



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AG/LDC/2014/0123**

Property : **Campden House, Glover House,
Harrold House, Hickes House and
Noel House, London NW6**

Applicant : **The London Borough of Camden**

Representative : **Camden Leaseholder Services**

Respondents : **The leaseholders of some 46 flats n
the Harben Road Estate**

Representatives : **Carol Berggren, Margaret Havell
and Zhaokang Yu, leaseholders,
representing the respondents who
have objected to the application**

Type of application : **For a dispensation from the
consultation requirements in
respect of works carried out under
a qualifying long term agreement**

Date heard : **29 January and 17 March 2015**

Appearances : **On 29 January:

Insley Ettienne, consultation and
final accounts officer, for the
landlord

Carol Berggren, Margaret Havell
and Zhaokang Yu, leaseholders,**

**representing the respondents who
have objected to the application**

On 17 March:

**Michael Walsh, counsel, instructed
by the landlord's legal department,
for the landlord**

**Robert Bowker, counsel, for
Zhaokang Yu and Yazhe Li**

**Carol Berggren and Margaret
Havell in person**

Tribunal : **Margaret Wilson
Luis Jarero BSc FRICS
Laurelie Walter**

Date of decision : **27 April 2015**

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DECISION

Introduction

1. This is an application by the landlord, the London Borough of Camden, under section 20ZA of the Landlord and Tenant Act 1985 ("the Act") for dispensation with compliance with the consultation requirements which apply to works which it carried out under a qualifying long term agreement ("QLTA").

2. The application is dated 8 September 2014. It seeks dispensation from compliance with the consultation requirements in respect of the replacement of communal central heating boilers serving the Harben Road Estate and associated works which were carried out between December 2011 and April 2012 on which it did not consult the leaseholders as it was required to do by section 20 of the Act. The respondents to the application are the leaseholders of the flats on the Estate which are held on long leases by virtue of which they are required to pay variable service charges. They will be called "the tenants" in this decision and the tenants of the flats which are not held on long leases will be called "periodic tenants".

The proceedings

3. Directions were made for the disposal of the application on 19 September 2014. The directions, which were made on consideration of the application alone and without an oral case management hearing, provided for a determination on the papers and without an oral hearing and did not inform the parties that they were entitled under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to ask for an oral hearing as of right. Nor did the directions indicate to the parties that, as the law now stands, the main issue for the Tribunal to determine on an application for dispensation with the consultation requirements is whether the tenants were prejudiced by the landlord's failure to comply with them and whether, if they were prejudiced, dispensation from compliance with the consultation requirements should be granted subject to conditions. It is fair to say that the directions were not as helpful to the parties as they might have been.

4. The tenants of eleven flats informed the Tribunal that they objected to the grant of dispensation and that they wished for an oral hearing, which was arranged. The application first came before the Tribunal on 29 January 2015. At that hearing the landlord was represented by Ms Insley Ettienne, a legal officer of the landlord, accompanied by Mr John Stow, the landlord's Mechanical Services Manager. Although in its application the landlord had said that a signed witness statement from Michael Hunt, Mechanical Contracts Manager, would explain the urgency of the works, no statement

from Mr Hunt was produced and Mr Hunt did not appear at the hearing. Of the tenants who had informed the Tribunal that they wished to oppose the application, three: Carol Berggren of 15 Noel Street, Margaret Havell of 1 Campden House and Zhaokang Yu of 1 Harrold House, attended the hearing. They said that they were representing all the tenants who opposed the application.

5. It was apparent at that hearing that the tenants who attended it had not heard of the decision of the Supreme Court in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 [2013] 1 WLR 854, nor were they aware of the principles it decided. Nor was it apparent that the landlord had had the decision in mind when its case was prepared or, indeed, that Ms Ettienne was familiar with the decision. Neither the decision nor the question of prejudice was mentioned in the landlord's case and Ms Ettienne had not brought to the hearing a copy of the report of the decision.

6. In those circumstances we considered it right to inform those present of the existence of *Daejan*. We explained to them, in general terms, what it decided and we provided the tenants and Ms Ettienne with copies of the case report. Having considered the report as best they could at the time, the tenants said that they wished to be legally represented in order more effectively to present their case in relation to prejudice which was, essentially, that they had been prejudiced by the landlord's failure to consult them as to the replacement of the boilers which denied them the opportunity to make observations proposing that, instead of replacing the communal boilers, individual systems should be installed within each of the flats, a proposal which they considered would be significantly cheaper than replacing the communal system of which the boilers form part. Asked by the Tribunal at the hearing what he would have said if he had been consulted, Mr Yu said "I would have said 'consider other options' and use temporary boilers in the meantime".

7. When the observations of Lord Neuberger in *Daejan* as to the landlord's probable obligation to pay the tenants' reasonable costs of opposing the application were drawn to her attention Ms Ettienne very properly accepted the Tribunal's suggestion that the landlord should bear the tenants' reasonable costs of legal representation at the adjourned hearing.

8. At the adjourned hearing on 17 March 2015 the landlord was represented by Michael Walsh, counsel, who called Mr Stow to give evidence. Mr Yu and Ms Li Yazhe, the joint tenants of 1 Harrold House, were represented by Robert Bowker, counsel, who called Mr Yu to give evidence. Ms Berggren and Ms Havell also attended the hearing and made submissions.

