004/2939), regs. 1(1), **2(b)**

Marginal Citations

M12 *See* section 18(2) of the Landlord and Tenant Act 1985.

The consultation requirements: qualifying long term agreements

5.—(1) Subject to paragraphs (2) and (3), in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA are the requirements specified in Schedule 1.

(2) Where public notice is required to be given of the relevant matters to which a qualifying long term agreement relates, the consultation requirements for the purposes of sections 20 and 20ZA, as regards the agreement, are the requirements specified in Schedule 2.

(3) In relation to a RTB tenant and a particular qualifying long term agreement, nothing in paragraph (1) or (2) requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the thirty-first day of the RTB tenancy.

Application of section 20 to qualifying works

6. For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250.

The consultation requirements: qualifying works

7.—(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3.

(2) Subject to paragraph (5), in a case to which paragraph (3) applies the consultation requirements for the purposes of sections 20 and 20ZA, as regards qualifying works referred to in that paragraph, are those specified in Schedule 3.

(3) This paragraph applies where—

(a) under an agreement entered into, by or on behalf of the landlord or a superior landlord, before the coming into force of these Regulations, qualifying works are carried out at any time on or after the date that falls two months after the date on which these Regulations come into force; or

(b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these Regulations come into force are carried out at any time on or after the date.

(4) Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works—

(a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;

(b) in any other case, are those specified in Part 2 of that Schedule.

(5) In relation to a RTB tenant and particular qualifying works, nothing in paragraph (1), (2) or (4) requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the thirty-first day of the RTB tenancy.

Signed by authority of the First Secretary of State

Keith Hill
Minister of State, Office of the Deputy Prime Minister

SCHEDULE 1

Regulation 5(1)

CONSULTATION REQUIREMENTS FOR QUALIFYING LONG TERM AGREEMENTS OTHER THAN THOSE FOR WHICH PUBLIC NOTICE IS REQUIRED

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to enter into the agreement—

(a) to each tenant; and

(b) where a recognised tenants' association [M13] represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) invite the making, in writing, of observations in relation to the proposed agreement; and

(e) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate in respect of the relevant matters.

Marginal Citations

M13 *See* section 29(1) of the Landlord and Tenant Act 1985, which was amended by the Landlord and Tenant Act 1987 (c. 31), **Schedule 2**, paragraph 10.

Inspection of description of relevant matters

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed agreement

3. Where, within the relevant period, observations are made in relation to the proposed agreement by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates

4.—(1) Where, within the relevant period, a single nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a single nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

Preparation of landlord's proposals

5.—(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, at least two proposals in respect of the relevant matters.

(2) At least one of the proposals must propose that goods or services are provided, or works are carried out (as the case may be), by a person wholly unconnected with the landlord.

(3) Where an estimate has been obtained from a nominated person, the landlord must prepare a proposal based on that estimate.

(4) Each proposal shall contain a statement of the relevant matters.

(5) Each proposal shall contain a statement, as regards each party to the proposed agreement other than the landlord—

(a) of the party's name and address; and

(b) of any connection (apart from the proposed agreement) between the party and the landlord.

(6) For the purposes of sub-paragraphs (2) and (5)(b), it shall be assumed that there is a connection between a party (as the case may be) and the landlord—

(a) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(7) Where, as regards each tenant's unit of occupation and the relevant matters, it is reasonably practicable for the landlord to estimate the relevant contribution attributable to the relevant matters to which the proposed agreement relates, each proposal shall contain a statement of that estimated contribution.

(8) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (7); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,

each proposal shall contain a statement of that estimated expenditure.

(9) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (7) or (8)(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters,

each proposal shall contain a statement of that cost or rate.

(10) Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal shall contain a statement—

(a) that the person whose appointment is proposed—

(i) is or, as the case may be, is not, a member of a professional body or trade association; and

(ii) subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and

(b) if the person is a member of a professional body trade association, of the name of the body or association.

(11) Each proposal shall contain a statement as to the provisions (if any) for variation of any amount specified in, or to be determined under, the proposed agreement.

(12) Each proposal shall contain a statement of the intended duration of the proposed agreement.

(13) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, each proposal shall contain a statement summarising the observations and setting out the landlord's response to them.

Notification of landlord's proposals

6.—(1) The landlord shall give notice in writing of proposals prepared under paragraph 5—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) be accompanied by a copy of each proposal or specify the place and hours at which the proposals may be inspected;

(b) invite the making, in writing, of observations in relation to the proposals; and

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) Paragraph 2 shall apply to proposals made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.

Duty to have regard to observations in relation to proposals

7. Where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Duty on entering into agreement

8.—(1) Subject to sub-paragraph (2), where the landlord enters into an agreement relating to relevant matters, he shall, within 21 days of entering into the agreement, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for making that agreement or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he has received observations to which (in accordance with paragraph 7) he is required to have regard, summarise the observations and respond to them or specify the place and hours at which that summary and response may be inspected.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the agreement is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement, summary and response made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.

SCHEDULE 2

Regulation 5(2)

CONSULTATION REQUIREMENTS FOR QUALIFYING LONG TERM AGREEMENTS FOR WHICH PUBLIC NOTICE IS REQUIRED

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to enter into the agreement—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for the relevant matters is that public notice of the relevant matters is to be given;

(e) invite the making, in writing, of observations in relation to the relevant matters; and

(f) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

Inspection of description of relevant matters

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to relevant matters

3. Where, within the relevant period, observations are made, in relation to the relevant matters by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Preparation of landlord's proposal

4.—(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, a proposal in respect of the proposed agreement.

(2) The proposal shall contain a statement—

(a) of the name and address of every party to the proposed agreement (other than the landlord); and

(b) of any connection (apart from the proposed agreement) between the landlord and any other party.

(3) For the purpose of sub-paragraph (2)(b), it shall be assumed that there is a connection between the landlord and a party—

(a) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal shall contain a statement of that contribution.

(5) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,

the proposal shall contain a statement of the amount of that estimated expenditure.

(6) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4) or (5)(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters to which the proposed agreement relates,

the proposal shall contain a statement of that cost or rate.

(7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (6)(b), the proposal shall contain a statement of the reasons why he cannot comply and the date by which he expects to be able to provide an estimate, cost or rate.

(8) Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal shall contain a statement—

(a) that the person whose appointment is proposed—

(i) is or, as the case may be, is not, a member of a professional body or trade association; and

(ii) subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and

(b) if the person is a member of a professional body trade association, of the name of the body or association.

(9) Each proposal shall contain a statement of the intended duration of the proposed agreement.

(10) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, the proposal shall contain a statement summarising the observations and setting out the landlord's response to them.

Notification of landlord's proposal

5.—(1) The landlord shall give notice in writing of the proposal prepared under paragraph 4—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) be accompanied by a copy of the proposal or specify the place and hours at which the proposal may be inspected;

(b) invite the making, in writing, of observations in relation to the proposal; and

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) Paragraph 2 shall apply to a proposal made available for inspection under this paragraph as it applies to a description made available for inspection under that paragraph.

Duty to have regard to observations in relation to proposal

6. Where, within the relevant period, observations are made in relation to the landlord's proposal by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Landlord's response to observations

7. Where the landlord receives observations to which (in accordance with paragraph 6) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

Supplementary information

8. Where a proposal prepared under paragraph 4 contains such a statement as is mentioned in sub-paragraph (7) of that paragraph, the landlord shall, within 21 days of receiving sufficient information to enable him to estimate the amount, cost or rate referred to in sub-paragraph (4), (5) or (6) of that paragraph, give notice in writing of the estimated amount, cost or rate (as the case may be)—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

SCHEDULE 3

Regulation 7(1) and (2)

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS UNDER QUALIFYING LONG TERM AGREEMENTS AND AGREEMENTS TO WHICH REGULATION 7(3) APPLIES

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;

(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;

(e) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

Inspection of description of proposed works

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works and estimated expenditure

3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

Landlord's response to observations

4. Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

SCHEDULE 4 Regulation 7(4)

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS OTHER THAN WORKS UNDER QUALIFYING LONG TERM OR AGREEMENTS TO WHICH REGULATION 7(3) APPLIES

PART 1

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS REQUIRED

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for carrying out the works is that public notice of the works is to be given;

(d) invite the making, in writing, of observations in relation to the proposed works; and

(e) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

Inspection of description of proposed works

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made in relation to the proposed works by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

Preparation of landlord's contract statement

4.—(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, a statement in respect of the proposed contract under which the proposed works are to be carried out.

(2) The statement shall set out—

(a) the name and address of the person with whom the landlord proposes to contract; and

(b) particulars of any connection between them (apart from the proposed contract).

(3) For the purpose of sub-paragraph (2)(b) it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the amount of the relevant contribution to be incurred by the tenant attributable to the works to which the proposed contract relates, that estimated amount shall be specified in the statement.

(5) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed contract relates, the total amount of his expenditure under the proposed contract,

that estimated amount shall be specified in the statement.

(6) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4) or (5)(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the works to which the proposed contract relates,

that cost or rate shall be specified in the statement.

(7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (6)(b), the reasons why he cannot comply and the date by which he expects to be able to provide an estimated amount, cost or rate shall be specified in the statement.

(8) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, the statement shall summarise the observations and set out his response to them.

Notification of proposed contract

5.—(1) The landlord shall give notice in writing of his intention to enter into the proposed contract—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) comprise, or be accompanied by, the statement prepared in accordance with paragraph 4 ("the paragraph 4 statement") or specify the place and hours at which that statement may be inspected;

(b) invite the making, in writing, of observations in relation to any matter mentioned in the paragraph 4 statement;

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) Where the paragraph 4 statement is made available for inspection, paragraph 2 shall apply in relation to that statement as it applies in relation to a description of proposed works made available for inspection under that paragraph.

Landlord's response to observations

6. Where, within the relevant period, the landlord receives observations in response to the invitation in the notice under paragraph 5, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

Supplementary information

7. Where a statement prepared under paragraph 4 sets out the landlord's reasons for being unable to comply with sub-paragraph (6) of that paragraph, the landlord shall, within 21 days of receiving sufficient information to enable him to estimate the amount, cost or rate referred to in sub-paragraph (4), (5) or (6) of that paragraph, give notice in writing of the estimated amount, cost or rate (as the case may be)—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

PART 2

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS NOT REQUIRED

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

4.—(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6.—(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which apply only in relation to England, relate to the amount that tenants can be required to contribute, by the payment of service charges, to relevant costs incurred by landlords in carrying out works or under certain agreements. Unless a landlord complies with prescribed consultation requirements or obtains a dispensation from a leasehold valuation tribunal under section 20(9) of the Landlord and Tenant Act 1985 in respect of all or any of those requirements, his tenants' contributions by way of service charges are limited.

Regulation 3(1) exempts from the consultation requirements applicable to agreements for a term of more than 12 months ("qualifying long term agreements"):

(a) contracts of employment;

(b) agreements between a tenant management organisation or an arms length management organisation (a body established under section 2 of the Local Government Act 2000) and a local housing authority under section 27 of the Housing Act 1985 (management agreements);

(c) agreements between a holding company and any of its subsidiaries or between two or more subsidiaries of the same holding company; and

(d) agreements for a term of not more than five years relating to buildings or other premises which are untenanted when the agreement is entered into.

Regulation 3(2) provides that an agreement entered into before the coming into force of these Regulations is not a qualifying long term agreement even if more than 12 months of the term of the agreement remain when these Regulations come into force.

Regulation 3(3) provides that an agreement for a term of more than 12 months is not a qualifying long term agreement if it provides for the carrying out of works on a building or any other premises ("qualifying works") for which notice has been published in the Official Journal of the European Union ("the Official Journal") (to comply with EU procurement rules) before these Regulations come into force.

