UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – failure of consultation – dispensation – conditions – section 20ZA, Landlord and Tenant Act 1985 – appeal dismissed

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

BETWEEN:

ASTER COMMUNITIES

Appellant

And

KERRY CHAPMAN AND OTHERS **Respondent**

Re: Saxon Court, Stuart Court,
Tudor Court and York Court,
Kingsway Gardens,
Andover,
SP10 4BU

His Honour Judge Stuart Bridge
4 February 2020
Royal Courts of Justice

James Fieldsend, instructed by Capsticks Solicitors LLP, for the appellant
Joshua Dubin, instructed by Talbot Walker LLP on behalf of the represented respondents only
Mr Piotr Konieczynski was in person before the Tribunal.

The following cases are referred to in this decision:

Piglowska v Piglowski [1999] 1 WLR 1360

Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260; [2008] 1 WLR 748

Stuart v Goldberg Linde (a firm) [2008] EWCA Civ 2; [2008] 1 WLR 823

Camden LBC v Leaseholders of 37 flats at 30-40 Grafton Way (unreported, 30 June 2008) [2008] EWLands LRX_185_2006

Paddington Basin Developments Ltd v West End Quay Estate Management Ltd [2010] EWHC 833 (Ch); [2010] 1 WLR 2735

Daejan Investments Ltd v Benson [2013] UKSC 14; [2013] 1 WLR 854

Jastrzembski v Westminster City Council [2013] UKUT 0284

OM Property Management Ltd [2014] UKUT 9 (LC)

Introduction

1. This appeal concerns the power vested in the First-tier Tribunal ("FTT") to dispense with the requirements imposed by statute on a landlord to consult with tenants when it is intended to carry out certain works to the building they occupy and to recover the cost of those works from the tenants through the service charge provisions contained in the lease. In this case, the FTT allowed the landlord's application to dispense with the consultation requirements on three conditions being satisfied by the landlord. The landlord has appealed to this Tribunal on the ground that the FTT was wrong to impose two of the three conditions. The tenants accept that the FTT was right to make the dispensation order, but seek to support all three of the conditions it imposed.

The statutory context

2. Long leases of flats almost always include an obligation on the landlord to provide services, such as keeping the common parts and the exterior in repair, and a corresponding obligation on the tenant to pay for a proportion of the costs incurred by means of a service charge. The extent of the parties' respective obligations depends on the terms of the parties' lease, but since 1972 statute has regulated the circumstances in which service charges can be recovered by the landlord. The current source of legislative regulation is the Landlord and Tenant Act 1985 which has itself been subsequently amended, most significantly by the Commonhold and Leasehold Reform Act 2002. The amended provisions of the 1985 Act, as outlined below, apply in this case.

3. Section 18(1) of the 1985 Act 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) then defines "relevant costs" as "the costs or estimated costs incurred or to be incurred … in connection with the matters for which the service charge is payable".

4. Section 19 (headed "Limitation of service charges: reasonableness") 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."

5. Two provisions in the 1985 Act are of particular importance in this appeal: section 20 ("Limitation of service charges: consultation requirements") and section 20ZA ("Consultation requirements: supplementary").

6. Section 20(1) provides:

"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

(b) dispensed with in relation to the works … by (or on appeal from) the appropriate tribunal."

7. A tenant's "relevant contribution" is defined as being, in effect, the amount due under the service charge provisions in respect of the works, and that contribution is limited to £250 per flat: see section 20(7) and SI 2003/1987, reg 6.

8. The cumulative effect of these provisions is that, if the landlord fails to comply with the consultation requirements, the tenant's contribution to the service charge will be limited to £250 unless and until the landlord obtains dispensation from the FTT. The current application, and this appeal, concerns the question whether the appellant landlord should be dispensed from complying with those requirements, and if so on what conditions being satisfied.

9. The statutory consultation requirements are set out in Part 2 of Schedule 4 to the 2003 Regulations. The summary provided by Lord Neuberger in the leading case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 at [12] (hereafter *Daejan*) cannot be improved upon:

Stage 1: Notice of intention to do the works

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

Stage 2: Estimates

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

Stage 3: 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.

10. The power to dispense with the consultation requirements is conferred on the tribunal by section 20ZA(1) which provides:

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

11. This is the central provision in this appeal. On its face, section 20ZA(1) appears to confer a wide discretionary power on the FTT (as "the appropriate tribunal") to dispense with the consultation requirements, but as a result of the Supreme Court decision in *Daejan*, above, a decision which has been accurately described as having "swept away" the previous jurisprudence (see *OM Property Management Ltd* [2014] UKUT 0009 (LC)), the scope and extent of the dispensation power has been closely prescribed.

