



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

**Case Reference** : **LON/00BJ/LDC/2021/0214**  
**Property** : **Milbrooke Court**  
**Applicant** : **Fairhold Holdings (2006) Appts Ltd**  
**Representative** : **Mr Stocks**  
**Respondent** : **The leaseholders of Millbrooke Court**  
**Representative** :  
**Type of Application** : **Application for dispensation under s  
20ZA Landlord and Tenant Act 1985**  
**Tribunal Member** : **Judge Jim Shepherd  
Steve Wheeler: MCIEH CEnvH**  
**Date of Decision** : **October 2021**

**DECISION**

**The application for dispensation is dismissed.**

**Reasons**

1. This is an application for the dispensation of the consultation requirements provided for by s20 of the Landlord and Tenant Act 1985. The applicants are Fairhold Holdings (2006) Appts Ltd (“The Applicants”). The Respondents are

the leaseholders of premises at Millbrooke Court, 69, 71 and 71A Upper Richmond Road and 1 and 3 Keswick Broadway, London.

2. The premises concerned is a five-storey building with commercial premises on the ground floor and 76 residential apartments and penthouses added to the sixth floor.
3. The application states that following guidance relating to the construction of the external wall system it had been discovered that the construction comprises combustible materials and poses a risk of fire spread. Accordingly, the Applicant intends to carry out remediation works to remove and replace the high-pressure laminate panels situated at the penthouse flat levels of the premises. The Applicant's agent began the consultation process in relation to the works. Due to the nature of the works and the ongoing Building Safety Fund application the Applicant says it is unable to complete the consultation process. They issued stage I notices to the leaseholders in respect of the proposed works. They seek dispensation from the remainder of the consultation process.
4. In their statement of case the Applicants say that D and G Block Management Ltd were the appointed managing agents. They instructed Tetra Consulting Limited to Commission a health and safety and fire risk assessment. Tetra provided the assessment dated 19 June 2019 which recommended a review take place in June 2020. Following the assessment D and G instructed Tri Fire Ltd to identify the external wall construction details and to provide a holistic fire safety review of the premises in line with government guidance.
5. The Tri Fire report identified that the penthouse comprises a metal frame and is clad with high pressure laminate and there is a risk of horizontal fire spread from penthouse to penthouse however this was considered a minimal risk.

6. On the basis of this report the Applicants intend to carry out works to remove and replace the high-pressure laminate. There are other associated works involved. The Applicants intend to proceed with the works via a design and build procurement route in which the main supervising consultant is appointed to facilitate the design and construction of the works.
7. A central part of the Applicant's application relates to the Building Safety Fund (BSF) which is the fund set up by the government to deal with fire safety works following the Grenfell disaster. The Applicants say that in order to adhere to the BSF timescales the Applicant was initially required to submit a full costs application by 31 December 2020. The deadline was subsequently extended to 30 June 2021. The works deadline was initially 31 March 2021 and then extended to the 30th September 2021. The works had not commenced at the date of the hearing. There does appear to be some flexibility under the BSF in relation to deadlines but it is not at all clear at this stage as to whether the works will be paid for from the fund even partially.
8. In their statement of case the Applicants state that the TriFire report and risk assessment shows that the exterior of the premises pose a potential health and safety risk to the residents and that this is the reason why the applicants decided to carry out the works.
9. The TryFire report states the following in its summary and recommendations:

*Our overall view is that the collective effect of the fire safety measures on the site considered holistically, as opposed to each measure in isolation, is that a reasonable standard of fire safety is achieved. The exterior the property complies with the consolidated guidance.... issued by the Ministry of Housing Communities and Local Government in January 2020 and in our view meets all current legislative requirements.*

*The exterior the property is largely of solid brick construction. Windows are UPVC, with no infill spandrel panels. Balconies are cantilevered, with a concrete base. The uppermost floor level is clad with a high-pressure laminate. This is provided to the penthouses only, which are set back from the main structure of the building. As such the HPL does not present a risk of vertical fire spread. Whilst there is a slight risk of horizontal fire spread to the penthouses, this is considered to be minimal and not a threat to safety.*

*Our view is that there are no attachments whose construction includes significant quantities of combustible materials, and the risk presented by the external façade is low. The risk of fire spread via cavities is also seen to be very low and deemed not to be an issue.... We recommend that an annual fire risk assessment is undertaken for the properties, in accordance with the regulatory reform (Fire safety) order 2005, by a third party credited fire risk assessor, registered on schemes such as the IFP fire risk assessor register.*