Regulation 4 imposes a limit of £100 in any accounting period (defined in regulation 4(2)) in respect of service charges attributable to the provision of goods or services, or the carrying out of works, under a qualifying long term agreement. That limit will apply unless the landlord complies with the consultation requirements prescribed by regulation 5 or obtains a dispensation from a leasehold valuation tribunal in respect of all or any of those requirements.

Regulation 5 deals with the consultation requirements applicable to qualifying long term agreements. Except in the cases mentioned below, the consultation requirements are those specified in Schedule 1. Where, on or after the coming into force of these Regulations, notice is required to be published in the Official Journal (to comply with EU procurement rules) of goods or services to be provided or works to be carried out under the agreement, the consultation requirements are those set out in Schedule 2. Where a person becomes a tenant as the result of exercising the right to be granted a long lease under section 138 of the Housing Act 1985 (right to buy) (including that section as applied in relation to the preserved right to buy under section 171A of that Act or the right to acquire under section 16 of the Housing Act 1996) the landlord is only

required to comply with such of the consultation requirements applicable to the agreement as remain to be complied with after the thirtieth day of that person's tenancy.
Regulation 6 imposes a limit of £250 as regards a tenant's contribution in respect of service charges attributable to qualifying works. That limit will apply unless the landlord complies with the consultation requirements prescribed by regulation 7 or obtains a dispensation from a leasehold valuation tribunal in respect of all or any of those requirements.
Regulation 7 deals with the consultation requirements relevant to qualifying works of the descriptions specified in that regulation. In relation to other qualifying works, the consultation requirements under section 20 of the Landlord and Tenant Act 1985, as it stood immediately before the substitution effected by section 151 of the Commonhold and Leasehold Reform Act 2002, continue to apply by virtue of article 3 of the Commonhold and Leasehold Reform Act 2002 (Commencement No.2 and Savings)(England) Order 2003 (S.I. 2003/1986 (c. 82)).
Paragraph (1) of regulation 7 relates to qualifying works that are the subject of a qualifying long term agreement. Subject to the exception for which paragraph (5) provides ("the paragraph (5) exception"), the consultation requirements are those set out in Schedule 3 to the Regulations.
Paragraphs (2) to (4) relate to qualifying works that are not the subject of a qualifying long term agreement.
Paragraph (2) deals with the consultation requirements in a case to which paragraph (3) applies. Subject to the paragraph (5) exception, the consultation requirements in such a case are those set out in Schedule 3 (the same requirements as apply to qualifying works under qualifying long term agreements).
Paragraph (3) applies where qualifying works are carried out:

(a) on or after the date that falls two months after the date on which these Regulations come into force under an agreement entered into before these Regulations come into force; or

(b) under an agreement for more than 12 months where notice of those works was published in the Official Journal before these Regulations come into force .

Paragraph (4) applies to cases to which paragraph (3) does not apply. Where notice of the qualifying works is required to be published in the Official Journal (to comply with EU procurement rules), and subject to the paragraph (5) exception, the consultation requirements are those set out in Part 1 of Schedule 4. Where notice is not required to be published in the Official Journal, and subject to the paragraph (5) exception, the consultation requirements are those set out in Part 2 of Schedule 4.
The paragraph (5) exception applies where a person becomes a tenant as the result of exercising the right to be granted a long lease under section 138 of the Housing Act 1985 (including that section as applied in relation to the preserved right to buy under section 171A of that Act or the right to acquire under section 16 of the Housing Act 1996). In that case, and in relation to that person and particular qualifying works, the landlord is only required to comply with such of the consultation requirements applicable to those works as remain to be complied with after the thirtieth day of that person's tenancy.
A Regulatory Impact Assessment has been prepared in connection with these Regulations. A copy may be obtained from the Office of the Deputy Prime Minister, Leasehold Reform Branch, Zone 2/J6, Eland House, Bressenden Place, London, SW1E 5DU (Tel 020 7944 3462).

Changes to legislation:
There are currently no known outstanding effects for the The Service Charges (Consultation Requirements) (England) Regulations 2003.

CHAPTER 11

Consultation Requirements

11-01 This chapter concerns the statutory regulation of service charges for residential property. For a detailed discussion of contractual requirements to consult, see Ch.2.

LANDLORD AND TENANT ACT SS.20 AND 20ZA

11-02 The statutory consultation procedures for residential properties in the Landlord and Tenant Act 1985 were substantially amended by Commonhold and Leasehold Reform Act 2002 s.151. They are now contained in Landlord and Tenant Act 1985 ss.20 and 20ZA. These are supplemented in England by the Service Charges (Consultation Requirements) (England) Regulations 2003 (as amended)[1] ("the Consultation Regulations").

Under Landlord and Tenant Act 1985 s.20 there is a statutory maximum that the lessee has to pay by way of a contribution to "qualifying works" or a "qualifying long term agreement" (QLTA) unless consultation requirements have either been complied with or dispensed with by, or on appeal from, the First-tier Tribunal (Property Chamber).[2]

Under s.20ZA(2), "qualifying works" means works on a building or any other premises and "qualifying long term agreement" means (subject to various specific exceptions) an agreement entered into, by or on behalf of the landlord or superior landlord, for a term of more than 12 months.

Under the Consultation Regulations, Landlord and Tenant Act 1985 s.20 applies to qualifying works when the relevant costs incurred on carrying out the works exceed an amount which results in the service charge contribution by any tenant to the cost of the works being more than £250, and applies to QLTAs when the relevant costs incurred under the agreement in a 12 month period exceed an amount which results in the service charge contribution of any tenant, in respect of that period, being more than £100. Unless the consultation requirements have either been complied with or dispensed with, the statutory maximum the landlord can recover in respect of relevant costs is limited to these amounts.

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1 Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987). The consultation regulations for Wales are the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (SI 2004/684). The regulations for England and Wales are broadly similar and this chapter will refer to the English regulations, but where there is any significant difference in the Welsh regulations it will be noted.

2 In Wales, the Leasehold Valuation Tribunal.

The purpose of consultation

11-03 In *Martin & Seale v Maryland Estates Ltd (Service Charges)*[3] Robert Walker LJ said of the consultation requirements in force at the time:

> "Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants, that tenants may not know what is going on, what is being done, ultimately at their expense."

In *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd*[4] Lewison J considered that Parliament had given two types of protection to tenants as regards residential service charges. First, tenants are protected by Landlord and Tenant Act 1985 s.19 from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Secondly, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a QLTA and the consultation process has not been complied with or dispensed with. Thus, he considered that the consultation provisions were imposed "to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement".

11-04 In *Daejan Investments Ltd v Benson*[5] Lord Neuberger[6] did not agree with this analysis.[7] The majority of the Supreme Court held that the purpose of Landlord and Tenant Act 1985 ss.20 and 20ZA is to reinforce and to give practical effect to the purpose of s.19(1), namely:

- ensuring that tenants of flats are not required to pay more than they should for works/services which are necessary pursuant to Landlord and Tenant Act 1985 s.19(1)(a); and
- ensuring that tenants of flats are not required to pay for works/services which are provided to a defective standard pursuant to Landlord and Tenant Act 1985 s.19(1)(b).

Sections 20 and 20ZA are not concerned with public law issues or public duties, so there is no justification for treating consultation or transparency as appropriate ends in themselves.

The scope of Landlord and Tenant Act 1985 ss.18-30

11-05 The scope of the statutory service charge limitations in Landlord and Tenant Act 1985 ss.18–30 is dealt with elsewhere in this book. For present purposes it is to be noted that these provisions apply to tenancies of dwellings, including subtenancies[8] and tenancies that comprise more than one dwelling, with or without other property.[9]

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3 (2000) 32 H.L.R. 116 at [125].
4 [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735.
5 [2013] UKSC 14; [2013] H.L.R. 21.
6 With whom Lord Clarke and Lord Sumption agreed.
7 In strong dissenting judgments, Lord Hope and Lord Wilson agreed with Lewison J's analysis.
8 Landlord and Tenant Act 1985 s.30.
9 See *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389; [2007] L. & T.R. 9, *Heron Maple House Ltd v Central Estates Ltd* [2004] L. & T.R. 17.

QUALIFYING WORKS

11-06 Landlord and Tenant Act 1985 s.20ZA(2) defines "qualifying works" as works on a building or any other premises. However, the term "works" is not defined either by s.20, s.20ZA, or by the Consultation Regulations. It may be noted that Landlord and Tenant Act 1985 s.18 refers separately to "works" and "services", which indicates that a distinction is to be drawn for the purposes of Landlord and Tenant Act 1985 ss.18–30 as between "works" and the provision of "services".

In *Paddington Walk Management Ltd v Peabody Trust*,[10] HH Judge Marshall QC considered whether window cleaning was "qualifying works". She said: [11]

> "Qualifying works" means, 'works on a building or any other premises'. That is not a very illuminating definition. [Counsel for the landlord] reminds me of the history where, of course, the Act originally provided protection in relation to works on a building. She says that window cleaning is not 'works on a building' or 'building works' because it falls more naturally in the category of 'services'. By definition, it is 'cleaning', which itself is part of 'services' and not 'works' … [Counsel for the tenant] says it is 'works' and it is works being done 'on a building'. Window cleaning is not that different from stone cleaning, which itself is not that different from maintenance work on stone surfaces. There is really no ground for distinguishing any form of such works that are being done, and window cleaning works, therefore, fall within the definition."

HH Judge Marshall QC concluded:[12]

> "It is again a short point and a matter of impression. I prefer [Counsel for the landlord's] argument. Window cleaning may be 'work' and even 'work on a building' but it is not, in my judgment, 'works on a building'. Works on a building comprise matters that one would naturally regard as being 'building works' and it does not seem to me that window cleaning naturally falls within that concept."

11-07 In *Phillips v Francis*,[13] having referred to *Paddington Walk*, HH Judge Cotter QC said:[14]

> "a common sense approach to construction needs to be taken and in view of the fact that it acts as a trigger for the protection afforded by consultation. If the threshold were too low and all minor or on non permanent works covered the result would be commercially unmanageable to the detriment of both lessor and lessee. The phrase building works is used to describe significant works with a permanent effect by way of modification of what there was before. Whether works are indeed qualifying works, is a question of fact having regard to the nature and extent of the works in question."

On a second appeal,[15] the Court of Appeal held that qualifying works will often be significant or substantial, as opposed to minor and insignificant, but it is not necessary to have a permanent effect modifying what was there before. For example, a substantial programme of redecoration or repair would not have a permanent effect modifying what was there before, but such a programme would still be qualifying works.

It is thought that "qualifying works" will generally be limited to the contractor's costs and will not include related professional fees (e.g. surveyors, structural

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10 [2010] L. & T.R. 6.
11 [2010] L. & T.R. 6 at [90].
12 [2010] L. & T.R. 6 at [92].
13 Unreported 19 March 2012 Truro County Court.
14 Unreported 19 March 2012 Truro County Court at [341].
15 [2014] EWCA Civ 1395; [2015] H.L.R. 3.

engineers, the managing agent's tenant liaison fees, etc.), save, possibly, where the professional services constitute an integral part of the actual physical works.[16] However, in the absence of an authoritative decision on 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.

Application of consultation requirements to qualifying works

11-08 Landlord and Tenant Act 1985 s.20(3) provides that the consultation requirements apply to qualifying works if the relevant costs incurred on carrying out the works exceed "an appropriate amount". The "appropriate amount" is set by regulations made by the Secretary of State (see below).

Landlord and Tenant Act 1985 s.20(5) provides that the "appropriate amount" is set by regulations which may make provision for either or both of the following to be an appropriate amount:

- an amount prescribed by, or determined in accordance with, the regulations; and
- 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.