The factual background

9. Much, if not all, of the following factual background is not contentious, but some of the events set out in the chronology of the works are taken from a document prepared by Mr Walsh for the second hearing and produced at the start of that hearing, not all of them supported by any documentary or other

evidence made available to the Tribunal. The events listed in paragraphs 14, 17, 19, 21, 23 and 25 below fall into that category. We assume for present purposes that they are accurately described but it is unsatisfactory that more supporting documents were not made available and that the chronology was not provided to the tenants earlier than the Friday before the second hearing, which was on a Tuesday. This case has in our view not been taken sufficiently seriously by the landlord and, as Mr Walsh, who did his best in difficult circumstances, accepted, the preparation of its case has been lamentable.

10. The Estate is said to comprise 184 flats (although we note that in a letter from the landlord's Head of Leaseholder Services at page 51 of the second hearing bundle it was said that the Estate had 285 properties, which we assume to be an error) in five low rise blocks, Campden House, Glover House, Harrold House, Hickes House and Noel House, all built in the 1950s and together forming what is known as the Harben Road Estate. One quarter of the flats are held on long leases purchased under the Right to Buy scheme and the others are occupied by periodic tenants.

11. The leases are effectively in common form. By clause 4.4 of the lease the landlord covenants:

Provided only that the amenities hereinafter in this sub-clause mentioned are provided to all the flats in the block at the date hereof but not otherwise and subject as hereinafter set out at all times during the term to supply hot water for domestic purposes to the flat by means of the boiler and heating installations serving the block and also from the 1st October to the 30th April inclusive in each year to supply hot water for heating to the radiators fixed in the flat so as to maintain a reasonable and normal temperature.

Paragraph 2 of the fifth schedule includes as an expense to which the leaseholder covenants to contribute by way of a service charge:

the cost of periodically inspecting maintaining overhauling repairing and where necessary replacing the whole of the heating and domestic hot water systems and gas electricity and water pipes and cables serving the block

12. Since the blocks were built in the 1950s hot water throughout the year and central heating from 1 October to 30 April have been provided to the flats by a communal system using four boilers situated in the lower ground floor of Campden House. It appears that the system, or parts of it, was replaced in the 1970s. Some leaseholders, including Mr Yu or his predecessors in title, have installed individual boilers within their flats and do not rely on the communal system.

13. In 2008, having consulted the then leaseholders under the applicable Consultation Regulations, the landlord entered into a ten year "partnering agreement", which was a QLTA within the meaning of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation

Regulations"), with Apollo Property Services Group Ltd ("Apollo") to carry out building repairs and renewals to the landlord's properties in the borough.

The works

14. (i) On 24 November 2011 the landlord's contracts manager became aware that Boiler No 3 was in need of repair and works orders were issued.
 - (ii) On 30 November parts were received and their installation was arranged.
 - (iii) On 9 December Boiler 3 was repaired.
 - (iv) On 14 December Boilers 1 and 2 were off-line.
 - (v) On 15 December the project managers and contractors visited the site and found that the two boilers were off-line because of split sections.
 - (vi) On 19 December three contractors [assumed to be G & D Higgins Mechanical Services Ltd ("G & D Higgins"), Sutton Group and Swift Engineering Services Ltd] were asked to provide a quotation for replacement boilers. [We have not been provided with copies of the request for quotations.]
15. On 4 January 2012 Sutton Group provided a quotation (at pages 128 and 129 of the first hearing bundle) for the removal of two of the existing boilers and their replacement by two Broag boilers for £32,010 plus VAT for each boiler. On 5 January 2012 Swift Engineering Services Ltd provided a quotation (at pages 130 and 131 of the first bundle) for the removal of one boiler and its replacement by a Remeha boiler for £38,940, presumably plus VAT.
16. On 5 January 2012 Jack Duncan, principal contracts manager with G & D Higgins, emailed Christopher Howard of Apollo, (page 132 of the first bundle) The email said:

Chris

Further to our quotation for the above works [not provided] dated 22nd December 2011, we now find ourselves in the situation that due to some other planned work being delayed that [sic] we now have spare labour capacity and rather than lay these people off we have looked at our price submitted and feel that we could reduce our price with a view to hopefully securing this work. I would like to point out however that this price reduction is based on the proviso that the order received will be for all 4 boilers and that this work will take place within the 2/3 months. We would therefore like to submit our

revised price of £30,995.00 per boiler a total of £123,980 plus VAT for all four boilers. We trust that you will find the above proposal of interest and await your further advice, if however you should require any additional information then please do not hesitate to contact me.
Regards

Jack Duncan

Later that morning Mr Howard forwarded the email to Daniel Chipps and Abdul Rohim, both quantity surveyors with Apollo, with the comment "interesting offer for Camden".

17. On 5 January 2012 Boiler 3 split on an intermediate section.
18. On 6 January 2012 the landlord issued a works order (first bundle, pages 120 - 121) for the installation of one Broag boiler at a price of £30,995 by G & D Higgins.
19. (i) Also on 6 January defective parts were removed from Boiler 3 and replaced with recycled parts from Boilers 3 [sic] and 4.