Daejan Investments Ltd v Benson

12. The majority of the Supreme Court adopted a purposive approach in the interests of consistency and predictability of decision making (and thereby enabling clear and reliable advice to be given to the parties to an application to dispense with consultation requirements). According to this approach, the consultation requirements had two distinct purposes reflected in the two limbs of section 19 (that is, (a) and (b) at [4] above): to ensure that tenants were not required to pay more than they should for those services that were necessary and provided to an acceptable standard or to pay at all for unnecessary or defective services. The consultation requirements were, according to Lord Neuberger, intended to reinforce and give practical effect to those two purposes.

13. The Court denied that the legislation was intended to promote an additional purpose of "transparency and accountability" (as articulated by Lewison J in the earlier decision *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] EWHC 833 (Ch); [2010] 1 WLR 2735). This point was emphasised by this Tribunal in *OM Property Management Ltd* at [43]:

> "It is not a free-standing objective of the statutory consultation regime… to promote confidence amongst tenants that their views are being listened to. A well-conducted consultation exercise may very well encourage confidence amongst leaseholders in the process itself and in the general management of their building but the nurturing of such confidence is not in itself a statutory objective and there is no provision in the 1985 Act for leaseholders to be relieved of their

> liability to pay service charges on the grounds of incompetent or inefficient administration which has not caused demonstrable prejudice."

14. Adherence to the consultation requirements not being an end in itself, the Supreme Court held that the scale of the landlord's culpability in failing to comply is not a material factor: it is not the function of the tribunal to punish the landlord. It follows that, when entertaining an application by a landlord for dispensation, the tribunal should focus on the extent, if any, to which the tenants have been prejudiced by the landlord's failure to comply with the requirements. Prejudice to the tenants is the main - and in the words of Lord Neuberger, "normally the sole"- question for the tribunal when exercising its statutory jurisdiction.

15. The legal burden- of satisfying the tribunal that it is reasonable to dispense with the consultation requirements - is on the landlord. However, the factual burden ("of identifying some relevant prejudice that they would or might have suffered") is on the tenants. Once there is "a credible case of prejudice" it will be for the landlord to rebut it. Each case must be decided on its particular facts.

16. The Supreme Court in *Daejan* was divided in its approach to the exercise of the dispensation power, but there was unanimity in one regard: that it was open to the Leasehold Valuation Tribunal ("LVT", the predecessor to the FTT) to grant dispensation on terms. The choice was not therefore a "binary" one between the grant of dispensation, waiving the landlord's failure to comply, and an outright refusal. It was not a case of all or nothing. Dispensation could be made conditional on such terms as the tribunal thought fit, subject to the proviso that any such terms were "appropriate in their nature and their effect" (see Lord Neuberger at [54]). This might involve the landlord agreeing to reduce the recoverable cost of the works or the landlord undertaking to pay the tenants' costs in resisting the application to dispense. In each such case, the justification for the dispensation being conditional would be that the tribunal would not consider it reasonable to dispense with the consultation requirements unless such a term were imposed (see [61]).

17. The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.

18. The majority of the Supreme Court accepted that the exercise to be carried out by the tribunal would be "occasionally difficult" but disagreed with the view of Gross LJ in the court below that it would be tantamount to "an invidious exercise in speculation" or that it would frequently be unfair to tenants. Such apparent difficulties could be attenuated by the tribunal being "sympathetic" to the tenants, as explained by Lord Neuberger at [67]:

> "However, given 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 show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice."

19. This approach was justifiable "not merely because the landlord is in default of its statutory duty" but also because the tribunal was "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" (see Lord Neuberger at [68]).

20. The usual complaint of the tenants (as in this case) is that, as a result of non-compliance with the statutory requirements, they did not have the opportunity to make representations to the landlord about the works being proposed. But it is clear that this loss of opportunity, without more, is not sufficient by way of prejudice, and the majority of the Supreme Court disapproved of reasoning to the contrary in the Lands Tribunal decision of *Camden LBC v Leaseholders of 37 flats at 30-40 Grafton Way* (unreported, 30 June 2008).

21. As proof of mere loss of opportunity is insufficient, the tenants would normally be expected to indicate what they would have said, had they been consulted properly. According to Lord Neuberger, they will in most cases "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. ([69])."

22. I have been referred to two decisions of this Tribunal applying the principles in *Daejan*. Both considered (and allowed) appeals from decisions (of the LVT as it then was) which pre-dated *Daejan*.

23. In *Jastrzembski v Westminster City Council* [2013] UKUT 0284, the Tribunal held that the tenant did not suffer any relevant prejudice as a result of the landlord's failure to serve notice of intention. Following *Daejan*, it was no longer appropriate to distinguish between a technical oversight and a serious failing, the tenant was in the same position as he would have been in had the consultation requirements been fully complied with, and the decision of the LVT was upheld in that regard.