The Landlord and Tenant Act 1985 therefore permits the appropriate amount to be arrived at on two distinct bases. In fact, it is the s.20(5)(b) basis that has been chosen and the appropriate amount is currently an amount which results in the relevant contribution of any one or more tenants being more than £250.[17]

A failure to consult will have the effect of limiting that tenant's contribution to £250, but will have no effect on the service charge contributions of the other tenants whose individual relevant contributions have remained below the amount prescribed (the £250 cap). It follows that, although works will be "qualifying works" if the relevant contribution of any one or more tenants is more than £250, it is not necessary to consult those tenants whose contribution will be less than £250.

The "sets" approach

11-09 It was generally understood that the "appropriate amount" served as what Walker LJ described in *Martin & Seale v Maryland Estates*[18] as a "triviality threshold". *Martin & Seale* was a case under the old s.20,[19] which provided that where the cost of qualifying works exceeded £1,000 a landlord could not recover the excess unless the consultation requirements had been complied with or dispensed with.[20] In that case, the landlord consulted the tenants on proposed works of repair and the works commenced. It became apparent during the course of the works that further repairs were required. The addition of the extra works almost doubled the costs of the works as specified in the s.20 notice. At first instance, the judge held that the statutory limit of £1,000 applied to all of the works and not just the additional

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16 *Marionette Ltd v Visible Information Packaged Systems Ltd* [2002] All E.R. (D) 377 (July) (Ch) at [90]–[100], a case on Landlord and Tenant Act 1985 s.20 before the amendments introduced by the Commonhold and Leasehold Reform Act 2002.

17 Consultation Regulations reg.6.

18 (2000) 32 H.L.R. 116 at 126.

19 I.e. s.20 as amended by the Landlord and Tenant Act 1987, but before the amendments introduced by Commonhold and Leasehold Reform Act 2002 s.151.

20 It should be noted that the £1,000 limit related to the total cost of the works rather than the tenant's contribution to the cost.

works. The landlord appealed to the Court of Appeal. Dismissing the appeal, Walker LJ held that Parliament had not spelled out any precise test as to whether the limit applied to a complete course of works or to batches of work and a common-sense approach was necessary. Walker LJ said "the legislative purpose of the limit is to provide a triviality threshold rather than to build into every contract a margin of error". The trial judge had been influenced by the fact that all the works were covered by one contract; that would not always be a decisive factor but on the particular facts of this case, that was the right approach.

Following *Martin & Seale*, it was necessary to identify whether works fell within the definition of "qualifying works", and if works were "qualifying works", identify whether the works constituted one or more "sets of qualifying works". If the consultation requirements had not been complied with or dispensed with in respect of each set of qualifying works, the landlord could only recover the statutory maximum in respect of that set of qualifying works. The effect of the amendments introduced by Commonhold and Leasehold Reform Act 2002 s.151 was that a tenant's contribution to any set of qualifying works was capped at £250 unless the consultation requirements had been complied with or dispensed with in respect of that set of qualifying works.

This well-established approach was confirmed in *Phillips v Francis*.[21] The case concerned long leases of chalets on a holiday site. The chalets were held to be dwellings within the meaning of Landlord and Tenant Act 1985 s.38 so that Landlord and Tenant Act 1985 ss.18–30 applied.[22] Mr and Mrs Francis purchased the freehold of the holiday site and wrote to all lessees indicating their intention to bring the site up to a first-class standard. They proceeded to carry out works without consulting in accordance with the Consultation Regulations. The lessees welcomed the plans for improvement but not the increase in service charge liability and sought declarations as to the true construction of the leases and injunctions preventing forfeiture. At first instance, the judge rejected the lessees' submission that that the works were one scheme planned in advance, instead finding that there were many disparate pieces of work. As a result, no consultation was required.

11-10 On appeal, the lessees argued that the judge was wrong not to recognise all the qualifying works as being a single set originally designed by the lessors. Counsel for the landlord submitted that the mechanics for consultation set out in Pt 2 of Sch.4 to the Consultation Regulations necessarily required a pre-defined set of works. Whether there was one or more sets of qualifying works was a question of fact in respect of which the trial judge was in the best position to judge, having had the benefit of a site visit.

The Chancellor held on the appeal that it was wrong to identify particular sets of works; there is no "triviality threshold" in relation to qualifying works; all qualifying works should be brought into the account for computing the lessee's contribution and then applying the statutory cap. The lessee's service charge contribution towards all qualifying works is capped at £250 unless the consultation requirements have been complied with in respect of all qualifying works. The Chancellor felt able to depart from the Court of Appeal's decision in *Martin & Seale* on the basis that the Landlord and Tenant Act 1985 has since been substantially amended. This decision was severely criticised. The previous edition of this work considered the decision was plainly wrong and almost unworkable in practice.

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[21] [2014] EWCA Civ 1395; [2015] H.L.R. 3.

[22] This issue was determined as a preliminary issue: see [2010] L. & T.R. 28.

The Court of Appeal[23] reversed the Chancellor's decision on this issue. It held that the consultation requirements place significant administrative burdens on the landlord and, if this were required for every piece of minor repair work that a landlord wishes to carry out over a year, it is likely that there would have to be perpetual consultation. To apply the landlord's obligation to have regard to the observations of the tenants in each consultation to every item of maintenance and repair would in many cases be unworkable. It would increase costs for landlords and, if recoverable under the terms of the lease, the tenants would have to pay for the protection of consultation even on minor matters. This cannot have been Parliament's intention. Accordingly, the trial judge was correct to apply "the sets approach".

Identifying a set of works

11-11 It is a question of fact and degree whether the work carried out is all part of one planned single set of works or a series of disparate pieces of work. In most cases it should be obvious whether works comprise one or more sets but relevant factors are likely to include:

- where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other);
- whether they are the subject of the same contract;
- whether they are to be done at more or less the same time or at different times; and
- whether the items of work are different in character from, or have no connection with, each other.

The Consultation Regulations do not apply to estimates

11-12 In *23 Dollis Avenue (1998) Ltd v Vejdani*,[24] it was held that the limitation in s.20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of work to be carried out in the future. It is not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of an interim service charge in respect of intended works.

QUALIFYING LONG-TERM AGREEMENTS

11-13 The extension of statutory consultation to include QLTAs was intended to meet the difficulty that arose in practice when applying the old Landlord and Tenant Act 1985 s.20 to situations where a landlord had entered into agreements for extended periods of time for the provision of recurrent items of expenditure, e.g. cleaning, gardening and general maintenance contracts.

It is important to appreciate that the purpose of introducing the QLTA regime was not solely to enhance tenants' rights in respect of long-term agreements entered into by the landlord. The new regime permits landlords to enter into long term agreements after a "once and for all" consultation process that then enables the landlord to undertake qualifying works under it that are only subject to an abbreviated form

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[23] [2014] EWCA Civ 1395; [2015] H.L.R. 3.
[24] [2016] UKUT 365 (LC).

of consultation.[25] This has proved to be particularly important in the context of qualifying works delivered on behalf of local authorities and other social landlords, under the Private Finance Initiative, partnering and other forms of long term collaborative arrangement.

Definition of a "QLTA"

11-14 Landlord and Tenant Act 1985 s.20ZA(2) defines a QLTA as, subject to s.20ZA(3), an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than 12 months. As a result of this broad definition, the subject matter of QLTAs extends beyond "works" and any agreement relating to a matter falling within the basic definition of "service charge" in Landlord and Tenant Act 1985 s.18(1) is potentially a QLTA unless specifically exempt. Landlord and Tenant Act 1985 s.20ZA(3) permits the Secretary of State to make regulations excluding classes of agreement from being QLTAs. This power has been exercised and a list of exceptions is set out in the Regulations reg.3. The principal exceptions are contracts of employment and the costs of management by a local housing authority.

In *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd*[26] the court had to determine whether an estate management deed was a QLTA as a preliminary issue. In that case the first claimant acquired a substantial estate under a long lease which it intended to redevelop. Part of that leasehold interest was then assigned to a developer which carried out a development consisting of three blocks of flats. The developer incorporated the first defendant as an estate management company to deal with the communal parts of the development and also incorporated three other companies, each of which was to perform management services for one of the three blocks. The long leases of the flats provided that each lessee was required to pay a service charge, part of which was payable to one of the block management companies for services provided to the relevant block with the remainder being payable to the first defendant estate management company. The leases also provided that any payments made by the landlord and/or the relevant management company to the superior landlords and/or the company that managed the entire estate could be included in the lessee's service charge. The third claimant was formed to provide estate services to the whole estate, including the development. By an estate management deed between the claimants and the first defendant, which had a minimum duration of 25 years, the first defendant estate management company covenanted to permit the third claimant to enter the site in order to provide services to the whole of the estate and to pay a fair proportion of the cost incurred by the third claimant in providing those services.

11-15 The claimants brought proceedings against the defendants for arrears due under the deed. The first defendant argued that it was an implied term of the deed that it was only liable to pay what was lawfully recoverable from the lessees of the individual flats; that as regards those lessees the first defendant was itself a landlord for the purposes of the service charge legislation; that, therefore, the estate management deed was a QLTA; and that as a result of the implied term the sums claimed over and above the statutory cap were not due because the consultation requirements had neither been complied with nor dispensed with.

The court (Lewison J) considered a QLTA involved three elements:

- an agreement;

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[25] See the Consultation Regulations Sch.3.

[26] [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735.

- entered into, by or on behalf of the landlord or a superior landlord, where "landlord" bears the extended meaning given by s.30; and
- for a term of more than 12 months.

He held that the fact that a tribunal had the power to dispense with all or any of the consultation requirements indicated that an agreement might fall within the definition of a QLTA even though the consultation requirements might be difficult or even impossible to apply and since the first defendant was a landlord within the extended meaning given by Landlord and Tenant Act 1985 s.30 in that it was entitled to enforce the payment of a service charge, and the estate management deed was an agreement for more than 12 months, the deed fell within the definition of a QLTA. Lewison J also held that an agreement either fell within the statutory definition of a QLTA or it did not; it could not be held to be a QLTA as against some and not others. An agreement between a landlord and a third-party contractor or service provider could be a QLTA whereas one between a landlord and a lessee under which the lessee was required to pay a service charge could not be a QLTA.

11-16 In *Paddington Walk Management Ltd v Governors of Peabody Trust*,[27] HH Judge Marshall QC held that a contract is not a QLTA simply because the agreement could continue beyond the original stated period of 12 months or less. In *Poynders Court Ltd v GLS Property Management Ltd*,[28] the Upper Tribunal made a distinction between the duration of an agreement and the opportunity to terminate it. In that case, it was held that the agreement was of indefinite duration, unless and until terminated by three months' prior notice and was therefore found to be for more than 12 months. The reasoning of the Tribunal in *Poynders Court* is difficult to reconcile with the reasoning in *Paddington Walk*. Both concerned agreements for the management of residential premises which could be terminated at the end of 12 months. The difference in result depends on there being a meaningful distinction between a management agreement of indefinite duration, terminable by notice, and such an agreement for successively recurring periods of 12 months, terminable by notice.

The tension between these decisions was resolved by the Court of Appeal in *Corvan (Properties) Ltd v Abdel-Mahmoud*.[29] In that case the agreement expressly provided that it was for a period of one year which "will continue thereafter". The issue was whether that term was one which could not be terminated until more than 12 months had expired. It was held that that the term of the contract was for a period of one year plus an indefinite period which was subject to a right of termination by giving three months' notice. In that respect, because it mandated continuation beyond the first year, it was a QLTA. As to whether it is determinative, for the purposes of assessing whether an agreement is for a term longer than a year, that an agreement involves a commitment to 12 months or more or that the maximum possible length of the period is greater than a year, it was held (obiter) that that the deciding factor is the length of the minimum commitment. Whether the agreement is for a term exceeding 12 months is not about the substance of the management agreement and its various obligations. Rather, it is about whether it is an agreement for a term which must exceed 12 months. As such, the reasoning of the Tribunal in *Poynders Court* was wrong. The requirement that the contract be for a term of more than 12 months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year.