10. In the executive summary prepared by Harris Associates it states the following at paragraph 1.4:

*Although the HPL panelling on its own might represent some spread of fire risk, the fire engineer has concluded that the risk is not significant. This is primarily due to the fact that the penthouse apartments are set back from the perimeter of the main façades and as such the presence of the HPL does not constitute any vertical risk of fire spread. The make up of the floors in the original roof structure are of solid construction and therefore the levels of compartmentation between floors is also good. There is a risk of horizontal fire spread from penthouse to penthouse however that this is considered a minimal risk and not a threat to safety.*

11. There were a number of objections to the dispensation application from leaseholders including the fact that the works to the structure should be paid for by the freeholder and not them. This of course would form the basis of a challenge brought under section 27A LTA 1985 rather than an issue for dispensation under section 20Z A. It was also pointed out by several leaseholders that the reports by the fire safety firms had shown that the risk to health and safety was minimal.
  
12. In their response to the objections of the leaseholders the Applicants state that they seek dispensation of the consultation requirements not only because of the requirements of the BSF application but also due to the design and build procurement method which they say is not compatible with s 20 consultation because it involves instructing a lead consultant to facilitate the design and construction of the works. They have appointed Harris Associates as lead consultants and in turn they intend to award the contract to a firm called Green Façades on the basis that they have offered the most competitive sum. They state therefore that because Green Façades would already have been appointed the leaseholders would not have the opportunity to raise any issues about the contractor chosen or to make their own nominations. A tender analysis report carried out by Harris Associates states that four contractors provided a tender for the works. They discounted two of the tenders and then chose the cheapest at £586,484.97 excluding VAT
  
13. The Applicants in their statement of case say that the scope of the works may be subject to change upon commencement of the project. If the scope of the works were to change they would not have sufficient time to restart the s 20 process whilst also complying with the BSF deadlines. They also state that the funding deadline which secures a grant for a large portion of the works may prevent the Applicant from fully consulting.

14. Originally it was intended to deal with the dispensation application on the papers however due to the large number of leaseholders objecting the matter was listed for a hearing on 20 October 2021.

### **The hearing**

15. The Applicants were represented by Cameron Stocks of Counsel. A number of leaseholders attended the hearing. The Tribunal heard from Jacob Chapel whose uncle lives in flat 58, Mr Huson who lives in Flat 22 and Miss Class who lives in flat 18.

16. Mr Stocks went through the reasons for the dispensation application. When asked why the works had not commenced he said that the Applicants had decided not to just *plough on* ahead but to seek to obtain dispensation before commencing the works. The Tribunal questioned why the Applicants had not consulted on existing costs and then if the costs changed to seek dispensation from that amount. Mr Stocks said it was better to prospectively seek dispensation.

17. Mr Chapel emphasised that there was only a low risk of fire and a low risk to health and safety as indicated by the fire report. He also said that in the letter raising the issue of the works there was no mention of the Design and Build procurement method and that this now put leaseholders in difficulty. He raised issues about the tender process and the fact that it wasn't much of a tender process because there were only two tenders considered. He said that the leaseholders had suffered prejudice because they had been prevented from being involved in the consultation process. Mr Huson said that the Applicants had not complied with a tribunal direction to provide a statement of anticipated costs. He also said that he did not buy the urgency in the application on the basis of the BSF funding application. Ms Class also challenged the question of

urgency and said that even if the BSF deadlines were not met the Applicants could apply for an extension.

18. Ms Phillips of the Applicant said that the funding application had been made in the summer of 2019. The applicant had been found to be eligible. The suggestion was that the Applicants were waiting for the government to approve the application before the works could start. She said that if the grant was refused the works may not take place. This clearly raises issues about the necessity of the works.

19. Following the Tribunal hearing and after a request by the Tribunal the Applicants submitted correspondence between them and the controllers of the BSF. This correspondence shows that the registration for the BSF was not actually made until August 2020 (email from the BSF dated 14 August 2020). There are a number of emails in which the BSF are seeking information from the Applicants. See the email dated 6 October 2020 headed *awaiting information*. In their email dated 14 May 2021 the BSF were seeking information from the Applicants in order to complete their application. In a further email dated 15 October 2021 the Applicants are asked if it is still their intention to proceed with the application for funding and they are asked for the further information in relation to the cladding. The strong suggestion here is that any delay in processing the application has been caused by the Applicants not providing the information requested.