(ii) On 10 January Boilers 3 and 4 were off-line and Boiler 2 was repaired. Boiler 1 was leaking but could not be repaired until Boiler 3 was on-line.

(iii) On 11 January Boiler 3 was repaired, enabling repairs to Boiler 4.
20. On 16 January a works order (first bundle pages 122 - 123) was issued for the installation of a second Broag boiler by G & D Higgins for £30,995.
21. (i) On 19 January a new front section and boiler door was ordered for Boiler 3.

(ii) On 30 January Boiler 4 broke down, causing total loss to the entire heating system. "Quotation from G D Higgins to replace two boilers is accepted".
22. On 9 February a works order (first bundle pages 124 - 125) was issued for the installation of a third Broag boiler by G & D Higgins for £30,995. Also on 9 February 2012 temporary boilers were hired at a cost of £1522.80 per week, together with a flexible hose at £78 per week and delivery and installation at £2154. The temporary boilers were in place for 10.5 weeks.
23. (i) On 10 February a temporary boiler was on site and prepared for installation. Only one boiler was in working order.

(ii) On 13 February a temporary boiler was installed and two boilers were working.

24. A works order for the replacement of the fourth boiler was issued on 13 February (first bundle pages 126 - 127), the work to be carried out by G & D Higgins for £30,995.

25. (i) On 28 February one new boiler installed, with temporary boiler continuing to run. Boilers 3 and 4 were to be delivered shortly.

(ii) On 16 April Boilers 1, 2 and 3 were on-line and Boiler 4 was ready for commissioning. Delay was caused by two burst main pipes on the Estate. [These were repaired in March and/or April 2012 - see section 20B notice at page 137.]

26. It is common ground that none of the works summarised above was the subject of any consultation, whether formal or informal, with the leaseholders.

27. In March 2012 Prime Glen Designs Ltd produced for the landlord an "Options Appraisal of Heating and DHW [domestic hot water] supplies at Harben Road Estate". The landlord did not produce the report for the first hearing but the tenants produced extracts (to save copying costs), and they produced the full report for the second hearing which is at pages 1 - 46 of the second bundle. It shows that the landlord was considering five options in relation to the provision of heating and hot water to the estate, it being accepted that the internal heating provision within each dwelling is poor and improvements are urgently required" (internal page 3). Option 1 was to do nothing but essential repairs; option 2 was to replace distribution mains, boilerhouse equipment and dwelling internals; option 3 was as option 2 but with the addition of new meters; option 4 was to remove the communal system and to install individual gas fired condensing boilers in each dwelling; and option 5 was as option 4 but replacing the communal system with electric heating and hot water.

28. On 15 July 2013 the landlord gave the leaseholders a notice under section 20B of the Act (sample in respect of Flat 1, Campden House at page 137 of the first bundle) notifying them that three of the four boilers had been replaced between December 2011 and February 2012 and that two sections of the mains hot water pipes had been replaced during March and April 2012, that the costs for the works were incurred on 14 March, 25 April, 29 June and 27 November 2012, that the total cost of the works was £246,707.15 and that, subject to the Tribunal dispensing with compliance with the consultation requirements, the leaseholder concerned would be asked to pay a service charge which, in the case of 1 Campden House, was estimated to be £1714.90 in respect of the works. The notice did not refer to the fourth boiler which had also been replaced.

29. On 29 November 2013 Mike Edmunds, the landlord's Head of Leasehold Services, wrote to the leaseholders (sample letter from page 48 of the second bundle). The letter set out what were said to be the costs of repairing the boilers and of their subsequent replacement and said that there was "still an ongoing consultation process being carried out with residents over the final options for the heating system and all are being reviewed", that the consultation included a voting form asking for residents' preferences, that bills

for the costs would not be issued until after the consultation was complete and there was a decision on whether the Estate should continue to have a communal system or should move to individual systems, that "if individual systems are the preferred option consideration will be given to what elements of the costs are re-charged", and that leaseholders could withhold payment of the "heating emergency repair works" charged in 2012/2013 until the dispensation was complete.

30. In February 2014 the landlord produced a second summary of the options available in relation to the central heating and hot water supply to the Estate.

31. The landlord's undated second statement of case served before the first hearing included, at paragraph 16 (page 68 of the first bundle) "Camden is still an [sic] ongoing consultation process being carried out with residents over the final options for the heating system and all are being reviewed. The heating team are in the process of consulting on the two options (individual vs communal) along with the basic pros and cons of each. Once this additional process has lapsed Camden may deem it necessary to seek judgement from the Tribunal on the reasonableness of cost for such."

32. Letters from the landlord to all residents dated 7 and 9 October 2014 (pages 58 and 59 of the second bundle) indicate that there was a fault in the boiler house and no heating or hot water to the Estate.

33. We were told by the tenants at the second hearing, and the landlord did not dispute, that since the works which are the subject of this application further works have been carried out to the heating system, at a cost of about £400,000. We were not told what works the works entailed save that they were to the heating system.

The legal background

34. Section 20 of the Act applies where the cost of qualifying works exceeds "an appropriate amount set by the regulations". By section 20ZA(2) "qualifying works" are "works on a building or any other premises", and, by regulation 6 of the Consultation Regulations, the "appropriate amount" is a sum which results in any leaseholder paying more than £250.