11-17 The decision in *Corvan* was followed by the Upper Tribunal in *Bracken Hill*

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[27] [2010] L. & T.R. 6; [2009] 2 E.G.L.R. 123.
[28] [2012] UKUT 339 (LC).
[29] [2018] EWCA Civ 1102; [2018] H.L.R. 36.

Court at Ackworth Management Co Ltd v Dobson.[30] In that case, the landlord had an oral contract with the managing agents. The contract was renewed annually over the telephone and it was agreed that the contract should last no longer than 364 days. The FTT found that there had been a continuous contract lasting 365 days, renewed on the 365th day each year. The Upper Tribunal allowed an appeal on the basis that, upon the proper construction of the oral agreement, the contract was only for 364 days (or for one year) and would not last longer than that unless it was renewed. In the circumstances, it was not a QLTA.

In *BDW Trading Ltd v South Anglia Housing Ltd*,[31] it was held that the consultation requirements in respect of QLTAs do not apply to agreements entered into in relation to buildings which have not yet been constructed or which are not let at the time of the agreement.

In *Kensington and Chelsea RLBC v Lessees of 1-124 Pond House, Pond Place, London SW23*,[32] the Upper Tribunal concluded that that local government framework agreements for procuring works were QLTAs. The works themselves were to be carried out under later "call-off" contracts. But the Tribunal concluded that the framework agreements sufficiently identified the works to be carried out to satisfy the test that the relevant costs of works were incurred in carrying out those works "under" those agreements.

Application of the consultation requirements to QLTAs

11-18 Landlord and Tenant Act 1985 s.20(4) provides that regulations may apply the provision to a QLTA:

- if relevant costs incurred under the agreement exceed an appropriate amount; or
- if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

As noted above, Landlord and Tenant Act 1985 s.20(5) provides for the appropriate amount to be set by regulations and may be determined on one of two bases. As with the ascertainment of the appropriate amount in respect of qualifying works, the approach chosen for QLTAs is the s.20(5)(b) basis, which fixes the appropriate amount by reference to the contribution payable by the tenant liable to contribute the largest proportionate share of the service charge.[33]

The appropriate amount in respect of QLTAs is currently £100.[34] The operation of the Consultation Regulations reg.4 is less straightforward than the equivalent reg.6 provision applying to qualifying works. This is inevitable because of the long-term nature of QLTAs and the need for the appropriate amount to be fixed by reference to periods of time, i.e. the amount payable during a prescribed period of time. This requires the prescription of an applicable relevant date in order to fix the relevant accounting period.

Accordingly, reg.4 proceeds on the basis that conventional service charge provisions levy a service charge by reference to accounting periods, usually of one year, and provides that the accounting period begins with the relevant date and ends on the date that falls 12 months after the relevant date. Where the service charge ac-

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30 [2018] UKUT 333 (LC); [2019] H.L.R. 27.
31 [2013] EWHC 2169 (Ch).
32 [2015] UKUT 395 (LC).
33 See commentary above in relation to qualifying works that considers how this mechanism operates where different tenants contribute different amounts.
34 Consultation Regulations reg.4.

counting period under the lease is annual, the first accounting period after the relevant date would be the date upon which the 12-month service charge period that includes 31 October 2003 (the date that the Consultation Regulations came into force) ends. In the unusual case where the service charge accounting period is not annual, the relevant date for the first accounting period is 31 October 2003. It will also be noted that:

- Where a landlord intended to enter into a QLTA on or after 12 November 2004 (the date that the Service Charges (Consultation Requirements) (Amendment) (No.2) (England) Regulations 2004[35] came into force) and that same landlord had not at any time between 31 October 2003 and 12 November 2004 prepare service charge accounts referable to a QLTA and payable in respect of the dwellings to which the intended agreement was to relate, the relevant date is the date upon which the first 12 month service charge period began (for which service charges are payable) under the terms of the leases of the dwellings.[36] It is doubtful this transitional provision will be of relevance to many QLTAs today, but due to the long-term nature of some of these agreements, details are included for the sake of completeness.
- In the case of all subsequent accounting periods, the relevant date will be the date immediately after the last date of the previous accounting period. Each subsequent accounting period will be a period of 12 months.[37]

11-19 A failure to consult on a QLTA will limit each qualifying tenant's contribution to costs payable in respect of the QLTA to £100 per service charge year.[38] As considered above regarding qualifying works, where tenants have differing individual contributions, the £100 limit may be exceeded by some tenants, but not by others. In such a case, it will only be the higher contributors whose contributions will be capped in the event of non-compliance or dispensation.[39]

Given that the costs payable under a QLTA may fluctuate from year to year and be difficult to predict in advance, a failure to comply with the consultation requirements under a QLTA may have very serious consequences over the life of the QLTA. Consequently, the option of deliberate non-consultation, which may sometimes be attractive to landlords in respect of qualifying works where only one tenant exceeds the appropriate amount, is unlikely to recommend itself in respect of QLTAs. Given that the appropriate amount is only £100, and it may prove difficult to forecast whether any (and if so, how many) of the tenants' contributions will be higher than this amount at any stage over the life of the QLTA, it is always advisable for a landlord to err on the side of caution and consult before entering into on a QLTA.

In *Paddington Walk Management Ltd v Peabody Trust*,[40] HH Judge Marshall QC held where a contract is a QLTA, the statutory £100 cap applies to each individual unit's contribution, and is not the total recoverable amount.

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35 Service Charges (Consultation Requirements) (Amendment) (No.2) (England) Regulations 2004 (SI 2004/2939).
36 Consultation Regulations reg.4(3A).
37 Consultation Regulations reg.4(4).
38 Landlord and Tenant Act 1985 s.20(7).
39 Landlord and Tenant Act 1985 s.20(7).
40 [2010] L. & T.R. 6.

THE CONSULTATION REGULATIONS

11-20 Landlord and Tenant Act 1985 s.20ZA(4) provides "in section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State". In England this is a reference to the Consultation Regulations.[41] Similar regulations apply in Wales.[42]

The Consultation Regulations apply[43] where a landlord:

- intends to enter into a "qualifying long term agreement" to which Landlord and Tenant Act 1985 s.20 applies on or after the date on which the Consultation Regulations came into force[44]; and
- intends to carry out qualifying works to which that section applies on or after that date.

The consultation requirements in respect of qualifying works and QLTAs are set out in the Schedules to the Consultation Regulations.[45]

Right to Buy leases

11-21 Exceptions exist that provide that in respect of a right to buy lease a landlord does not have to comply with any QLTA consultation requirements before the 31st day of the tenancy.[46]

THE SCHEDULES

11-22 There are four relevant Schedules to the Consultation Regulations and they apply as follows:

- Sch.1 prescribes the requirements for QLTAs for which public notice is not required;
- Sch.2 prescribes the requirements for QLTAs for which public notice is required;
- Sch.3 prescribes the requirements for qualifying works under a QLTA and agreements to which reg.7(3) applies[47]; and
- Sch.4 (which is divided into two parts) prescribes the requirements for qualifying works for which public notice is required (Pt 1) and for which public notice is not required (Pt 2).

Each schedule/part of a schedule contains a complete code of consultation for the circumstances to which it relates.

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41 Service Charges (Consultation Requirements) (Amendment) (England) Regulations 2003 (SI 2003/1987), as amended by Service Charges (Consultation Requirements) (Amendment) (No.2) (England) Regulations 2004 (SI 2004/2939).

42 For Wales, see the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (SI 2004/684), as amended by the Service Charges (Consultation Requirements) (Amendment) (Wales) Regulations 2005 (SI 2005/135).

43 Consultation Regulations reg.1(3).

44 31 October 2003.

45 Consultation Regulations regs 5 and 7.

46 Consultation Regulations regs 5(3) and 7(5).

47 Where qualifying works are undertaken not earlier than two months from the date the Regulations came into force in furtherance of an agreement entered into prior to the coming into force of the Regulations, or qualifying works for which public notice was given before the Regulations came into force are undertaken in furtherance of an agreement for a term of more than 12 months.

For private landlords, Sch.4 Pt 2 will generally be the schedule that will be applicable when they propose to undertake qualifying works. Schedule 1 contains the scheme applicable to QLTAs other than those for which a public notice under a public procurement regime is required. This will be the schedule applicable for private landlords proposing to enter into a QLTA.

Schedule 2 contains the modified scheme that is applicable for QLTAs for which public notice under a public procurement regime is required. This schedule will only apply to public bodies and proposed QLTAs that exceed the applicable financial limits.

Schedule 3 contains the abbreviated consultation requirements (as compared to Sch.4 consultation) which apply to qualifying works that are carried out pursuant to a QLTA that has already been consulted on.[48] This schedule applies to both private landlords and local authorities.

Part 1 of Sch.4 contains the modified scheme that is applicable to qualifying works where no QLTA is in place: it applies only where a public notice is required under a public procurement regime. It is therefore only applicable to works procured by or on behalf of public bodies (e.g. local authorities), and where the value of the works exceeds the applicable financial limits.

Given that the Consultation Regulations are highly detailed and prescriptive, particularly as to content of notices and the applicable time limits, specific reference must be made to them in order to ensure compliance/to ascertain whether there have been any wants of compliance.

Terminology used in the Schedules

"Notice of Intention"

11-23 The landlord must give notice in writing of its intentions to each contributing tenant and, where applicable, to a recognised tenants' association. Thus, it appears that a failure to give a notice of intention to each tenant amounts to a breach of the consultation requirements. The notice should set out the proposed work or relevant matters, or instead specify a place and time at which a description of the proposed work or relevant matters can be inspected. Whether a notice sufficiently describes in general terms the proposed works is a question of fact and degree to be determined in the circumstances of each case.[49] The notice should also state the landlord's reasons for considering it necessary to carry out the proposed work or enter into the agreement. It should invite the making of written observations in respect of the proposed work or the proposed agreement, stating the address to which the observations should be sent, that observations must be submitted within the relevant period and specify the date upon which the relevant period ends. Under Sch.1, and Sch.4 Pt 2 (but not Sch.2 and Sch.4. Pt 2: i.e. where a public notice is required), the notice of intention should also invite each tenant or recognised tenants' association to propose the name of an individual from whom the landlord should try to obtain an estimate. Under Sch.3 and Sch.4 Pt 1, it is instead necessary for the landlord to include a statement of the total estimated expenditure. There

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[48] The then President of the Upper Tribunal (Lands Chamber) (George Bartlett QC) described the three stages of the consultation requirements relating to QLTAs, for which public notice is required, and to qualifying works carried out under QLTAs in *Southwark LBC v Leaseholders of Southwark LBC* [2011] UKUT 438 (LC).

[49] *Southern Land Securities Ltd v Hodge* [2013] UKUT 480 (LC).

is no requirement in relation to the address the landlord must give as the address to which the tenant may send observations.[50]

"Relevant period"

11-24 The "relevant period" in respect of a notice means the period of 30 days beginning with the date of the notice.[51] In *Trafford Housing Trust Ltd v Rubinstein*,[52] it was held that the "date of the notice" from which the relevant period of 30 days is calculated is the date on which the notice is given to the recipient. In *Peverel Properties Ltd v Hughes*,[53] it was held that did not have to specify the precise date on which the consultation period ended for written observations to be made about estimates in order to be valid; it was sufficient if the date was made clear.