24. In *OM Property Management Ltd*, above, the LVT was concerned with two breaches of the consultation requirements. The first breach comprised a failure by the landlord to provide the leaseholders with access to all the estimates it had received. The LVT held that

this was a substantial breach enabling it to infer that the leaseholders had been prejudiced without considering whether actual prejudice had been suffered. The second breach comprised a failure by the landlord to summarise the observations it received in response to the initial consultation notice. The LVT held that this was a substantial breach and that the leaseholders were prejudiced because if they had been able to see the summary they would have been able to have greater confidence in the consultation process as a whole. The LVT accordingly refused to make a dispensation order in favour of the landlord.

25. The Tribunal allowed the landlord's appeal on the grounds that there was no evidence of any prejudice sustained as a result of the first breach and that there was insufficient evidence of relevant prejudice as a result of the second breach. Following *Daejan*, the seriousness of the breach was not a material factor. The Tribunal imposed two conditions: that the landlord pay the legal costs (of instructing counsel) incurred by the leaseholders in the application and in the appeal, and that the landlord's own costs should not be recovered from the leaseholders by way of service charge.

26. In both the above cases, the LVT decision pre-dated *Daejan*, and neither LVT had the opportunity to consider and apply the decision of the Supreme Court. In the current case, *Daejan* was cited before the FTT, and the central issue in this appeal is whether the FTT applied the *Daejan* principles correctly. This may be the first such appeal before the Tribunal.

The facts

27. In January 2017 the current respondent, Aster Communities, applied to the FTT under section 27A of the Landlord and Tenant Act 1985 for a determination of the service charge payable by long lessees at Kingsway Gardens, Andover. Throughout the FTT proceedings, the tenants were referred to as "lessees" and that is the terminology I shall adopt when referring to the parties in this case.

28. The property is a development of 160 flats built in the 1960s and comprising five blocks (Saxon, Stuart, Tudor, York and Atholl Courts), 114 of which are let on long leases. The principal issue before the FTT on the respondent's application was whether on-account demands of service charge made by the landlord were unreasonable, the lessees contending that the proposed works that gave rise to them included elements which were either not reasonably incurred or not of a reasonable standard (thereby contravening section 19 of the 1985 Act).

29. The FTT (Judge E Morrison, Judge M Tildesley OBE and Mrs H Bowers MRICS) heard the application over the course of seven days in November 2017 and February 2018. It issued its decision on 8 May 2018, and then (following further representations concerning calculations) an amended decision on 13 July 2018. The final decision contains 181 paragraphs and is 44 pages long, excluding schedules. The FTT considered evidence from the appellant's expert surveyor Mr Roman Potschynok (his reports being dated between May 2014 and January 2016) and an expert surveyor instructed by a number of the lessees Mr David Pincott (his report being dated 6 October 2017). There was an Experts' Joint

Statement of Matters Agreed and Disagreed (this document being finalised on 21 November 2017).

30. It is unnecessary for present purposes to explain the section 27A determination in any detail, save to say that the FTT reduced the amounts recoverable on account of the works in question in relation to each of the five blocks. It should however be noted that the FTT found that the consultation in relation to the four "main blocks" (that is, all excluding Atholl) had been carried out in good faith.

31. The focus of the current proceedings has been the replacement of asphalt on the balconies of the main blocks. This had been an issue before the FTT in the section 27A application. In making its determination, the FTT found, on the evidence before it, that the condition of the asphalt had caused the ingress of water in relation to two flats only, and that that could not justify the wholesale replacement of asphalt from all the balconies. The FTT therefore concluded that full replacement of all balcony asphalt in the main blocks was unnecessary, and that the landlord could not pass on its cost to the lessees through the on-account service charge.

32. The FTT stated at [92]:

> "A further matter arises. The replacement of the balcony asphalt was not part of the section 20 consultation. So far as the Tribunal can ascertain from the voluminous documentation (this point not being addressed during the hearing) the first indication lessees would have received that this work was included in the specification was in Aster's replies to the lessees' Stage 2 observations dated 10 February 2017, although it had been mentioned in communications sent much earlier to the lessees in January- March 2015. Even if Aster can eventually justify some or complete balcony asphalt replacement based on what has been discovered in the course of the works, and seeks to recover the cost from the lessees, an application for dispensation under section 20ZA of the Act would seem to be required."

33. Although the FTT found in favour of the lessees on the issue of the balcony asphalting, and refused to sanction the costs being recovered through the on-account service charge, it remained possible that those works could be charged to the lessees in the future. That would however require two steps to be taken by the landlord. First, as the FTT had indicated in the section 27A proceedings, the landlord would have to make application to the FTT to dispense with the consultation requirements. Secondly, once the work had been completed, and in the event of the lessees' refusing to pay the amounts claimed, the landlord would go back to the FTT for a determination under section 27A that the lessees were liable to pay the costs of the works that had been carried out.