35. Section 20(1) of the Act provides, in effect, that the contributions of each leaseholder are limited to £250 unless the relevant consultation requirements have been either complied with or dispensed with by the Tribunal. The Tribunal's dispensation power arises from section 20ZA (1) which, as amended to take account of the replacement of the leasehold valuation tribunal by the First-tier Tribunal, provides:

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

36. The consultation requirements which applied to the partnering agreement between the landlord and Apollo are not relevant to the present case. The consultation requirements which apply to the works for which dispensation is sought are set out in Schedule 3 to the Consultation Regulations, which apply to "qualifying works under qualifying long term agreements". The relevant consultation requirements which apply to works carried out under QLTAs are, essentially:

- i. the landlord must give notice of its intention to carry out the works to each tenant [ie leaseholder who pays variable service charges] and to any recognised tenants' association;
- ii. the notice must describe the proposed works, state the landlord's reason for considering them to be necessary and the total estimated cost of the works and must invite the making of observations in relation to the proposed works and their cost;
- iii. if within 30 days of the date of the notice observations are made in relation to the proposed works or their cost by any leaseholder or recognised tenants' association the landlord shall have regard to those observations; and
- iv. where the landlord receives observations to which he is required to have regard he must, within 21 days of their receipt, respond to them in writing.

37. Until the decision of the Supreme Court in *Daejan* it had been considered to be the law that an important and relevant consideration in determining whether to dispense with the consultation requirements was the seriousness of the landlord's breach of those requirements but, by a majority of three to two, the Supreme Court in *Daejan* decided otherwise. The majority judgment of Lord Neuberger now sets out the principles to be applied on an application for dispensation. The principles and their application in the present case will be considered in greater detail later, but it may be convenient to set out at this stage a summary of the principles which *Daejan* identified.

- i. The jurisdiction of the Tribunal to dispense with the consultation requirements is unfettered beyond what can be gathered from the Act itself (paragraph 41).
- ii. Since the purpose of the consultation requirements is to ensure that tenants are protected from paying for inappropriate works or paying more than would be appropriate, the question on which the Tribunal should focus is the extent, if any, on which the tenants were prejudiced in either respect by the landlord's failure to comply with the requirements (paragraph 44).
- iii. The Tribunal has power to grant dispensation on appropriate conditions (paragraph 54).

iv. The correct approach to prejudice to the tenants requires the Tribunal to bear in mind in particular:

a. the only disadvantage of which the tenants can complain is one which they would not have suffered if the requirements had been complied with but which they will suffer if an unconditional dispensation were granted (paragraphs 65 and 67);

b. while the legal burden is on the landlord, the factual burden of identifying some relevant prejudice is on the tenants, who will have to identify what they would have said if they had been consulted; but, given that the landlord will have failed to comply with the consultation requirements, the landlord can "scarcely complain" if the Tribunal views the tenants' arguments sympathetically (paragraph 67), and, once the tenants have shown a credible case for prejudice, it is for the landlord to rebut it (paragraph 68).

The evidence

38. John Stow, the landlord's Mechanical Services Manager, gave evidence for the landlord. He had provided a written statement for the first hearing and a second written statement, served on the Friday before the second hearing, for the second hearing, at which he gave oral evidence. He said that he had not been personally involved in the works but that those who had were no longer with Camden or were not available.

39. Cross-examined, he said that he had not at any stage seen the landlord's statement of case or read, or been asked to read, its bundle of documents prepared for the hearing. He said, initially, that he did not know the value of the works for which dispensation was sought, although he later agreed that it was likely to be £246,707.15. He could not explain the difference of some £100,000 between that figure and the combined costs of the four boilers and of the hire of temporary boilers. He said that he could not explain why, as it appeared from the documents, at least two of the three sub-contractors who had been asked to price new boilers had been asked to quote for a different number of boilers (see paragraph 15 above). He agreed that, notwithstanding that he had said in his first written statement (page 133 of the first bundle at page 134) that "a decision that the works were necessary to replace all 4 boilers was made on 10th Feb 2012", the documents tended to suggest that the decision to replace all four boilers must have been taken on 5/6 January when G & D Higgins's offer to replace all four boilers at a price of £30,995 for each boiler appears to have been accepted. He said that he was aware that there was a discussion in mid-December 2011, in which he had not been involved, about whether the four boilers should be replaced because they were nearing the end of their useful life and he agreed that now that the money had been spent on new boilers it was more difficult for the tenants to mount a challenge to the replacement of the boilers based on the argument that it would have

been more cost-effective to install individual systems. He agreed that the project was complex and had spanned twelve months, and he did not know why the landlord had not consulted the leaseholders before the works were done. He said that he had been involved in projects where Camden had converted from a communal heating system to individual systems and they had taken about a year.

40. Mr Yu said that he adopted his written statement of case, which had been drafted for him by a friend, save that he did not adopt the challenge to Apollo's honesty. He said that the tenants did not oppose dispensation in relation to the genuinely urgent works to restore heating and hot water, which would have included mending the broken pipes and hiring a temporary boiler which could have maintained the services for a long period at relatively little cost while the landlord consulted the leaseholders about the best option to pursue. He said that if he had been consulted about the works he would have asked whether it was reasonable to continue with a communal system and not consider other options, and that he favoured individual systems because they would be much cheaper in the long run and the running costs of individual systems would be lower. He and other tenants had submitted statements to similar effect (example at page 16 of the first bundle), adding that individual condensing boilers were the most efficient in terms of fuel and carbon dioxide emissions.