## **The law**

### ***Landlord and Tenant Act 1985, s.20ZA***

#### **20ZA Consultation requirements: supplementary**

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

- (2) In *section 20* and this section—  
“qualifying works” means works on a building or any other premises, and  
“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
- (3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—  
(a) if it is an agreement of a description prescribed by the regulations, or  
(b) in any circumstances so prescribed.
- (4) In *section 20* and this section “the consultation requirements” means requirements prescribed by regulations made by the Secretary of State.
- (5) Regulations under subsection (4) may in particular include provision requiring the landlord—  
(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,  
(b) to obtain estimates for proposed works or agreements,  
(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,  
(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and  
(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.
- (6) Regulations under *section 20* or this section—  
(a) may make provision generally or only in relation to specific cases, and  
(b) may make different provision for different purposes.
- (7) Regulations under *section 20* or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## **Daejan**

20. In *Daejan Investments v Benson* [2013] UKSC 14, the landlord was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants under long leases which provided for the payment of service charges. The landlord gave the tenants notice of its intention to carry out major works to the building. It obtained four priced tenders for the work, each in excess of £400,000, but then proceeded to award the work to one of the tenderers without having given tenants a summary of the observations it had received in relation to the proposed works or having made the estimates available for inspection. The tenants applied to a leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985, as inserted, for a



determination as to the amount of service charge which was payable, contending inter alia that the failure of the landlord to provide a summary of the observations or to make the estimates available for inspection was in breach of the statutory consultation requirements in paragraph 4(5) of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 so as to limit recovery from the tenants to £250 per tenant, as specified in section 20 of the 1985 Act and regulation 6 of the 2003 Regulations in cases where a landlord had neither met, nor been exempted from, the statutory consultation requirements. The landlord applied to the tribunal under section 20(1) of the Act for an order that the paragraph 4(5) consultation requirements be dispensed with, and proposed a deduction of £50,000 from the cost of the works as compensation for any prejudice suffered by the tenants, which offer they refused. The tribunal held that the breach of the consultation requirements had caused significant prejudice to the tenants, that the proposed deduction did not alter the existence of that prejudice, and that it was not reasonable within section 20ZA(1) of the Act, as inserted, to dispense with the consultation requirements. The Upper Tribunal (Lands Chamber) dismissed the landlord's appeal and the Court of Appeal upheld the Upper Tribunal's decision.

21. The Supreme Court , allowing the appeal (Lord Hope of Craighead DPSC and Lord Wilson JSC dissenting), held that the purpose of a landlord's obligation to consult tenants in advance of qualifying works, set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 , was to ensure that tenants were protected from paying for inappropriate works or from paying more than would be appropriate; that adherence to those requirements was not an end in itself, nor was the dispensing jurisdiction under section 20ZA(1) of the 1985 Act a punitive or exemplary exercise; that, therefore, on a landlord's application for dispensation under section 20ZA(1) the question for the leasehold valuation tribunal was the extent, if any, to which the tenants had been prejudiced in either of those respects by the landlord's failure to comply; that neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation was a relevant consideration for the tribunal; that the tribunal

could grant a dispensation on such terms as it thought fit, provided that they were appropriate in their nature and effect, including terms as to costs; that the factual burden lay on the tenants to identify any prejudice which they claimed they would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted; that once a credible case for prejudice had been shown the tribunal would look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice; and that, accordingly, since the landlord's offer had exceeded any possible prejudice which, on such evidence as had been before the tribunal, the tenants would have suffered were an unqualified dispensation to have been granted, the tribunal should have granted a dispensation on terms that the cost of the works be reduced by the amount of the offer and that the landlord pay the tenants' reasonable costs, and dispensation would now be granted on such terms. Per Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Sumption JJSC. (i) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted (post, para 45). (ii) Any concern that a landlord could buy its way out of having failed to comply with the consultation requirements is answered by the significant disadvantages which it would face if it fails to comply with the requirements. The landlord would have to pay its own costs of an application to the leasehold valuation tribunal for a dispensation, to pay the tenants' reasonable costs in connection of investigating and challenging that application, and to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal would adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue (post, para 73).