34. It was as a result of the FTT's comments (at [92], as set out above) that, having completed the works, the landlord commenced the current application on 12 February 2019, the application (under section 20ZA) being limited to the works on the residents' balconies in the four "main blocks". Directions were given on 20 February 2019. There was no oral hearing of the section 20ZA application, as with the parties' consent it was determined on

the papers (that is, the written evidence and submissions) by Judge Morrison, the same judge who had presided over the section 27A application, although on this occasion sitting alone. The decision was issued on 15 May 2019.

The decision of the First-tier Tribunal

35. The application to dispense was opposed by some 41 lessees who were represented by Talbot Walker solicitors; and by four lessees acting in person, Miss Motovilova (the lessee of a flat in Saxon Court), Kerry Chapman (a lessee in Tudor Court) and Piotr Konieczynski and Katarzyna Slawska (joint lessees of a flat in Stuart Court).

36. Talbot Walker put forward two grounds of objection in its statement of case:

> (1) that the landlord Aster had provided no new evidence to justify the replacement of the balcony asphalt and that without such evidence the strength of the landlord's application could not be properly assessed: in particular, there was nothing which could be referred by the lessees to an expert;
>
> (2) that the lessees had been prejudiced by being unable to object to the scope of the works at the time that different options were under consideration, at which time they were likely to have obtained expert assistance. When an expert (Mr Pincott) was consulted in the course of the section 27A proceedings, he was of the view that the sampling that had taken place provided justification for asphalt replacement to no more than two flats.

37. Talbot Walker submitted that, if dispensation were granted, it should be on three conditions. First, Aster should be required to pay the lessees' reasonable costs of obtaining an expert assessment of its new evidence, once that evidence had been disclosed. Secondly, Aster should pay the lessees' reasonable costs incurred in the application to dispense (to be summarily assessed if not agreed). Thirdly, the costs of the application should not be recoverable by Aster from the lessees through the service charge.

38. The individual lessees made the point that the lack of consultation had deprived them of the opportunity to compare the proposed asphalt replacement with other options and to assess whether there was a more economic approach. They also doubted such evidence that there was concerning the need to replace all the asphalt.

39. In response, Aster provided a statement from Steve Greenhalgh, an employee of Aster who claimed 35 years' experience in surveying buildings, in which he gave his opinion that as a result of the failure of the asphalt there was damp, due to water ingress, in the lounges of the flats below the affected balconies. He referred to core sampling having taken place at every flat in three of the main blocks (that is, all except Saxon Court) between December 2017 and June 2018 which displayed moisture readings above 17% in 95% of the flats sampled. He contended (contrary to the earlier report of the tenants' expert Mr Pincott) that

replacement was therefore justified in relation to all those flats, and further that it was reasonable to carry out the same work on the remaining 5%, as well as Saxon Court, because the fair inference was that the position there would be the same.

40. Aster contended that the lessees 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, this was "not the time and place": in other words, the lessees should seek a determination under section 27A in the event of the landlord seeking to recover the actual costs of asphalt replacement through the service charge. (The previous section 27A determination having been in relation to on-account service charges, it remained open for the lessees to make such an application in relation to service charge demands based upon costs actually incurred.)

41. Aster submitted that in the event of dispensation being granted it should be on the single condition that Aster should bear its own costs and not seek to recover them from the lessees through the service charge.

42. The FTT noted that it was "common ground" that neither the Stage 1 notice nor the Stage 2 notice mentioned any works to the balcony asphalt ("let alone wholesale replacement"). It did make reference to other "extra-statutory information" which mentioned the possibility of some asphalt being replaced. The FTT did not accept that the fact that only four observations were received from lessees in response to the Stage 1 notice established that had the asphalt works been publicised no further observations would have been made.

43. The FTT went on to hold, making reference to *Daejan*, that, viewing the lessees' arguments sympathetically, they had made out a "credible case of relevant prejudice, namely that the lessees will be asked to pay for inappropriate works." The decision continues:

> "In the s.27A proceedings, by which time the lessees did have the benefit of expert advice, the expert evidence then available led the Tribunal to conclude that replacement of the balcony asphalt was unnecessary. It is therefore possible that Aster might have reached the same conclusion before works commenced if the lessees had had the opportunity to challenge the proposed works."

44. The FTT considered whether the appellant landlord had rebutted the lessees' case on prejudice. It did not accept that, because no expert evidence was sought by the lessees at Stage 1, they would not have sought such evidence had they appreciated the estimated costs of the balcony works (stated by the FTT to be nearly £300,000 plus VAT). The FTT was not willing to accept the evidence of Mr Greenhalgh (to the effect that the works were necessary) without providing the lessees with an opportunity to challenge it. At the time the dispensation application was made, it was not accompanied by any specific evidence in support of the works being necessary. Mr Greenhalgh's statement (which exhibited evidence of the core samples referred to in [39] above, those for Tudor Court and York Court having been before the FTT on the section 27A application) was made on 9 April 2019 by way of reply to the lessees highlighting the lack of evidence in support of the landlord's application). The FTT was reluctant to rely upon the opinion evidence of an

employee of the landlord who was not in any sense an independent witness and whose evidence in the section 27A proceedings it had not accepted in its entirety.