The argument

41. Mr Walsh submitted at the outset of the second hearing that the tenants' statements of case were not witness statements, attested by statements of truth, and that there was thus no evidence before the Tribunal on which we could find that the tenants had suffered prejudice and that the tenants' case was thus bound to fail because they could not discharge the evidential burden upon them. We rejected that formalistic approach. Before the first hearing the tenants had submitted long statements of their case, some parts of which were admittedly irrelevant in the light of *Daejan* of which they had never heard, but parts of which explained why they had wished to be consulted and what they would have said if they had been consulted. It is frequently the case that statements of case stand as witness statements for the purpose of Tribunal hearings, which are supposed to be relatively informal.

42. In his final submissions he argued that the tenants' case remained doomed to fail for lack of evidence. He submitted that the only form of prejudice which might be considered a permissible consideration was financial prejudice, for which proposition he relied on paragraph 44 of Lord Neuberger's judgment in *Daejan* which reads:

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.

He submitted that the tenants had not shown the financial prejudice which was required to defeat an application for dispensation, because there was no evidence that the option chosen by the landlord was not the cheapest option, the only evidence of the financial advantages and disadvantages being the Options Appraisal, which did not demonstrate that the tenants had suffered financial prejudice. He submitted that there would have been very considerable difficulties facing a landlord which chose the option of individual systems, which would have included the need to vary the leases, that the landlord had been under intense pressure to restore heating and hot water when the system failed, and that the landlord's only obligation, if it had consulted the tenants, would have been to "have regard" to such observations as they made, and that the landlord, having done so, would have rejected them as it was entitled to do. He submitted that the grant of dispensation would not be a "landlord's charter" as Mr Bowker suggested because decisions of the Tribunal have no precedent effect. He also submitted that the Tribunal had already attached conditions to any grant of dispensation because it had required the landlord to pay the tenants' legal costs of opposing the application, and he made no submissions as to any further conditions which the Tribunal should attach to a grant of dispensation.

43. Mr Bowker confirmed the evidence of Mr Yu and other tenants that they did not take issue with the landlord's entitlement to carry out genuinely urgent work to reinstate heating and hot water to the Estate over Christmas, but that most of the works which were the subject of this application were not urgent and that it had been the landlord's deliberate choice to carry out works which were not urgent without any consultation whatsoever. He submitted that the truly urgent work was, according to the landlord's Housing Repairs Service manual which the tenants produced, required to be carried out in five working days from the date when the failure was reported to it, and that a reasonable landlord would have activated the statutory consultation process within two or three days after the failure was reported. He submitted that the landlord had had ample opportunity to consult the leaseholders, either fully in accordance with the Consultation Regulations or at any rate in an abbreviated form, that its failure to do so was wilful and that its breaches were cavalier or worse, which was relevant to the way the Tribunal should exercise its discretion under section 20ZA.

44. He submitted that it was also relevant that the landlord had delayed for over two and a half years after the works were completed before applying for dispensation, thereby making it more difficult for the tenants to establish their case because employees of the landlord who could have given relevant evidence had left and tenants had either moved or lost interest, and that the landlord's failure to disclose relevant documents or to produce its evidence in good time, or generally to put its cards on the table in a clear and helpful way, had made the tenants' task the more onerous and that that, too, was relevant to the exercise of our discretion.

45. Mr Bowker submitted that it was clear from paragraph 67 of the decision in *Daejan* that the prejudice sufficient to defeat an application for dispensation did not have to be financial, but that if only financial prejudice would do, there was such prejudice here because the landlord had spent, and the tenants were going to be asked to pay by way of service charges, very large sums which need not have been spent, and that no more than the costs of hiring a temporary boiler and of initial repairs to the system should have been charged. He submitted that if the landlord was granted dispensation, other than on onerous conditions, it would be "a landlord's charter" and the landlord would have benefited from its own wrongdoing, and that we should refuse to dispense with compliance with the Consultation Regulations except on terms which allowed the landlord to recover only the cost of the genuinely urgent works.

Decision

46. *Daejan* establishes that the only consideration for a Tribunal faced with a decision whether to grant or refuse dispensation with the consultation requirements is whether the tenants have been prejudiced by a landlord's failure to comply with them. But this case brings into sharp focus some problems which arise from the decision and, in particular, the significant difficulties facing tenants who seek to demonstrate that they have been prejudiced.

47. One such difficulty is this. It is clear from *Daejan* that the Tribunal has the power to impose as a condition on a grant of dispensation that the landlord pays the reasonable costs which the tenants have incurred in connection with the landlord's application for dispensation. But many tenants, and indeed some landlords, are not aware of the decision in *Daejan*, and, if they have heard of it, they do not necessarily fully understand its implications. Thus in this case, as in others with which we are familiar, the tenants did not appreciate until it was arguably too late to be as effective as it could have been, and only after a largely abortive first hearing, that they might be entitled to the advantage of representation by a lawyer and/or by a surveyor paid for by the landlord. In order to obtain the full advantages of professional representation tenants are likely to need to be represented well in advance of the hearing of the application so that they may obtain the disclosure and require the evidence that they need in order to establish that they have been prejudiced.