22. Lord Neuberger giving the leading judgment stated the following:

*41. However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act*

*itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.*

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

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

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

*45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be*

*granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be—ie as if the requirements had been complied with.*

*46. I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the requirements. That view could only be justified on the grounds that adherence to the requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them.*

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

*48. The distinction could also, I think, often lead to uncertainty. Views as to the gravity of a landlord's failure to comply with the requirements could vary from one LVT to another. And questions could arise as to the relevance of certain factors, such as the landlord's state of mind. The present case provides an example of the possible uncertainties. In para 99 of his judgment, Lord Wilson JSC understandably expresses a very unfavourable view*

*of Daejan's failure in this case. However, to some people it might seem that Daejan's failure in the present case was not a "serious failing", given that (i) the evidence of any resulting prejudice to the respondents is weak, (ii) Daejan adhered fully to stages 1 and 2, and to a significant extent to stage 3, (iii) Daejan did consult the respondents, through both REA and FPM, (iv) Daejan did some things which went beyond the requirements (eg employing REA at Ms Marks's request), and (v) Daejan did give summary details of the tenders even though it did not accord the respondents sight of the tenders themselves. So, too, views may differ as to whether Daejan should be blamed for not taking up the time of the LVT with attempts to excuse its failures, and as to whether it was an innocent misunderstanding or flagrant incompetence which caused Daejan's representatives to tell the LVT that the contract had been placed with Mitre weeks before it had been. (None of those points undermines the basic fact that there was an undoubted failure by Daejan to comply with the requirements.)*

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

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

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

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

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

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

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

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

57. Further, consider a case where a landlord carried out works costing, say, £1m, and failed to comply with the requirements to a small extent (eg in accidentally not having regard to an observation), and the tenants establish that the works might well *Daejan Investments Ltd v Benson*, [2013] 1 W.L.R. 854 (2013) have cost, at the most, £25,000 more as a result of the failure. It would seem grossly disproportionate to refuse the landlord a dispensation, but, equally, it would seem rather unfair on the tenants to grant a dispensation without reducing the recoverable sum by £25,000. In some cases, such a reduction could be achieved by the tenants invoking section 19(1)(b), but there is no necessary equivalence between a reduction which might have been achieved if the requirements had been strictly adhered to and a deduction which would be granted under section 19(1)(b) : see the next section of this judgment.

58. Accordingly, where it is appropriate to do so, it seems clear to me that the LVT can impose conditions on the grant of a dispensation under section

20(1)(b) . In effect, the LVT would be concluding that, applying the approach laid down in section 20ZA(1) , it would be “reasonable” to grant a dispensation, but only if the landlord accepts certain conditions. In the example just given, the condition would be that the landlord agrees to reduce the recoverable cost of the works from £1m to £975,000.

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

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

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

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



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

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

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

66. It was suggested by Mr Rainey and Mr Fieldsend that the determination of such a question would often involve a very difficult exercise (or “an invidious exercise in speculation” as Gross LJ [2011] 1 WLR 2330, para 73 put it in the Court of Appeal) and would frequently be unfair on the tenants. It may occasionally involve a difficult exercise, but the fact that an assessment is difficult has never been regarded as a valid reason for the court refusing to carry it out (although in some cases disproportionality may be a good reason for such a refusal). While each case must, inevitably, be decided on its

*particular facts, I do not think that many cases should give rise to great difficulties.*

*67. As to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given 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.*

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

*rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the requirements.*

*69. Apart from the fact that the LVT should be sympathetic to any points they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord.*

*Overview of the analysis so far*

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

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

*72. On the approach adopted by the courts below, as the Upper Tribunal said at the very end of its judgment, [2010] 2 P & CR 116, para 62, requiring the landlord to limit the recoverable service charge to the statutory minimum in a case such as this “may be thought disproportionately damaging to the landlord, and disproportionately advantageous to the lessees”. That*

*criticism could not, it seems to me, be fairly made of the conclusion I have reached.*

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

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

## **Determination**

23. The tribunal were unimpressed by this application for dispensation. Applications under s 20ZA are not unusual in the Tribunal. Generally, they deal with urgent works which have already commenced or need to commence very soon for a variety of reasons generally associated with the health and safety of occupiers or preventing further damage to the property e.g. a roof needs repair, a wall needs to be supported, or a boiler needs to be repaired in order to prevent the spread of Legionnaires' Disease. In the present case there is not a clear case of urgency on the facts existing currently neither is it clear why consultation has not been carried out to date.