45. At [39], in an important passage, the FTT stated:

> "So while there is now some evidence before the Tribunal in support of the appropriateness of the works, the Tribunal does not accept it as conclusive, and the lessees have not had the opportunity to challenge it. It is not good enough for Aster to contend that such evidence is for another day…, by implication in future proceedings under section 27A. By that time the costs of the works will in all likelihood have been demanded from the lessees. If every lessor making a section 20ZA application could neutralise a plea of inappropriate (or excessively costly) works by saying that there is no prejudice because the lessees can always challenge the service charge under section 19 in a section 27A application, unconditional dispensation would be the norm. That is clearly not what the Supreme Court intended. Conversely, refusing dispensation altogether when prejudice is established could provide lessees with a windfall. Lord Neuberger made it clear that the correct approach is to consider whether the prejudice can be remedied by imposing appropriate terms of dispensation. At [69] he said that lessees "are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord".

46. The FTT therefore took into account the fact that Aster had failed to provide its own evidence in a timely manner (albeit in compliance with the FTT's directions and not in breach of any Rule), and the fact that as a result the lessees had not been given an opportunity to consider and respond to the evidence of Mr Greenhalgh. As a consequence, it remained unclear to the FTT whether the lessees were being asked to pay for inappropriate works. While the FTT was satisfied (in the terms of the statutory power) that it was reasonable to grant dispensation to Aster, it was only reasonable "on terms that will remove possible prejudice to the lessees". The FTT considered that those terms were as follows:

> "(i) Aster 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.
>
> "(ii) Aster is to pay the respondent's [*sic*] reasonable costs of this application, to be summarily assessed if not agreed.
>
> (iii) The costs of the application should not be recoverable by Aster from the lessees through the service charge."

47. The FTT held that dispensation would take effect when conditions (i) and (ii) had been complied with. It explained, in justifying condition (i), that had Mr Greenhalgh's evidence been provided with the application the lessees would have had the opportunity to obtain expert advice, and that the FTT would have imposed the same condition "regardless of whether the advice obtained supported the claim of prejudice." The FTT stated:

> "This is because it is reasonable for the lessor to pay the lessees' costs of investigating prejudice. There is no reason why the condition should not be applied to prospective advice that the lessees, through no fault of their own, have not yet had the opportunity to obtain."

The appeal

48. The appellant landlord sought permission to appeal from the FTT but such permission was refused by the FTT, with reasons, on 20 June 2019. The current appeal is brought with permission of the Upper Tribunal granted on 18 September 2019. The appeal is by way of review of the decision of the FTT and has been conducted under the Tribunal's standard procedure. An agreed hearing bundle was duly provided, and those parties who are legally represented filed and exchanged skeleton arguments.

49. The appeal was heard on 4 February 2020 in the Royal Courts of Justice. The appellant landlord and those respondent lessees who had instructed solicitors were represented by counsel. The only individual lessee to appear, Piotr Konieczynski, made short representations of his own broadly in support of the stance adopted by the other respondents.

50. No criticism is made by the respondents of the fact that the FTT dispensed with the consultation requirements. It is accepted that, following *Daejan*, the FTT had jurisdiction to make the dispensation order conditional. The issue is what conditions (if any) were appropriate in the circumstances. The appellant has submitted that the FTT was wrong to impose conditions (i) and (ii); and that it should have granted dispensation subject only to condition (iii), that is to say the appellant not seeking to recover the costs it incurred in making the application through the machinery of the service charge. The respondents have sought to uphold all three conditions imposed by the FTT.

51. The appellant has submitted that in imposing conditions (i) and (ii) the F-t T misdirected itself in law, and that, more specifically, it misapplied the leading authority of *Daejan* to the facts of the case.

52. The initial submission made by the appellant is that the FTT 'elided' Stages 1 and 2, and in doing so wrongly criticised the appellant for failing to comply with its obligations throughout. In fact, and this does not seem to be contested, the detailed specifications provided at Stage 2 did include reference to asphalting the balconies of the main blocks, albeit contained in a lengthy document (180 pages in total) where it was unlikely to be noticed.

53. It is correct, as the appellant contends, that it is the failure to comply with Stage 1 that is material in this case. All that can be said is that if at Stage 2 the specifications had made the asphalting proposals an obvious part of the intended works it may have been relevant in considering whether the respondents had suffered prejudice as a result of the failure to consult at Stage 1.