"Relevant matters"

11-25 The "relevant matters", in relation to a proposed agreement, means the goods or services to be provided or the works to be carried out (as the case may be) under the agreement.[54]

Inspection

11-26 Where a notice specifies a place and time for inspection, the place and time specified must be reasonable and the landlord must make available at that place and time a description of the proposed works or relevant matters for inspection, free of charge. If copies of the description cannot be taken at the time, the landlord must provide a copy of the description to any tenant upon request, free of charge. In *Ashleigh Court RTM Co Ltd v De-Nuccio*[55] the consultation notice said that the tenders for the works could be inspected at its registered office between 9.00 am and 12.00 noon on any weekday during the consultation period. It also stated that contact had to first be made with its managing agents by phone or email at least 48 hours beforehand. No contact details for the agents were provided. The Upper Tribunal held that the tribunal was wrong to consider whether the place and time provided for inspection were "sufficiently convenient", as that was not the question posed by the Regulations. It should have considered whether the place and hours specified were "reasonable". In determining what was reasonable, it should have had regard to the nature and resources of both the landlord and the tenants. The location had to be relatively convenient to the tenants, otherwise the purpose of inspection would be frustrated.

Observations

11-27 Where any tenant or recognised tenants' association makes observations within the relevant period, the landlord shall have regard to those observations. The duty of the landlord in such circumstances appears to be limited, although under certain Schedules the landlord will be required to respond in writing to any observations

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50 *Jastrzembski v Westminster City Council* [2013] UKUT 284 (LC).
51 Consultation Regulations reg.2(1).
52 [2013] UKUT 581 (LC).
53 [2012] UKUT 258 (LC).
54 Consultation Regulations reg.2(1).
55 [2015] UKUT 258 (LC).

submitted. In *Waaler v Hounslow LBC*,[56] Lewison LJ explained the extent of the duty as follows:

> "What this means is that the landlord must conscientiously consider the lessees' observations and give them due weight, depending on the nature and cogency of the observations. In the light of this statutory obligation to consult, it is impossible to say that the tenants' views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord's objective. But a duty to consult and to 'have regard' to the lessees' observations entails more than simply telling them what is going to happen."

In *Re OM Property Management Ltd*,[57] it was held that tenants' responses, which did no more than raise questions about payment for the works, were not observations such that the landlord was required to have regard to them when deciding on what work to undertake and by whom it should be undertaken. There was, therefore, no requirement to include a summary of those observations.

Estimates

11-28 Under Sch.1 and Sch.4 Pt 2 the notice of intention invites any tenant or recognised tenants' association to submit the name of an individual from whom the landlord should try to obtain an estimate for the proposed works or relevant matters. The process for obtaining estimates is as follows:

- if a single nomination is made by a recognised tenants' association, the landlord should try to obtain an estimate from that nominated person;
- if a single nomination is made by only one of the tenants, the landlord should try to obtain an estimate from that nominated person;
- if a single nomination is made by more than one tenant, the landlord should try to obtain an estimate from the person who received the most nominations, or, if there is no such person but two (or more) persons received the same number of nominations (being a number of nominations in excess of the nominations received by any other person), the landlord should try to obtain an estimate from one of those two (or more) persons. In any other case the landlord should try to obtain an estimate from any nominated person; and
- if more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord should try to obtain an estimate from at least one person nominated by a tenant and at least one person nominated by a recognised tenants' association (other than a person nominated by a tenant from whom an estimate is already being sought).

In *23 Dollis Avenue (1998) Ltd v Vejdani*,[58] it was held that the regulations do not require estimates to contain unit prices or specific details of the areas on which they were based.

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[56] [2017] EWCA Civ 45; [2017] 1 W.L.R. 2817 at [38].
[57] [2014] UKUT 9 (LC).
[58] [2016] UKUT 365 (LC).

Provisional figures

11-29 It is not unusual for a contractor to provide only a provisional or contingency sum for elements of the proposed works. An example would be a provision for the cost of dry rot works within a wider contract for structural repair. It is submitted that a notice will not be invalid merely because it gives only a provisional or contingency sum; nor will the landlord be prevented from recovering a higher sum if the provisional sum turns out to be insufficient.

Connection with the landlord

11-30 In certain circumstances the Consultation Regulations require the landlord to obtain an estimate from an individual that is wholly unconnected with it. It is assumed that there exists a connection between a landlord and another party in the following circumstances:[59]

- where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- where the landlord is a company, and the party is a partner in the partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
- where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or
- where the party is a company and the landlord is partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

Time limit between service of notice of intention and carrying out works

11-31 In *Jastrzembski v Westminster City Council*,[60] the Upper Tribunal rejected the respondent's submission that there is no time limit between the date of service of the notice of intention and the carrying out of works. It held that, while there is no specified time limit for the service of a s.20 notice, the relevant time periods for the work to be undertaken is months rather than years. In that case, the passage of time between 2007 and 2009 combined with the change in the works meant that a notice served in 2007 was invalid for the purpose of works carried out in 2009. This case appears to support the proposition that a delay between the date of service of the notice of intention and the carrying out of works itself could amount to a breach of the consultation requirements.

Consultation in respect of qualifying works, no QLTA applying and no Public Notice Requirements (Sch.4 Pt 2)

11-32 This is probably the most common situation in practice. It is therefore dealt with first. The consultation requirements are set out in the Consultation Regulations Sch.4 Pt 2.

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[59] See, e.g. Consultation Regulations Sch.4 Pt 2 para.4(7).
[60] [2013] UKUT 284 (LC).

Overview

- the landlord serves a "notice of intention" on all tenants and any recognised tenants' association describing the proposed works;
- the tenants or recognised tenants' association then have 30 days to make observations as to the works proposed and nominate a person or persons from whom the landlord should try to obtain an estimate for the carrying out of the proposed works;
- the landlord then obtains a minimum of two estimates. It must try to obtain an estimate from one and in some cases two of the tenants' nominees, at least one estimate must be from a contractor wholly unconnected with the landlord;
- the landlord serves on all tenants and any recognised tenants' association a "paragraph (b) statement" free of charge summarising at least two of the estimates, setting out any observations received and its response to observations. All estimates should be made available for inspection;
- at the same time, the landlord should make the estimates available to all tenants and any recognised tenants' association, inviting observations on the estimates and the tenants or recognised tenants' association have 30 days to respond;
- the landlord is obliged to consider the observations but is otherwise free to enter into a contract for the carrying out of the works if it contracts either with a person nominated by the tenants or recognised tenants' association or with the person who supplied the lowest estimate; and
- otherwise, the landlord must within 21 days of entering into the contract serve notice on the tenants or recognised tenants' association stating the reasons for awarding the contract, setting out observations received, and any response to those observations.

Consultation in respect of qualifying works, QLTA applying (Sch.3)

11-34 By way of contrast with the extensive consultation scheme applicable where there is no QLTA, the consultation requirements in respect of qualifying works under a QLTA are abbreviated. This is inevitable, because once a QLTA is in place, the contractor will, usually, have the exclusive right to carry out the proposed works, and very often it will be the contractor that has decided that the works need to be done.

The relevant consultation requirements are set out in the Consultation Regulations Sch.3.

Overview

- the landlord serves a "notice of intention" on all tenants and any recognised tenants' association describing the proposed works and inviting observations;
- the tenants or recognised tenants' association then have 30 days to make any observations as to the works proposed and as to the landlord's estimated expenditure;
- the landlord is obliged to consider the observations and must within 21 days of receipt of observations state any response by notice to the person who made the observations; and
- otherwise the landlord is free to carry out the works.

Consultation in respect of QLTAs (Schs 1 and 2)

11-36 As a quid pro quo for the advantages of a QLTA, the consultation scheme applicable where the landlord proposes to enter into a QLTA is relatively extensive.

The relevant consultation requirements, in respect of QLTAs to which a procurement regime does not apply, are set out in the Consultation Regulations Sch.1. The principal difference between this scheme and that which applies to public bodies where the public procurement regime is applicable (Sch.2) is that, where the public procurement regime applies, the tenants do not have the right to nominate a contractor from whom an estimate must be sought: allowing a tenant-nominated contractor to tender could be contrary to the scheme of the EU public notice.

Overview

- the landlord serves a "notice of intention" to enter into the QLTA on all tenants and any recognised tenants' association describing the goods or services to be supplied or works to be carried out under the QLTA and any reasons for wishing to enter into the QLTA;
- the tenants or recognised tenants' association then have 30 days to make observations as to the proposed QLTA and nominate a person or persons from whom the landlord should try to obtain an estimate for the carrying out of the goods or services to be supplied or works to be carried out under the QLTA;
- the landlord then obtains a minimum of two estimates. It must try to obtain an estimate from one and in some cases two of the tenants' nominees, and at least one estimate must be from a contractor unconnected with the landlord;
- the landlord prepares at least two "proposals" for the carrying out of the goods or services to be supplied or works to be carried out, at least one of which must be by a person unconnected with the landlord and one of which must be based on an estimate from a nominated person;
- the landlord serves the proposals on all tenants and any recognised tenants' association inviting observations on the proposals. All proposals should be made available for inspection;
- the proposals should include:
  (1) Where it is reasonably practicable for the landlord to estimate the relevant contribution of each tenant, a statement of that estimated contribution.
  (2) Alternatively, where it is reasonably practicable for the landlord to estimate the total amount of expenditure, a statement of that estimated expenditure.
  (3) Alternatively, where it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters, a statement of that cost or rate.
  (4) If the landlord proposes to appoint an agent, a statement containing details of the membership of that proposed agent to any professional body or trade association and the agent's subscription to any code of practice or voluntary accreditation scheme.
  (5) A statement as to the provisions (if any) for variation of any amount specified or determined under the proposed agreement.
  (6) A statement of the intended duration of the proposed agreement.
  (7) The landlord's response to any observations received.

- the tenants/recognised tenants' association have 30 days to respond with observations;
- the landlord is obliged to consider the observations but is otherwise free to enter into a QLTA if it contracts either with a person nominated by the tenants/recognised tenants' association or with the person who supplied the lowest estimate; and
- otherwise, the landlord must within 21 days of entering into the agreement serve notice on the tenants/recognised tenants' association stating its reasons for entering into the agreement, setting out observations received, and its response to observations.

Consultation in respect of qualifying works, no QLTA applying, a public procurement regime applying (Sch.4 Pt 1)

11-38 The Consultation Regulations make reference to works for which a public notice is required. These are works where the sum of money involved will be of a level where public procurement rules apply. In such cases the proposed works must be advertised by public notice in the Official Journal of the EU. While the tenants are invited to submit their observations, they do not have a right to nominate a contractor for these works. The relevant consultation provisions are set out in the Consultation Regulations Sch.4 Pt 1.

Overview

- the landlord serves a "notice of intention" to carry out qualifying works on all tenants and any recognised tenants' association describing the goods or services to be supplied or works to be carried out and any reasons for considering it necessary to carry out the proposed work. The notice should also state that the reason why the landlord is not inviting nominations for contractors is because public notice of the relevant matters is to be given;
- the tenants and the recognised tenants' association then have 30 days to make observations on the proposed works;
- the landlord then prepares a statement in respect of the proposed contract. The proposal should contain a statement of the name and address of every party to the proposed agreement and any connection between a party and the landlord;
- the proposal should include:
  (1) Where it is reasonably practicable for the landlord to estimate the relevant contribution of each tenant, a statement of that estimated contribution.
  (2) Alternatively, where it is reasonably practicable for the landlord to estimate the total amount of expenditure, a statement of that estimated expenditure.
  (3) Alternatively, where it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters, a statement of that cost or rate.
  (4) Alternatively, a statement of the reasons why the landlord cannot provide a statement of cost or rate and the date by which it expects to be able to provide an estimate.
  (5) The landlord's response to any observations received.
- the proposal should be served on the tenants/RTA who then have 30 days to respond with observations; and
- the landlord is obliged to consider the observations and must within 21 days

of receipt of observations state any response by notice to the person who made the observations.