48. Furthermore, even if tenants are aware of their potential right to have their costs paid by the landlord, most lawyers and surveyors will be reluctant to accept instructions without an assurance that they will be paid. Until the Tribunal has heard the case it is most unlikely, unless the tenants themselves have the means, if necessary, to pay their own costs, that such assurance will be provided to them until it is too late. It is apparent from the judgment of Lord Neuberger in *Daejan* that it cannot be assumed that costs will be awarded. In paragraph 68 of his judgment he said only that the Tribunal "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" 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". Those words are very far from providing the certainty of payment which would satisfy most lawyers and surveyors.

49. It follows that the availability to tenants of legal or other professional representation for the preparation or conduct of a landlord's application for dispensation is not as great an advantage as might appear. In many cases it will be illusory.

50. Then there is the question whether, as Mr Walsh submitted, the prejudice of which the tenants must, in the words of Lord Neuberger, show "a credible case" is limited to financial prejudice or can be of another kind. Mr Walsh submitted that only financial prejudice was relevant, but in our view it is open to tenants to rely on prejudice which is not financial. To conclude otherwise would be to fetter the very wide discretion given to us by section 20ZA(1) which enables us to dispense with compliance if we are *satisfied that it is reasonable to dispense with the requirements*. We do not accept Mr Walsh's submission that paragraph 44 of the judgment in *Daejan* is to be read as the fetter on our discretion which he proposes and our view is, we are satisfied, supported by Lord Neuberger's observations in paragraph 67 that "given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the [Tribunal] 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 have not been carried out or would have been carried out in a different way*) " and "if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works *or to have resulted in some other advantage*, the [Tribunal] would be likely to proceed on the assumption that the point would have been accepted by the landlord" [our emphasis].

51. So, if in the present case the tenants had argued, as indeed some of them might well have done if they had taken a more active part in the proceedings, that individual heating systems would have non-financial advantages such as the ability to have the heating on in September and off in October, or to have the system repaired quickly, those would be arguments which in our view we could have taken into account. We do not regard the tenants' undeveloped argument that individual boilers would be more efficient in terms of fuel use and carbon dioxide emissions as capable of amounting to prejudice to them, so, in this case, the only specific evidence of prejudice which the tenants adduced was of financial prejudice, but it may well be that the delay which is a feature of the landlord's conduct of this case has deprived the tenants of evidence of possible non-financial prejudice which some of them might have wished to give. Nevertheless, we do not think it is open to us to speculate about what they might have said and we therefore consider that we are, in this

case, restricted by the evidence to consideration of financial prejudice, the evidence of which is from Mr Yu and from the landlord's Options Appraisal.

52. Before we consider the evidence of prejudice, the next matter which we need to address is whether the landlord's failure to consult the leaseholders was an "egregious" breach of the Consultation Regulations. That is relevant because, as Lord Neuberger said in paragraph 67, "the more egregious the landlord's failure, the more readily [a Tribunal] would be likely to accept that the tenants had suffered prejudice".

53. Our conclusion from the evidence is that the landlord's failure to comply with any of the Consultation Regulations was egregious.

54. In the first place, even in an emergency, it is good practice, adopted by most landlords, to comply with the Consultation Regulations to the extent that that is possible so that the tenants may have the opportunity to make observations to which the landlord must have regard. As Lord Neuberger said in paragraph 56, "it is clear that a landlord may ask for dispensation in advance. The most obvious cases would be where it was necessary to carry out some works while contractors were already on the site carrying out other work. In such cases, it would be odd if, for instance, the [Tribunal] 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". In the present case the landlord could have called a meeting and/or given notice of intention between 15 December 2011, when, according to Mr Walsh's chronology, the project managers and contractors visited the site and found that the two boilers were off-line because of split sections, and 19 December, when three contractors were asked to provide a quotation for replacement boilers, and it could have asked the tenants for observations before the order for the replacement of four boilers was made which, as Mr Stow agreed, must have been on 5 or 6 January 2012 when G & D Higgins's price was accepted.

55. However, in our view the landlord could have done better than that. The tenants' uncontradicted evidence was that a temporary boiler could have maintained the heating and hot water supply for a considerable period of time and at relatively modest cost, (they said at £550 a week, in support of which they produced an alternative quotation). The landlord provided no evidence and advanced no argument that temporary boilers could not have been employed throughout the full consultation period. That period, it must be remembered, in the case of consultation under Schedule 3 need take no longer than the time needed to prepare the notice of intention under paragraph 1 of Schedule 3, plus 30 days, in accordance with paragraph 2(1) of the Consultation Regulations, for the tenants to make observations, plus sufficient time for the landlord to have regard to the observations and to respond to them in writing in accordance with paragraphs 3 and 4 of the notice of intention, which need not take the 21 days allowed for the landlord's response. It is obvious, therefore, that the consultation process under Schedule 3 need take no longer than four or five weeks. We are satisfied on the evidence that it

would have been possible for the landlord to consult the leaseholders fully on its proposal, without putting in jeopardy the supply of heating and hot water.