54. More pertinently, and with reference to *Daejan*, the appellant landlord claims that the FTT in effect reversed the burden of proof, requiring the landlord to adduce evidence when it was incumbent on the respondent lessees to do so, and finding in favour of the lessees despite their failure to show that they had suffered real prejudice consequent upon any non-compliance with the consultation requirements on the landlord's part. In short, the appellant contends that it was for the lessees, not the landlord, to have instructed a surveyor, and that it was not open to the FTT to impose as a condition a requirement that the landlord pay the costs of the lessees' surveyor in circumstances where no surveyor had yet been instructed. In the absence of evidence from a surveyor, the appellant submits that the lessees cannot establish any actual prejudice, and adds that the terms of condition (i) are insufficiently certain.

55. The appellant submits further that if the FTT was wrong to impose a condition that the landlord pay the reasonable costs of a surveyor to advise the lessees, then it must also have been wrong of the FTT to impose as a further condition that the landlord meet the legal costs incurred by the lessees in resisting the landlord's application. Such costs would be recoverable only if they were reasonably incurred, and in the event of the failure of the lessees' demand that the landlord pay the costs of their surveyor, there would seem to be no good reason for an application to have been made to the FTT at all. That being the case, how could a condition that the landlord pay the lessees' legal costs be a reasonable condition to impose?

56. The respondent lessees submit that the FTT had ample power to impose the three conditions in question. Emphasis has been placed upon the breadth of the statutory words and the recognition by the Supreme Court in *Daejan* that each case is fact-specific. The FTT had particular knowledge of the context, the judge having herself heard the section 27A application together with such expert evidence as was then adduced. Having already determined that wholesale replacement of balcony asphalt was unnecessary, the FTT was able to exercise its own judgment in deciding whether to grant dispensation and on what terms. It was unsurprising that the FTT took a sceptical view of the landlord's contention that the works carried out were appropriate and necessary, and reasoned that had the landlord indicated from the outset (at Stage 1) that replacement of the asphalt was intended the lessees may have sought the evidence of an expert surveyor at that stage. It was therefore an appropriate condition of the grant of dispensation that the landlord pay the reasonable costs of such a surveyor.

57. The respondent lessees urge the Tribunal not to interfere with the exercise of discretion conferred by statute on the FTT, arguing that the scope for appellate intervention is limited. Reference has been made to *Piglowska v Piglowski* [1999] 1 WLR 1360 in which the House of Lords criticised the Court of Appeal for granting leave in circumstances where the discretion (in proceedings for financial relief on divorce) was properly that of the first instance judge, emphasising (at 1372) the advantage that judge had of seeing the parties and other witnesses and discouraging appellate courts from substituting their own discretion for that of the judge "by a narrow textual analysis which enables them to claim that he misdirected himself".

Discussion

58. Section 20ZA of the 1985 Act confers a discretion on the FTT to dispense with the statutory requirements of consultation where the landlord has failed to comply with them. It is clear from *Daejan*, however, that the discretion conferred on the FTT is a long way removed from the broad discretion exercisable in proceedings for financial relief on divorce. Following *Daejan*, unconditional dispensation will be granted in favour of the landlord unless the tenants are able to establish real or actual prejudice as a result of the landlord's failure to abide by the consultation requirements.

59. It is often the case, as *Daejan* acknowledged, that the tenants' central complaint is that they have lost the opportunity to make representations at the time they were entitled to be consulted. But the mere loss of that opportunity does not on its own establish prejudice, as *Daejan* makes abundantly clear, and it may be incumbent on the tenants to indicate what they would have said if they had been properly consulted by the landlord.

60. The FTT found that the lessees had made out "a credible case of relevant prejudice, namely that the lessees will be asked to pay for inappropriate works." The FTT was influenced by the lessees' contention that, had they been aware of the landlord's intention to replace all the balcony asphalt, "they might have enlisted expert advice on the scope of the works". It referred to the evidence of one lessee Miss Motovilova (who had inspected the specifications but did not realise that asphalt replacement was intended) to the effect that, had she known, she would have commissioned an independent surveyor's report. The FTT took into consideration the expert evidence adduced in the course of the section 27A proceedings, evidence which had led it to conclude in those proceedings that balcony asphalt replacement was unnecessary, stating that it was therefore "possible that Aster might have reached the same conclusion before works commenced if the lessees had had the opportunity to challenge the proposed works."

61. The landlord submits that, as the factual burden is on the tenants, it should have been for the lessees to instruct an expert, to adduce that evidence before the FTT in order to establish that the works in question were unnecessary or inappropriate, and thereby to prove that they had suffered actual or real prejudice. Only once that evidence was forthcoming could the landlord be expected to rebut the lessees' case.