Consultation in respect of QLTAs, a public procurement regime applying (Sch.2)

11-40 The Consultation Regulations also make reference to QLTAs for which public notice is required. These are agreements where the sum of money involved will be of a level where a public procurement rules apply, with the proposed agreement needing to be advertised by public notice on the official Find a Tender service. While the tenants are invited to submit any observations that they wish to make, they do not have a right to nominate a contractor for these agreements. The relevant consultation provisions are set out in the Consultation Regulations Sch.2.

Overview

- The landlord serves a "notice of intention" to enter into the QLTA on all tenants and any recognised tenants' association describing the goods or services to be supplied or works to be carried out under the QLTA and any reasons for wishing to enter into the QLTA. The notice should also state that the reason why the landlord is not inviting nominations for contractors is because public notice of the relevant matters is to be given;
- the tenants or recognised tenants' association then have 30 days to make observations as to the proposed QLTA;
- the landlord then prepares a "proposal" in respect of the proposed agreement. The proposal should contain a statement of the name and address of every party to the proposed agreement and any connection between a party and the landlord;
- the proposal should include:
  (1) Where it is reasonably practicable for the landlord to estimate the relevant contribution of each tenant, a statement of that estimated contribution.
  (2) Alternatively, where it is reasonably practicable for the landlord to estimate the total amount of expenditure, a statement of that estimated expenditure.
  (3) Alternatively, where it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters, a statement of that cost or rate.
  (4) Alternatively, a statement of the reasons why the landlord cannot provide a statement of cost or rate and the date by which it expects to be able to provide an estimate.
  (5) If the landlord proposes to appoint an agent, a statement containing details of the membership of that proposed agent to any professional body or trade association and the agent's subscription to any code of practice or voluntary accreditation scheme.
  (6) A statement of the intended duration of the proposed agreement.
  (7) The landlord's response to any observations received.
- the proposal should be served on the tenants/recognised tenants' association, who then have 30 days to respond with observations; and
- the landlord is obliged to consider the observations and must within 21 days of receipt of observations state any response by notice to the person who made the observations.

Good service of the consultation notices

11-42 There are no specific statutory provisions relating to the service of notices under the Consultation Regulations. Consequently the ordinary rules governing the service of documents applies to the giving of the various consultation notices. In the event that service is disputed by a tenant, it will be for the landlord to establish as a fact in issue good service or deemed service (if applicable) of the notice in question. Essentially this will involve proving: (1) that a notice addressed to the tenant has been delivered to a particular address; and (2) that this address was a good address for service/deemed service; alternatively, that the notice otherwise came to the actual attention of the tenant.

Particular problems can arise where the tenant is not resident in the flat. This was illustrated in *Akorita v 36 Gensing Road Ltd*[61] in which a non-resident tenant argued that there had been a failure to consult on building works. Her lease included a deemed service provision which provided that notices could be served on the tenant by leaving them at her last known business or residential address, or by affixing them to or leaving them on the demised premises and that, in either case, notices were to be treated as served even though the tenant might not receive them. The lease further provided that notices could be sent by ordinary post in a prepaid envelope addressed to the tenant at her last known business or residential address and that such notices were to be treated as served unless the Post Office returned them undelivered. Although it was known to the landlord (through its previous managing agents) that the tenant no longer lived in the flat, the current managing agents were unaware of this and posted the consultation notice to the tenant at the flat. In the result it was left by the Royal Mail in the entrance hall of the building and did not come to the actual attention of the tenant. The Lands Tribunal held that this did not amount to good service: the landlord had agreed to use the tenant's last known business or residential address when effecting service, or to affix notices to, or to leave them at, the flat. As the notice was posted to the flat, which was not the tenant's last known address it was not an address that the tenant had agreed could be used for postal service. However, the Lands Tribunal accepted that the landlord could have duly served the notice by affixing it to, or leaving it in the flat (even though the flat was empty) as the lease provided that this was a permissible means of service provided for by the lease.

In *Trafford Housing Trust v Rubenstein*,[62] the Tribunal assumed, but expressly said that it did not decide, that a notice given pursuant to s.20 was a notice required to be served by the lease for the purposes of s.196 Law of Property Act 1925. In *Southwark LBC v Akhtar*,[63] the Tribunal held that a contractual incorporation of s.196 in a lease applied to notice under Landlord and Tenant Act 1985 s.20B because it enabled the landlord to do something prescribed by the lease, namely to recover service charges. The point may be important because, in such circumstances, the landlord may rely on the presumption of service in Interpretation Act 1978 s.7.

It is considered that there would be a failure to comply with the Regulations by reason of failure to serve one tenant.[64]

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61 LRX/16/2008 Lands Tribunal.
62 [2013] UKUT 581 (LC); [2014] 1 E.G.L.R. 34.
63 [2017] UKUT 150 (LC); [2017] L. & T.R. 36.
64 *Trafford Housing Trust Ltd v Rubinstein* [2013] UKUT 581 (LC) at [9].

Consultation with sub-tenants

11-43 In *Leaseholders of Foundling Court and O'Donnell Court v Camden LBC*[65] the Upper Tribunal held that a superior landlord intending to carry out works or enter into a qualifying long-term agreement must give notice to each of its direct tenants of a dwelling, and each of its own tenants' sub-tenants of a dwelling or dwellings who is liable to contribute towards the costs of the works. Consultation is therefore required with any intermediate tenant of premises which include a dwelling and with all sub-tenants of individual dwellings or of larger premises which include at least one dwelling. The decision marks a significant departure from the conventional approach of consultation "along the chain".

The Deputy President suggested that "the simplest and cheapest approach would be to deliver a consultation notice addressed to 'the leaseholder' to each flat in the building or development" but "the better course may be for the superior landlord to obtain the necessary information by asking the intermediate landlord (or intermediate landlords) to provide it". Alternatively, the superior landlord could apply for a dispensation from the consultation requirements either before carrying out the work or entering into the agreement or after doing so if the issue of consultation subsequently became contentious.

Failure to comply with the requirements of Landlord and Tenant Act 1985 s.20

11-44 The consequence of a failure either to comply with the consultation requirements, or to obtain a dispensation, is set out in Landlord and Tenant Act 1985 ss.20(1), (6) and (7): the relevant contributions of the tenants are limited to the "appropriate amount" fixed by regulations made under Landlord and Tenant Act 1985 s.20(5). Under the Consultation Regulations, Landlord and Tenant Act 1985 s.20 applies to qualifying works when the relevant costs incurred on carrying out the works exceed an amount which results in the service charge contribution by any tenant to the cost of the works being more than £250, and applies to QLTAs when the relevant costs incurred under the agreement in a 12 month period exceed an amount which results in the service charge contribution of any tenant, in respect of that period, being more than £100. Unless the consultation requirements have either been complied with or dispensed with the statutory maximum the landlord can recover in respect of relevant costs is limited to these amounts. A failure to comply with Landlord and Tenant Act 1985 ss.20 and 20ZA is not a criminal offence.

Procedure before the Appropriate Tribunal

11-45 A specific application form is provided for applications to the Appropriate Tribunal.[66] It is not uncommon for the tribunal, during the course of the hearing, to identify a failure by the landlord to comply with the consultation requirements that the tenants are unaware of and therefore does not form part of the tenants' case before the tribunal. In such cases, the tribunal must put the point to the landlord and ensure that the landlord is given a sufficient opportunity to address the argument, including, if necessary, the opportunity to file evidence. A failure to do so may

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65 [2016] UKUT 366 (LC); [2017] L. & T.R. 7.

66 The "Appropriate Tribunal" means the First-tier Tribunal (Property Chamber) for premises in England, and the Leasehold Valuation Tribunal for premises in Wales: s.112(1) Commonhold and Leasehold Reform Act 2002. In England, the Upper Tribunal (Lands Chamber) also has a first-instance jurisdiction which it may exercise in rare cases.

amount to a breach of natural justice and hence be a sufficient procedural irregularity to ground an appeal.[67]

In *Warrior Quay Management Co Ltd v Joachim*,[68] it was held that where there is an issue in relation to compliance with the Consultation Regulations and there is no formal dispensation application before the tribunal, then, at least where a landlord is not professionally represented, the tribunal should ask the landlord whether it wishes to apply for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted. However, in practice the tribunal usually requires the landlord to make a separate application for dispensation and to pay the appropriate application fee.

When considering an application under s.27A(3), the tribunal has jurisdiction to consider whether the correct consultation has been carried out in accordance with the Consultation Regulations.[69]

Dispensation with the consultation requirements

11-46 The Appropriate Tribunal is given exclusive power under Landlord and Tenant Act 1985 s.20(1)(b) to dispense with the consultation requirements. Landlord and Tenant Act 1985 s.20ZA(1) provides that where an application is made to the tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or QLTA, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

It should be noted that the dispensation power under Landlord and Tenant Act 1985 s.20 applies only to the statutory consultation requirements. It confers no power to dispense with any consultation requirement which may be present in the lease itself: *Northways Flats Management Co (Camden) Ltd v Wimpey Pension Trustees Ltd*.[70]

As may be expected given the highly prescriptive nature of the Consultation Regulations, wants of compliance are not uncommon. This has led to a considerable volume of litigation on the exercise of the dispensing power.

The leading authority on applications for dispensation is the Supreme Court's decision in *Daejan Investments Ltd v Benson*.[71] In that case the Supreme Court held that the main, indeed normally, the sole question for the Appropriate Tribunal when considering how to exercise its jurisdiction in accordance with s.20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements. The financial consequences for the landlord of not granting a dispensation is not a relevant factor. The Appropriate Tribunal may grant dispensation on such conditions as it thinks fit: provided that any such conditions are appropriate in their nature and their effect.

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67 See the decision of the Lands Tribunal in *Westbourne Ltd v Spink* [2008] LRX/14/2007 Lands Tribunal and the decisions of the Upper Tribunal in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC); [2012] 3 E.G.L.R. 53 and *Crosspite Ltd v Sachdev* [2012] UKUT 321 (LC); [2013] 1 E.G.L.R. 31.

68 LRX/42/2006 Lands Tribunal.

69 *Kensington and Chelsea RLBC v Lessees of 1-124 Pond House, Pond Place, London SW23* [2015] UKUT 395 (LC); [2016] L. & T.R. 10.

70 [1992] 2 E.G.L.R. 42 CA.

71 [2013] UKSC 14; [2013] H.L.R. 21.

The old approach

11-47 Before the decision of the Supreme Court in *Daejan v Benson*, the leading cases on the approach to dispensation were *Eltham Properties v Kenny*[72] and *Camden LBC v Leaseholders of 37 flats at 30–40 Grafton Way*.[73] In *Eltham Properties*, the landlord's notice of estimate had failed to invite the leaseholders to nominate an alternative contractor. The Leasehold Valuation Tribunal had declined to grant dispensation. In allowing the landlord's appeal the Lands Tribunal rejected the Leasehold Valuation Tribunal's approach, namely, that the legislation was to be applied as a punitive measure in order to punish landlords who did not comply with the Regulations, and that the dispensation power was to be exercised with that in mind. The Lands Tribunal held:[74]

> "The most important consideration is likely to be the degree of prejudice that there would be to the tenants in terms of their ability to response to the consultation if the requirements were not met."