56. It is irrelevant for the landlord to assert, in its second statement of case at page 68 of the first bundle that "undertaking an option appraisal would have significantly increased the risk to service, should individual heating have been a preferred option the installation and laying of new gas service would have taken months and the service would have been disrupted for that duration of time this effecting in excess of 180 properties" [sic]. The landlord's duty to the tenants was to consult them in accordance with the Consultation Regulations. An options appraisal is a separate matter.

57. We accept Mr Bowker's submission that most of the works were not so urgent as not to permit consultation, and in our view the application, which was based entirely on urgency of the works as the application itself and the landlord's two statements of case show, was based on a false premise. Obviously it was urgently necessary to restore the heating and hot water supply, but that could and should have been done by carrying out urgent repairs to the cracked pipes and hiring a temporary boiler for a few weeks while the consultation took place. In our view the landlord neglected to consult the leaseholders not because of the urgency of the works but either deliberately or through ignorance of the Consultation Regulations; or, perhaps, although this could not be explored because the landlord's only witness had not been personally involved in the decision to go ahead and replace all the boilers, because of the landlord's enthusiasm for G & D Higgins's "special offer" in the email of 5 January 2012 which called for the ordering of four boilers and for the works to be completed in two to three months. The landlord's approach of consulting the leaseholders long after the work was completed can be charitably described as curious.

58. We can only guess the real reason why the landlord did not make any attempt at consultation, because the only witness it chose to call, Mr Stow, while he did his best to help us, was not involved in the decision, if such it was, not to consult. If it was not a decision but, rather, ignorance of the Consultation Regulations, that is no excuse. We expect a local authority with a large number of properties occupied by long leaseholders to be aware of the Consultation Regulations and of the possible (and, indeed, at least until *Daejan*, probable) consequences of failure to consult in accordance with the Regulations.

59. We also regard it as relevant to our consideration of the egregiousness of the landlord's failure to consult that it delayed so long before making its application to the Tribunal. The delay has affected the presentation of the case by both sides and we have no doubt that it has made the tenants' task more difficult and thereby increased the prejudice that they have suffered. This is because witnesses whom the tenants might have wished to cross-examine are no longer available and because, as Mr Bowker submitted, tenants who might have wished to take an active part in opposing the application may have sold their flats or lost interest.

60. Relevant, to a limited extent, to the length of the delay is the landlord's evidence about when the decision to replace the boilers was taken which was, in our view, misleading. As we have said, we infer from the documents which the landlord has chosen to put before us that the decision to replace the boilers was taken on 5 or 6 January 2012, between G & D Higgins's revised emailed quotation of 5 January and the following day's works order for Boiler 1 at the price offered by G & D Higgins for the installation of all four boilers in two to three months. Mr Stow agreed in his oral evidence that the decision was likely to have been taken on 5 or 6 January, despite what he had said his first witness statement at page 134 of the first bundle which was: "a decision that the works were necessary to replace all 4 boilers was made on 10th Feb 2012". He could give no explanation for that date. It is also unfortunate that the "reports which back up the reason for the emergency works Risk assessment and Letters of information to residents [sic]" which he said were attached to his statement were neither attached to it nor produced at the hearing, and that all that was attached to it were a newspaper cutting and the notice under section 20B of the Act dated 15 July 2013. That in our view typifies the landlord's lackadaisical approach to the preparation of its case.

61. For these reasons we have concluded that the landlord's breach of the Consultation Regulations was egregious. It is not our function, however, to punish the landlord, and if the present law strikes some as a "landlord's charter" then so be it: we must apply the law, and must seek to assess such prejudice as the tenants may have suffered by the landlord's failure and to reflect it in our decision. That is not an easy task.

62. In the light of what Lord Neuberger said in paragraph 67 of his judgment, namely:

... given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the [Tribunal] 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, have been carried out in a different way) if the tenants had been given a proper opportunity to make their points. ... Further, the more egregious the landlord's failure, the more readily [a Tribunal] would be likely to accept that the tenants had suffered prejudice

we regard ourselves as entitled, indeed obliged, to view the tenants' arguments particularly "sympathetically" which, we think, must mean more than merely feeling sorry for them.

63. Lord Neuberger also said in paragraph 67, that:

if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the [Tribunal] would be likely to proceed on the assumption that the point would have been accepted by the landlord.

64. The tenants say that if they had been consulted they would have made the observation that the communal system should have been replaced with individual systems because the cost to them would have been significantly less. For that they rely on the Options Appraisal of March 2012 carried out by Prime Glen Designs Ltd.

65. The Options Appraisal is a lengthy document which was put before us but was not the subject of detailed scrutiny at the hearing. Essentially, it rejects Option 1 (do nothing but essential repairs) on the ground that the whole system is in need of replacement. In relation to the two main options, Option 2 and Option 4, it says that the capital cost of Option 2 (replacing distribution mains, boilerhouse equipment and all dwelling internals and installing controls) would be £2,584,000 and the charge to each leaseholder would be £14,000, and that the capital cost of Option 4 (remove existing communal system and install individual boilers) would be £1,235,000 and the charge to each leaseholder £6700. It is not clear whether those costs include the costs which are the subject of this application. The report says that options 3 and 4 give the best environmental performance. Despite its lower capital cost the report rejects Option 4 for two reasons: because it imposes the problem of annual servicing on the landlord, an obligation which, the report says, becomes progressively expensive when costed over 30 years; and because it places the responsibility of purchasing fuel on tenants, an obligation which it considers would cost each household an extra £120 a year. It concludes that the preferred option should be option 2, mainly because it would enable the landlord to protect its periodic tenants from fuel poverty. Despite that conclusion and despite the considerable expenditure which has already been incurred on replacing the boilers and, apparently, on other, later works to the system, we were told that the landlord is still actively considering Option 4.