62. I do not agree with the landlord's submissions in this regard. It seems to me that to have expected the lessees to instruct an expert in order to conduct a survey and to comment upon the necessity of the works to the balconies as a precursor to the current application would have been unrealistic. The landlord had failed to consult the lessees adequately and then carried out the works to the balconies with the intention of recovering its costs through the service charge. It presented the lessees with a *fait accompli*. The lessees had not had the opportunity to consult their expert on the works that had been done in circumstances where the FTT had already found, in the course of section 27A proceedings, that complete replacement of the balcony asphalt was unnecessary. There was, to say the least, a "credible case of prejudice", and that prejudice could most effectively be remedied by the lessees instructing their expert to conduct a survey of the balconies throughout the main blocks. That would place the lessees in the position they would have been in if there had been proper consultation, and in a position to decide whether and if so how the landlord could be challenged in its attempt to charge the works to them.

63. The difficulty with the landlord's argument is that it fails to distinguish the discharge of a factual burden with the obligation to adduce evidence. It is possible for the factual burden to be discharged by a party without that party calling any evidence at all. In this case, the FTT had already heard evidence, in the course of the earlier section 27A proceedings, which it took into account as well as the evidence of Mr Greenhalgh adduced by the landlord in the course of the application to dispense. In my judgment, the FTT was entitled, having done so, to find that the factual burden of establishing prejudice had been discharged without the lessees themselves calling expert evidence.

64. The appellant landlord contends, as it did before the FTT, that it is relevant that, at Stage 1 of the consultation process, only four observations were forthcoming from lessees by way of response. Given such a low level of apparent interest in what was obviously a substantial scheme of work, it is argued by the landlord that it was unduly speculative for the FTT to infer or assume that, if there had been reference to balcony asphalting, the lessees would have responded by instructing an expert to consider whether the work in question was necessary.

65. I do not agree with the landlord's submissions in this regard either. In *Daejan*, the Supreme Court at [68] emphasised the importance of being sympathetic to the tenants not merely because the landlord is in default of its statutory duty but also 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." It was open to the FTT to find (relying in particular on the evidence of Ms Motovilova referred to at [60] above) that, had the scale and extent of the balcony works been properly communicated to the lessees at Stage 1, it would have been likely to have elicited a reference by the lessees to an expert. The landlord's default had therefore led to a "credible" case of prejudice, the lessees having been unable, in the course of the consultation exercise, to take the necessary steps to satisfy themselves that the works intended were necessary and appropriate.

66. Having found that the lessees had discharged their factual burden (of establishing a credible case of relevant prejudice), the FTT went on to consider whether the landlord had rebutted the lessees' case. The landlord adduced the evidence of Mr Greenhalgh, its own employee, who claimed that the works that had been carried out to the balconies were necessary. That evidence was served to support its application for dispensation with the consultation requirements, and had not been available in the course of the section 27A proceedings.

67. The FTT took an adverse view of Mr Greenhalgh's evidence. The evidence had not been served in a timely manner, as explained above. Mr Greenhalgh was not in any sense independent: not only was he an employee of the landlords, he had been involved throughout the process of planning the scheme of works; and there were respects in which the FTT, in the previous hearing, had rejected his evidence on other matters. The lessees had not had a proper opportunity to challenge his evidence before they had to state their case. In these circumstances, it is hardly surprising that the FTT was not prepared to accept Mr Greenhalgh's evidence as conclusive.

68. The landlord contends that the appropriateness of the works is not an issue in the current application to dispense with the consultation requirements. It may become an issue in a future application by the lessees for a determination that the service charge claimed by the landlord is excessive, in the sense that the landlord seeks to recover costs (that is, the actual costs of asphalting the flat balconies) which were not reasonably incurred. But as it is not an issue as far as the application to dispense is concerned, the landlord contends that the FTT was wrong to require the landlord to recompense the lessees for instructing an expert to advise.

69. The difficulty with this submission of the landlord is that it does not take into account the wider context of the application being made. An application to dispense with consultation requirements does not take place in a vacuum. If the FTT takes a view of the application without regard to what has happened previously as between the landlord and the tenants, and what is likely to happen in the foreseeable future, it is difficult to see how it can properly consider what if any prejudice has been suffered.

70. There is one further point. If the tenants were obliged in every case to show that the works proposed were inappropriate (or too expensive) as a prerequisite to the FTT refusing the landlord's application for unconditional dispensation, it would entirely frustrate the process of dispensation. In effect, the FTT would be answering the question it is asked in every section 27A application at the stage of dispensation. I agree with what was said in this regard by the FTT at [39]:

> "If every lessor making a section 20ZA application could neutralise a plea of inappropriate (or excessively costly) works by saying that there is no prejudice because the lessees can always challenge the service charge under section 19 in a section 27A application, unconditional dispensation would be the norm."

71. It is axiomatic that each case must be decided on its own particular facts. Moreover, the FTT should be guided, but not led, by the principles laid down in *Daejan*. I note what is said by Lord Neuberger at [41]:

> "…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 [FTT'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."

72. It follows that the Tribunal should be reluctant to interfere where the FTT has heard evidence, has formed its own view of the circumstances and has exercised its discretion properly and in accordance with the principles laid down in *Daejan*.