The decision went on to state that:[75]

> "it is reasonable to give dispensation from the consultation requirements where there has been a minor breach of the procedure that has not prejudiced the tenants."

11-48 In *Grafton Way*,[76] through administrative error, the local authority failed to send a statement of estimates/paragraph (b) statement setting out the estimated cost of the works, a summary of any observations received during the first stage of consultation period and its response to them. The Leasehold Valuation Tribunal refused dispensation so that the total service charges which could be recovered from lessees was limited to £9,250 (37 flats at £250 each), rather than £504,200.71. The President (George Bartlett QC) held:[77]

> "The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation … [The omission to give a statement of estimates] was a gross error, which manifestly prejudiced the leaseholders in a fundamental way … The extent to which, had they been told of the estimates, the leaseholders would have wished to examine them and make observations upon them, can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice."

The financial consequences for the landlord were held not to be a relevant consideration.

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72 [2008] L. & T.R. 14.
73 LRX/185/2006 Lands Tribunal.
74 [2008] L. & T.R. 14 at [26].
75 [2008] L. & T.R. 14 at [30].
76 LRX/185/2006 Lands Tribunal.
77 LRX/185/2006 Lands Tribunal at [33].

The current approach: Daejan v Benson

Facts

11-49 The landlord (Daejan) was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants under long leases which provided for the payment of service charges. The landlord gave the tenants notice of its intention to carry out major works to the building and appointed a firm of surveyors, at the tenants' request, to prepare a revised specification of works and act as contract administrator. Four tenants nominated Rosewood Building Contractors as their preferred contractor. The landlord obtained four priced tenders for the work and instructed the surveyors to prepare a tender report. The report stated that the choice was between Rosewood and Mitre (the landlord's preferred contractor). The landlord gave the tenants a copy of Mitre's tender and the tender report and the tenants requested copies of the other tenders; they particularly wanted to see Rosewood's tender.

The tenants then issued an application at the Leasehold Valuation Tribunal under Landlord and Tenant Act 1985 s.27A for a determination inter alia that the consultation process had not been complied with and that the cost of the major works was not reasonable. The landlord served a statement of estimates which stated that the end of the relevant period for making observations was 31 August 2006. At a Pre-trial Review in the Leasehold Valuation Tribunal proceedings on 8 August 2006 (i.e. before the end of the relevant period), the landlord's representative stated that the contract had already been awarded to Mitre. The Leasehold Valuation Tribunal found that it was futile for the tenants to make further observations and that the landlord had failed to comply with the consultation requirements. The tenants' contribution to the cost of the works (which was around £280,000 under the terms of their leases) was capped at £1,250 (£250 each).

The landlord applied for dispensation pursuant to Landlord and Tenant Act 1985 s.20ZA(1). It argued inter alia: (1) that the failure to comply with the consultation requirements had not caused the tenants to suffer significant prejudice; (2) that the financial consequences for the landlord of not granting dispensation was a relevant factor; and (3) the offer to compensate the tenants for any prejudice by reducing the cost of the works by £50,000 was also relevant. At the dispensation hearing, the tenants were unable to identify what comments they would have made had they seen the Rosewood tender.

Decisions of the Leasehold Valuation Tribunal, the Upper Tribunal and the Court of Appeal

11-50 The Leasehold Valuation Tribunal, Upper Tribunal and the Court of Appeal refused the landlord's application for dispensation. Giving the leading judgment of the Court of Appeal, Gross LJ held that significant prejudice to the tenants is a consideration of first importance in exercising the dispensatory discretion under Landlord and Tenant Act 1985 s.20ZA(1) and the landlord's failure in this case constituted a serious failing and did cause the tenants serious prejudice. This was not a technical, minor or excusable oversight. The Leasehold Valuation Tribunal was entitled not to speculate on what would have happened if there had been no breach, on the ground that the tenants' loss of opportunity to make further representations and have them considered itself amounted to significant prejudice. Gross LJ doubted that the Leasehold Valuation Tribunal would have been entitled

to accede to the landlord's offer to reduce the chargeable amount by £50,000, and that, anyway, the Leasehold Valuation Tribunal was entitled to reject that proposal.

Decision of the Supreme Court

11-51 The landlord appealed to the Supreme Court. By a majority (of three to two), the Supreme Court reversed the decisions of all lower courts and tribunals and granted the landlord dispensation on terms. Lord Neuberger (with whom Lord Clarke and Lord Sumption agreed) gave the leading judgment. Lord Hope and Lord Wilson delivered powerful dissenting judgments.

Financial Consequences

11-52 An argument that is sometimes relied on by landlords, particularly local authority and other social landlords, is that a relevant consideration in the exercise of the dispensation is the prejudice to the landlord in terms of suffering a serious and disproportionate financial penalty which (at least in the case of local authority landlords is likely to be to the disadvantage of its social tenants), whilst the long lease tenants will thereby derive an undeserved windfall gain. This argument was expressly rejected by the Supreme Court in *Daejan v Benson*.

The correct approach to applications for dispensation

11-53 Given that the purpose of the consultation requirements is to ensure that the tenants are protected from (1) paying for inappropriate works or (2) paying more than would be appropriate, the issue on which the Appropriate Tribunal should focus when entertaining an application under Landlord and Tenant Act 1985 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 consultation requirements. Thus, the main, indeed normally, the sole question for the Appropriate Tribunal when considering how to exercise its jurisdiction under Landlord and Tenant Act 1985 s.20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

It is not appropriate, as the Lands Chamber had done in *Grafton Way* and the Upper Tribunal and the Court of Appeal did in *Daejan v Benson*, to distinguish between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes. The landlord's conduct in failing to consult may not be relevant to the application for dispensation. It follows that it may now be possible for a landlord who deliberately decides not to follow the consultation requirements to obtain a dispensation. This is a significant departure from the approach to Landlord and Tenant Act 1985 s.20ZA taken by the Upper Tribunal and the Court of Appeal and from the previous dispensing power contained in the old s.20(9) Landlord and Tenant Act 1985.[78] Under the old s.20(9) the courts applied a two-stage process under which it was first necessary to establish that the landlord had acted reasonably, otherwise the discretion to dispense did not arise.[79] Landlord and Tenant Act 1985 s.20ZA(1) does not require the Appropriate Tribunal to be satisfied that the landlord has acted reasonably as a pre-condition to the engagement of its discretion to dispense.

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[78] I.e. before the amendments made introduced by Commonhold and Leasehold Reform Act 2002 s.151.

[79] I.e. before the amendments made introduced by Commonhold and Leasehold Reform Act 2002 s.151.

11-54 In the second edition of this work, it was suggested that s.20ZA(1) may not therefore be as strict as the old s.20(9). Lord Neuberger's comments in *Daejan v Benson* that dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements, appears to confirm this.

In dissenting judgments, Lord Hope and Lord Wilson held that Lord Neuberger's conclusion that the gravity of the landlord's non-compliance with the consultation requirements is relevant to dispensation not of itself but only insofar as it causes financial prejudice to the tenant "subverts Parliament's intention". Moreover, Lord Neuberger's conclusion that real prejudice to the tenant should normally be the sole consideration for the tribunal departs from the width of the criterion ("reasonable") which Parliament has specified and runs counter to the legislative history of the requirements for consultation. Lord Wilson held that a serious failure of the landlord does not need to be described as amounting to "prejudice" to the tenant but the tribunal should weigh the gravity of the non-compliance with a consultation requirement in determining whether to dispense with it along with any prejudice in the narrower financial sense (which will often be a matter of prime importance).

Prejudice

11-55 The legal burden of proof in applications for dispensation remains throughout on the landlord but the factual burden of identifying some "relevant" prejudice that they would or might have suffered caused by the landlord's failure to consult is on the tenants.

"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 with identifying what could have been said. If dispensation is granted, the landlord may be ordered to pay the costs of the tenant's expert's report as a condition of dispensation (see para.11-58).

Lord Neuberger held that once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and that he anticipates that tribunals will view the tenants' arguments "sympathetically". Lord Neuberger suggested this included resolving in the tenants' favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. The more egregious the landlord's failure, the more readily a tribunal would be likely to accept that the tenants had suffered prejudice. This hypothetical exercise may prove difficult for

both parties and tribunals.[80] It may be sufficient for the tenant to raise a prima facie case, after which the evidential burden shifts to the landlord. However, in many cases the tenant will suffer no financial prejudice and this will not be an issue.

11-56 It remains to be seen 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. 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.

In *Aster Communities v Chapman*,[81] the landlord applied under s.27A for a determination in respect of on-account service charges for proposed works which included the replacement of asphalt on balconies. The FTT held, on the evidence before it, that full replacement of all balcony asphalt was unnecessary such that the landlord could not recover the estimated costs. It acknowledged, however, that the landlord may in the future be able to justify some or complete balcony asphalt replacement based on what may be discovered in the course of the works. The FTT also held that the landlord had failed to comply with the consultation requirements in respect of the proposed replacement of the asphalt. Having completed the works, the landlord applied for dispensation and adduced evidence from its own surveyor that replacement of the asphalt was justified. The lessees adduced no evidence on the condition of the balconies. The landlord submitted that the tenants had failed to establish prejudice by having to pay for inappropriate works, and that, if the lessees wished to challenge the necessity of replacing the balcony asphalt, the appropriate time was in proceedings under s.27A as to the reasonableness of the actual costs of the works, not the current application for dispensation under s.20ZA. The FTT held that the lessees had made out a "credible case of relevant prejudice, namely that the lessees will be asked to pay for inappropriate works." It expressly rejected the landlord's submission that there was no prejudice because the lessees could always challenge the service charges under s.19 in a section 27A application. If that were so "unconditional dispensation would be the norm. That is clearly not what the Supreme Court intended." Dispensation was granted on conditions which included that the landlord was to pay the reasonable costs of an expert nominated by the lessees to consider and advise them on the necessity of replacing all the balcony asphalt. Dispensation would not take effect until that condition was satisfied.[82] The Upper Tribunal dismissed the landlord's appeal on the basis that the lessees had discharged the factual burden of establishing prejudice without calling any expert evidence by reason of the FTT's findings in the s.27A proceedings. In so doing, the Upper Tribunal emphasized the importance of being sympathetic to the tenants because the FTT "is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so".

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[80] Lord Wilson expressed concern as to whether a tenant can often discharge the burden cast upon him.
[81] [2020] UKUT 177 (LC).
[82] As to the Upper Tribunal's decision in relation to conditions, see para.11-57 below.

It went on to state that the FTT has a wide discretion in terms of the conditions that may be imposed. Permission to appeal to the Court of Appeal has been granted.

Conditional dispensation

11-57 One of the criticisms of the binary approach to applications for dispensation adopted by the Upper Tribunal and the Court of Appeal was that refusing dispensation "may be thought to be disproportionately damaging to the landlord, and disproportionately advantageous to the lessees". As the President noted in *Grafton Way*, "it is in the very nature of the provisions that the landlord will suffer financially, and the tenant will gain financially in the event that dispensation is not given".

In *Daejan v Benson*, Lord Neuberger sought to address this criticism and strike a fair balance between ensuring that tenants do not receive a windfall because the dispensation power is exercised too sparingly and ensuring that landlords are not cavalier about adhering to the consultation requirements because the power is exercised too loosely. This objective was achieved by concluding that the tribunal has power to grant a dispensation on terms. Although there is no specific reference in Landlord and Tenant Act 1985 s.20ZA(1) to the imposition of conditions, the Appropriate Tribunal would be concluding that it would be "reasonable" to grant a dispensation, but only if the landlord accepts certain conditions. Thus, the Appropriate Tribunal can and should reduce the service charge recoverable from tenants by such amount to compensate the tenants fully for any relevant prejudice. In *Daejan v Benson*, the majority held that Daejan's offer to reduce the recoverable service charge by £50,000 would adequately compensate the tenants and granted dispensation on terms accordingly.