66. We accept Mr Yu's evidence, supported by written statements from other tenants, that if he had been consulted in relation to the proposed works he would have favoured the installation of individual systems, equivalent to Option 4. In our view that would have been "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" to the tenants, as envisaged by Lord Neuberger. So the question arises whether we should "proceed on the assumption that the point would have been accepted by the landlord" and assume that the costs of replacing all the boilers were wasted.

67. The particular difficulty in taking that approach in this case, unlike *Daejan*, is that this is a social landlord of mixed tenure estate on which three quarters of the flats are occupied by periodic tenants, many of them likely to have different means and needs from the Right to Buy tenants. Although Option 4 is undoubtedly within the range of reasonable options, it cannot really be said that the landlord would be acting unreasonably if it decided that, because of its responsibility to vulnerable tenants, it should incur the significantly greater initial cost of Option 2. In this respect there is a fundamental difference between private landlords and social landlords of mixed tenure blocks of flats who have responsibilities other than the provision of best value to leaseholders. From the tenants' perspective it is clear that they

have suffered significant financial prejudice from the landlord's apparent choice of what was later categorised as Option 2, and even greater prejudice if the landlord, having belatedly consulted the tenants and the other residents, were to change its mind and choose Option 4. From the landlord's perspective it has a duty to its periodic tenants which it may not adequately perform if it follows the tenants' preferred option. Moreover, adopting Option 4 would require the variation of the leases, although we consider that that would be fairly straightforward. It is not obvious, therefore, that we should "proceed on the assumption that the [tenants'] point would have been accepted by the landlord".

68. At this stage, before we know which option the landlord will choose, we cannot be certain of the extent of the prejudice, if any, which the tenants will suffer. We do not know whether, if we dispense with compliance, or decide to do so subject to conditions, the tenants will have a "windfall" of new boilers provided wholly or largely at the landlord's expense, or will find that almost all the charges they have been asked to pay will have been wasted. But it would not be sensible, and we were not invited, to wait and see what option the landlord chooses before finding a way to reflect the prejudice which the tenants have suffered and will suffer by reason of the landlord's failure to consult them.

69. If the landlord had consulted them and if they had, as we accept that at least some of them would have done, made observations to the effect that the landlord should install individual boilers, the landlord would in any event have incurred the cost of hiring temporary boilers at a weekly cost of between £550 (tenants' quotation from King's Boiler Hire Ltd) and some £1600 (actual cost), plus delivery and connection charges. It is impossible to say for how long the hiring would have been necessary and we have no evidence as to whether one or more of the existing boilers could have been patched up and used while the relevant consultation took place and decisions were taken.

70. Because of the uncertainties, but seeking to apply *Daejan* as best we can, we have concluded that both extremes of refusing to dispense and of dispensing only on the condition that the landlord has paid the tenants' (presumably not vast) legal costs, would be inappropriate and that the most reasonable solution is to limit the costs which the tenants must pay in respect of the works which are the subject of the application by attaching to the grant of dispensation a condition limiting the costs to which they are required to contribute. We invited counsels' submissions as to any such condition which we might attach to a dispensation but they were reluctant to suggest one. Mr Walsh submitted only that we had already imposed a condition as to costs, and that no further conditions were appropriate. Mr Bowker submitted that we might consider reducing the tenants' estimated contributions by a sum deemed to represent the cost of non-urgent work, even if that meant making a rough estimate.

71. A rough estimate is all we can make in this case, and, we think, in many dispensation cases where it is appropriate to grant dispensation on conditions, because it will rarely, if ever, be the case that it can be demonstrated that a precise figure has been over-spent because of a failure to observe the correct

consultation process. Based on the only evidence we have, the total cost of the works in respect of which dispensation is sought was £246,707.15. According to Mr Edmunds's letter to tenants dated 29 November 2013, the cost of repairing pipe leaks was £34,188.43 (first bundle at page 51). The reasonable cost of the hire of temporary boilers at a hire charge of, say, £1000 per week, allowing in that figure for delivery and installation, for a period of, say, six months to allow for consultation and a decision, would have been £26,000. Bearing in mind our duty to regard the tenants' arguments sympathetically, in the extremely difficult exercise of our discretion mandated by *Daejan*, we have concluded that dispensation from compliance with the Consultation Regulations should be granted on condition that the tenants' contribution to the works which are the subject of the application should not exceed £60,000 in all, divisible between the tenants in the proportions specified in their leases, which is the rough total of the landlord's figure for repairing the leaks together with our estimate of the reasonable hire costs of temporary boilers for a reasonable period. That is in addition to the previously agreed condition that the landlord should be responsible for the tenants' legal costs. That is not to say that the sum of £60,000 was necessarily reasonably incurred. That is a matter which may have to be considered later, if and when an application is made to determine the reasonable costs of all the works carried out in connection with the communal system.

Judge: Margaret Wilson