24. If consultation had been carried out in parallel with the funding process it could have been started immediately after the fire reports were received. The Applicants knew in July 2020 that there was a suggestion of a risk of some sort to the external cladding of the penthouses. There is no reason why consultation could not have started then. Instead of doing this the Applicants chose to make an application to the BSF in around August 2020, an application which is still pending apparently because the Applicants have failed to provide information required and to do this instead of rather than as well as consulting leaseholders as to the proposals. There is absolutely no reason why both things could have been couldn't have been done at the same time.

25. This is not a case like *Daejan* where works were already underway and where dispensation was sought for a failure to carry out the consultation process properly. The works in the present case have not even commenced and its not clear if they ever will do. Neither is this the type of urgent case emphasised in bold in the *Daejan* judgement above. The urgency of this application appears to have been created by the Applicant's own failure to properly manage the application for funding so much so that there is now some uncertainty as to whether the funding will even be provided and when it will be provided. Indeed, the Tribunal was struck by the overall speculative nature of the application. It was said by Ms Phillips that if the funding application was not successful the works may not be carried out. Alternatively, it was said that if the Application was only partially successful it may be that the leaseholders would be required to pay a share. This appears to be entirely vague and unsatisfactory. As emphasized in *Daejan* the whole purpose of the consultation process is for leaseholders to be able to know their likely cost liability. At present there is considerable uncertainty about the works, whether they will take place, who will pay for them and whether they are even necessary.

26. The fire reports submitted by the Applicants presumably on the basis that they supported the application that works needed to be carried out urgently self-

evidently don't support that proposition. They are if anything reassuring towards the freeholder as to the future safety of the external parts of the penthouses. There is only a low risk of horizontal spread of fire and a low risk to health and safety. The Tribunal appreciates that following the Grenfell fire disaster many freeholders up and down the country are extremely concerned about the risk to occupiers and their asset. However, the matter has to be put into some perspective. The Applicants have obtained detailed risk reports which on the whole do not support the need for urgent works such that consultation is not possible.

27. The situation may become urgent if grant funding is given but made conditional on works starting within a short period of time. That is not the case currently. The Tribunal can only consider the application as it stands before it. We can't speculate as to what may happen in the future. If grant is refused then it may be that the works are abandoned.

28. The Tribunal were also unimpressed by the arguments in relation to this being a Design and Build contract which does not fit in with the s 20 consultation process. Design and Build contracts are not unusual. In every case which exceeds the cost threshold, even cases involving design and build contracts, freeholders are expected to consult leaseholders pursuant to section 20 unless they have dispensation. One would expect freeholders to consult leaseholders about the proposal to use a design and build contract as part of the overall consultation.

29. The Applicants obtained tenders and reports on them in August 2021 presumably on the basis that the dispensation application would succeed. The leaseholders were not provided with the tenders until the dispensation application was underway. This is unacceptable. There is no reason why the Applicants have not carried out a proper consultation in this case.

30. Mr Stocks emphasized that *Daejan* required the tribunal to give dispensation if leaseholders could not show the necessary prejudice. *Daejan* as a decision of the Supreme Court is binding but it was dealing with cases in which dispensation was required. This was usually because of a failure to consult on works which had already been started or completed or because of the urgency of forthcoming works. Dispensation is not required in the present case as things stand currently. There is simply too much uncertainty. It is not known whether funding will be obtained. It is not known whether the works will be carried out even. Until this position becomes clearer dispensation is not required. If the Applicant genuinely intends to carry out the proposed works they need to consult the leaseholders. In any event the Tribunal notes that at paragraph 41 of *Daejan* Lord Neuberger made it clear that the Tribunal's discretion was at large notwithstanding the guidance given.

31. In all the circumstances the tribunal considers that the dispensation application should be refused. It may be that the situation changes and there is a change of circumstances in the future such as the funding being granted by the government and the works having to start in a short period of time. In those circumstances the Tribunal would accept a further application for dispensation. Such an application would not however be well received if consultation has still not been carried out. It is for the Applicants to decide whether to carry out the works and if they are to carry out the works then they need to follow the consultation process even if it is truncated to meet the urgency of the situation. Dispensation can then be sought for not applying the proper timescales.

## **Summary**

32. The application for dispensation is dismissed.

Judge Shepherd

## ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.