11-58 The Appropriate Tribunal has power to grant a dispensation on such terms as it thinks fit, provided that any such terms are appropriate in their nature and their effect. This includes the power to impose a condition as to costs, notwithstanding the Appropriate Tribunal's otherwise limited power to award costs under Commonhold and Leasehold Reform Act 2002 Sch.10 and to limit the recovery of costs through the service charge pursuant to Landlord and Tenant Act 1985 s.20C. The power is analogous with the court's jurisdiction to grant from relief from forfeiture. A party seeking a dispensation is claiming what Lord Neuberger characterised as an indulgence from the tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence. In many cases it will be appropriate to grant dispensation on condition that the landlord pays its own costs and the tenant's reasonable costs incurred in investigating or establishing prejudice and investigating and challenging the application for dispensation. Importantly, the landlord may also have to pay the tenant's costs in establishing that the landlord failed to comply with the consultation requirements, even if this point was determined in earlier separate proceedings.[83]

The lack of prejudice may be so obvious that it would be unreasonable for the tenant to incur any costs in investigating prejudice and/or challenging the application for dispensation so that dispensation should be granted unconditionally. However, it is clear from Lord Neuberger's judgment that a tenant can act reasonably, although ultimately be unsuccessful in resisting dispensation. It is submitted that, save in exceptional cases, it will be reasonable for the tenant to obtain legal

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[83] *Daejan v Benson (No.2)* [2013] UKSC 54 at [8].

advice on the application for dispensation and that, provided the cost of such advice is reasonable and proportionate, the landlord should pay those costs even if the tenant does not oppose the application for dispensation. Similarly, it may be reasonable for the tenant to instruct a surveyor to investigate whether the tenant has suffered any prejudice and it could be argued that that the landlord should pay those costs as well, even though the tenant never actually advances any positive case of prejudice. Where tenants argue they have suffered prejudice and it is reasonable to instruct solicitors and/or counsel to represent them at the hearing, landlords should also pay those costs as a condition of dispensation.

It is not immediately obvious what other terms and conditions the Appropriate Tribunal may order as a condition of dispensation but it is submitted that the Appropriate Tribunal has a very wide discretion to impose whatever terms and conditions are required to meet the justice of the particular case.[84]

When does dispensation take effect?

11-59 Dispensation takes effect only when the landlord has complied with the terms and conditions imposed on the landlord for the grant of the dispensation. If unconditional dispensation is granted, dispensation takes effect on the date of the Appropriate Tribunal's decision.[85] This may be important with regard to ancillary matters, such as the date from which interest on late payments under a lease is payable.

In *Aster Communities v Chapman*,[86] dispensation was granted on conditions which included that the landlord pay the reasonable costs of an expert nominated by the lessees to consider and advise them on the necessity of replacing all the balcony asphalt at the main blocks. Dispensation would not take effect until that condition was satisfied. On appeal to the Upper Tribunal the landlord argued that the condition was too vague and imprecise to comprise a lawful condition of dispensation: there was no time limit within which the expert was to be nominated, there was no mechanism where the identity of the expert was to be agreed by the various tenants (some of whom were representing themselves), nor was there any means for determining whether the costs claimed by the expert were reasonable. In rejecting these submissions, the Upper Tribunal emphasized the wide power vested in the FTT to set conditions and held that the condition was "perfectly workable" and "appropriate in its nature and effect." Permission to appeal to the Court of Appeal has been granted.

Prospective applications for dispensation

11-60 Most dispensation applications are made after the landlord has undertaken the qualifying works or has entered into the QLTA. However, it is possible to apply for a dispensation before undertaking the works or entering into a QLTA: see the decision of the Lands Tribunal in *Auger v Camden LBC*.[87] In *Daejan v Benson*, Lord Neuberger put the issue beyond any doubt.[88]

The most obvious cases are where it is necessary to carry out some works very

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[84] In *Aster Communities v Chapman* [2020] UKUT 177 (LC), the terms imposed by the FTT included that the landlord is to pay the reasonable costs of an expert nominated by the lessees to consider and advise them on the necessity of replacing all the balcony asphalt at the main blocks. See above for a detailed summary of the decision.

[85] *Daejan v Benson (No.2)* [2013] UKSC 54 at [19]–[21].

[86] [2020] UKUT 177 (LC). See above for a detailed summary of the decision.

[87] LRX/81/2007 Lands Tribunal.

[88] *Daejan v Benson (No.2)* [2013] UKSC 54 at [19]–[21].

urgently,[89] or where it only becomes apparent that it is necessary to carry out some works while contractors are already on site carrying out other work. In such cases, the Tribunal may dispense with the consultation requirements on terms which require the landlord to adopt a truncated consultation process, for example, the landlord may be required to convene a meeting of the tenants at short notice to explain and discuss the necessary works. Alternatively, the landlord may be required to serve a notice of intention and a para.(b) statement, but with (say) five days instead of 30 days for the tenants to reply. The extent to which the Appropriate Tribunal will be willing to require truncated consultation will depend all of the circumstances of the case, including the nature, complexity, urgency and cost to the tenants of the proposed works.

It will often be prudent to make a prospective application for dispensation, particularly in the case of high value, often borough wide, partnering and similar agreements into which local authorities frequently enter. As the decision in *Auger* illustrates, it is very important to ensure that any such application to the Appropriate Tribunal for a dispensation is fully supported by detailed evidence as to the impracticality of complying with the requirements for which a dispensation is sought.

The circumstances in which a pre-emptive application for a dispensation may be made could include the case where only one contractor could possibly carry out certain works, e.g. repairs to an alarm system where only the installer could carry out maintenance.

Summary

11-61 Following *Daejan v Benson*, dispensation is likely to be granted in the majority of cases, albeit on terms. Tenants will have to identify what they would have said with the benefit of hindsight and what prejudice they have suffered by the failure to consult. In many cases, it will be reasonable for the tenants to instruct lawyers and surveyors to investigate prejudice and challenge the application for dispensation. If and to the extent that tenants establish relevant prejudice, dispensation will be granted on condition that the recoverable costs are reduced to compensate such prejudice. However, it is difficult to envisage many cases whereby a tenant's contribution to the cost of major works will be capped at £250. Such cases are now likely to be the exception, rather than the rule.

LTA 1985 S.30B: CONSULTATION ON THE APPOINTMENT AND EMPLOYMENT OF MANAGING AGENTS

11-62 Many leases provide for the tenant to contribute towards the cost of managing agents or other persons appointed by the landlord to manage the property.

There is no general requirement that tenants be consulted in relation to the appointment and employment of managing agents. It is possible for the terms of the lease to provide for such consultation. Residential tenants who are "qualifying tenants" under the Leasehold Reform Housing and Urban Development Act 1993 have the right to a management audit under Ch.V of that Act.

Under Landlord and Tenant Act 1985 s.30B, a recognised tenants' association can require a landlord to consult the association in relation to the appointment or

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[89] For example, dispensation was granted in respect of fire safety works in *GRIF039 Ltd v Leaseholders* Unreported MAN/00BN/LDC/2018/0005.

employment of managing agents. However, the recognised tenants' association must first serve on the landlord a notice requesting the landlord to consult.[90]

So long as the landlord employs a managing agent he must serve a notice on the association at least once every five years specifying any change in the managing agent's functions since the last notice and a reasonable period within which the association can make observations as in (b) above.[91] If the landlord proposes to appoint a new managing agent, then it must serve a notice specifying the matters mentioned in s.30B(2)(a)–(c) (s.30B(4)(b)). However, a landlord is not, by virtue of a notice served by a recognised tenants' association under subs.(1), required to serve a notice under subss.30B(4)(a) or (b) if the recognised tenants' association subsequently serves on the landlord a notice withdrawing its request under subs.(1) to be consulted by him.[92]

11-63 If the landlord changes, then the recognised tenants' association notice will be of no effect and a new notice needs to be served if the association still wishes to be consulted.[93]

Any notice served by a landlord must specify the name and the address in the UK of the person to whom any observations made in pursuance of the notice are to be sent; and the landlord must then have regard to any such observations that are received by that person within the period specified in the notice. However, the extent of the landlord's duty to have regard to observations is not set out in any greater detail in the statute.[94]

In Landlord and Tenant Act 1985 s.30B, "landlord" means the immediate landlord of the tenants represented by the association or a person who has a right to enforce payment of service charges payable by any of those tenants.[95] Consequently, a management company with whom the tenants covenant to pay service charges is a "landlord" for the purposes of Landlord and Tenant Act 1985 s.30B.[96] Where a RTM company has acquired the right to manage relevant premises, the RTM company is the "landlord" for the purposes of s.30B and s.30B(6) is of no effect.[97]

Further, "managing agent" means "an agent of the landlord appointed to discharge any of the landlord's obligations to the tenants represented by the recognised tenants' association in question which relate to the management by him of those premises"[98]; and any premises (whether a building or not) are "relevant premises" in relation to a recognised tenants' association if any of the tenants represented by the recognised tenants' association may be required under the terms of their leases to contribute by payment of service charges to costs relating to those premises".[99]

Section 30B applies to land owned by the Crown.[100]

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90 Landlord and Tenant Act 1985 s.30B(1).
91 Landlord and Tenant Act 1985 s.30B(4)(a).
92 Landlord and Tenant Act 1985 s.30B(5).
93 Landlord and Tenant Act 1985 s.30B(6).
94 Landlord and Tenant Act 1985 s.30B(7).
95 Landlord and Tenant Act 1985 s.30B(8).
96 *Cinnamon v Morgan* [2001] EWCA Civ 1616; [2002] L. & T.R. 20.
97 Commonhold and Leasehold Reform Act 2002 s.102, Sch.7 para.6.
98 Landlord and Tenant Act 1985 s.30B(8).
99 Landlord and Tenant Act 1985 s.30B(8).
100 Commonhold and Leasehold Reform Act 2002 s.172(1).

CONSULTATION REQUIREMENTS RELATING TO COMMERCIAL PROPERTIES

11-64 Commercial leases occasionally include express contractual consultation requirements. There is no statutory equivalent to Landlord and Tenant Act 1985 ss.20 and 20ZA applicable to commercial leases.

The RICS Professional Statement: *Service Charges in Commercial Property*[101] provides at Core Principle 6 that:

> "While the owner has the right to set the standards by which their investment will be managed and has a duty to manage, managers should consult with occupiers regarding the standard and quality of service charge provision required."

The Professional Statement also emphasises the importance of having a clear communication structure between managers and occupiers.

The Professional Statement professes itself to reflect good practice in the industry. A good landlord will no doubt comply with it. If a landlord fails to comply with the Guide, it has (subject to the caveat below) no teeth and does not affect liability for service charge. It should be noted that the Guide is not a Code of Practice with statutory recognition.

The caveat lies in the courts' powers as to costs. Under CPR 44.2(4), when deciding what order (if any) to make about costs, the court must have regard to (among other circumstances) the conduct of a party to litigation. CPR 44.2(5)(a) makes clear that "conduct" includes conduct prior to the issue of proceedings. It is considered that failure to comply with the RICS Professional Statement is something which the court might take into account when deciding whether to make a costs order in favour of (or against) a landlord, particularly if the judge takes the view that the landlord's uncooperative attitude is one reason why the dispute ended up being the subject of litigation.

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[101] RICS Professional Statement: *Service Charges in Commercial Property*, 1st edn (2019). See Ch.16: Management Codes of Practice.