73. In my judgment, and by way of summary, the following circumstances have persuaded me that the FTT had good reason, in dispensing with the consultation requirements, for deciding to impose the three conditions that it did:

(1) There had been a prior, and contested, section 27A application before the FTT (in which the judge who adjudicated upon the current application presided) where the issue was whether the works proposed by the landlord could be charged to the lessees "on account".

(2) In the course of that application, the landlord had failed to satisfy the FTT that the proposed replacement of the asphalt on all the balconies was necessary. The FTT found, in terms, that full replacement of all the balcony asphalt was unnecessary.

(3) The landlord did not appeal against that finding.

(4) The current application was not supported by any independent expert evidence adduced by the landlord challenging the FTT's finding in the section 27A proceedings.

(5) The current application was supported by a statement from Mr Greenhalgh, an employee of the landlord, contending that the works to the balconies (which had now been carried out) were necessary and referring to core sampling that had taken place.

(6) The FTT had rejected certain evidence of Mr Greenhalgh in the prior section 27A proceedings, and it found that his new statement was lacking in the impartiality one would expect from an expert witness.

(7) There was no adequate opportunity for the lessees to respond to Mr Greenhalgh's statement in view of the time when it was served.

(8) The issue of asphalt replacement was clearly contested, and in the event of the landlord seeking to recover the costs of the works from the lessees it was anticipated that there would be a further section 27A application.

74. The FTT sought to do justice by imposing as a condition of dispensation that the landlord pay the reasonable costs of obtaining a surveyor's report. The purpose of a surveyor's report would be to show whether the works proposed by the landlord were (in simple terms) unnecessary or inappropriate. The imposition of this condition is understandable as the FTT looked back, with the benefit of hindsight, to the issues ventilated in the section 27A application concerning the on-account demands, and as it looked ahead to the likely issues in a future section 27A application concerning service charge demands for completed works. The FTT properly applied itself, in my judgment, to the particular circumstances, and to the overall context, of the case with which it was concerned.

75. The FTT has a wide discretion in terms of the conditions that may be stipulated, and there is no suggestion in *Daejan* or subsequent cases that the FTT is limited to imposing a requirement on the landlord to pay a specific sum to the tenants. In *Daejan*, at [54], the Supreme Court stated that the LVT (now 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 effect." It expressly contemplated the imposition of a condition requiring the

landlord to recompense the tenants for the costs of an expert surveyor: see Lord Neuberger at [69], cited above at [21].

76. The landlord has contended that condition (i) is insufficiently certain- it is too vague and imprecise - to comprise a lawful condition of dispensation. There is no time limit within which the expert is to be nominated, there is no mechanism where the particular expert is to be agreed by the various tenants (some of whom are representing themselves), nor is there any means for determining whether the costs claimed by the expert are reasonable.

77. These do not seem to me to be issues of any real substance. It is clear that the Supreme Court in *Daejan* was contemplating a wide power vested in the FTT to set conditions as appropriate, and there is no qualification of the circumstances in which reimbursement of a surveyor's costs could be made. It may be necessary in due course, in the event of conditions not being complied with or requiring clarification, for the FTT to be asked to make such directions as it considers appropriate. But matters can be advanced by the lessees agreeing between themselves on the identity of the expert whom they wish to instruct, obtaining from that expert a fee quote which they should furnish to the landlord for information only, and instructing the selected expert to liaise with the landlord over the provision of any necessary information (insofar as it is not already available to the lessees). The current restrictions in place to accommodate the Covid 19 pandemic may cause those steps to take longer than might otherwise be the case, but they ought to be capable of being completed within four months. In my judgment, and adopting a pragmatic approach, condition (i) is perfectly workable, and it can be fairly said that it is "appropriate in [its] nature and effect".

78. There remains the issue of conditions (ii) and (iii). They can be dealt with shortly. Having upheld condition (i), the objection to condition (ii) falls away as the respondent lessees have established that their opposition to the landlord's application to dispense was justifiable. Condition (iii) has been conceded by the landlord throughout.

79. Finally, I should emphasise, with reference to authorities to which I was referred in the course of argument, to the importance of exercising judicial restraint out of respect for the expertise of the FTT: see in particular the words of Lord Hope of Craighead in *Daejan* at [89]. In *Stuart v Goldberg Linde (a firm)* [2008] EWCA Civ 2; [2008] 1 WLR 823 at [81] Sir Anthony Clarke MR analysed the circumstances in which an appellate court should interfere with the first instance decision. His Lordship agreed with the statement of principle of Thomas LJ in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 at [16] ("it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him") adding "If the judge reached a conclusion that was plainly wrong, it would be the duty of the appeal court to interfere."

80. For the reasons given, I do not consider that it is the duty of the Tribunal to interfere with the FTT's exercise of discretion in granting dispensation on the three stated conditions, and this appeal must therefore be dismissed.

HH Judge Stuart Bridge

Date 15 June 2020