Neutral Citation Number: [2021] EWCA Civ 660

Case No: C3/2020/1569

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
His Honour Judge Stuart Bridge
[2020] UKUT 0177 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2021

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE PHILLIPS

- -

Between:

ASTER COMMUNITIES	**Applicant/ Appellant**
- and -	
KERRY CHAPMAN and other leaseholders of flats in Saxon Court, Stuart Court, Tudor Court and York Court, Kingsway Gardens, Andover	**Respondents**

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Mr Ranjit Bhose QC (instructed by **Birketts LLP**) for the **Appellant**
Mr Philip Rainey QC and Miss Robyn Cunningham (instructed by **Talbot Walker LLP**) for 33 of the **Respondents**

Hearing date: 15 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday 07 May 2021 at 10:30am

Lord Justice Newey:

1. This is an appeal by Aster Communities ("Aster") from the dismissal by the Upper Tribunal (Lands Chamber) (His Honour Judge Stuart Bridge) of an appeal from the First-tier Tribunal ("the FTT") (Judge E Morrison). It involves a challenge to conditions which the FTT attached when acceding to an application by Aster under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for dispensation from consultation requirements.

The legal framework

2. Sections 18 to 30 of the 1985 Act deal with service charges. The expression "service charge" is defined by section 18(1) to mean:

> "an amount payable by a tenant of a dwelling as part of or in addition to the rent—
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> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
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> (b) the whole or part of which varies or may vary according to the relevant costs".

Section 18(2) explains that the "relevant costs" are "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable".

3. Section 19 of the 1985 Act imposes a requirement of reasonableness. By section 19(1), "relevant costs" are to be taken into account in determining the amount of a service charge payable for a period:

> "(a) only to the extent that they are reasonably incurred, and
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> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard".

Further, section 19(2) provides that, where a service charge is payable before the relevant costs are incurred, "no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise".

4. Sections 20 and 20ZA are concerned with consultation requirements. Section 20(1) provides for the "relevant contributions of tenants" to be:

> "limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
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> (a) complied with in relation to the works or agreement, or

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

The "relevant contribution" of a tenant is "the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement": section 20(2). Under section 20(7) and regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations"), a tenant's "relevant contribution" is limited to £250. A landlord who has not complied with the "consultation requirements" can thus recover no more than £250 from a tenant unless the requirements in question have been dispensed with. By section 20ZA(1), however, a tribunal may dispense with "all or any of the consultation requirements" "if satisfied that it is reasonable to dispense with the requirements".

5. Section 20ZA(4) of the 1985 Act provides for "the consultation requirements" to be prescribed by statutory instrument. The "consultation requirements" relevant to the present case are to be found in part 2 of schedule 4 to the 2003 Regulations. In *Daejan Investments Ltd v Benson* [2013] UKSC 14, [2013] 1 WLR 854 ("*Daejan*"), Lord Neuberger summarised the requirements as follows in paragraph 12:

> "*Stage 1: Notice of intention to do the works*
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> 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.
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> *Stage 2: Estimates*
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> The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
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> *Stage 3: Notices about estimates*
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> 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.
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> *Stage 4: Notification of reasons*
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> 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."

The statement which a landlord must issue at Lord Neuberger's Stage 3 is referred to as a "paragraph (b) statement": see paragraph 4(5) of part 2 of schedule 4 to the 2003 Regulations.

6. Section 27A of the 1985 Act states that an application may be made to the appropriate tribunal (in England, the FTT) for a determination whether a service charge is payable and, if it is, the amount payable.

7. The leading authority on dispensation with consultation requirements is *Daejan*, where the Supreme Court held by a majority that, on the facts of the case, dispensation should be granted on certain terms. Lord Neuberger, with whom Lord Clarke and Lord Sumption agreed, observed in paragraph 52 that there were "no grounds for treating the obligations in sections 20 and 20ZA [of the 1985 Act] as doing any more than providing practical support for the two purposes identified in section 19(1)". Lord Neuberger did "not accept the view that a dispensation should be refused … solely because the landlord seriously breached, or departed from, the requirements" (paragraph 46) and did not think it "convenient or sensible to distinguish in this context … between 'a serious failing' and 'a technical, minor or excusable oversight', save in relation to the prejudice it causes" (paragraph 47). The "main, indeed normally, the sole question" when considering whether to dispense with consultation requirements was whether there was "real prejudice to the tenants flowing from the landlord's breach of the requirements" (paragraph 50). Lord Neuberger said in paragraphs 44 and 45:

> "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 [i.e. the leasehold valuation tribunal] 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.
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> 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."

8. The "only disadvantage of which [tenants] could legitimately complain", Lord Neuberger said in paragraph 65, "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" and, while the legal burden of proof would throughout be on the landlord, "the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants" (paragraph 67). Since "the tenants' complaint will normally be … that they were not given the requisite opportunity to make representations about proposed works to the landlord", "it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said" (paragraph 69). In fact, Lord Neuberger explained in paragraph 69, the tenants 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".

9. On the other hand, Lord Neuberger said in paragraphs 67 and 68:

> "67. … [G]iven 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."

10. Lord Neuberger also concluded that dispensation from consultation requirements can be granted on terms. He gave this example in paragraph 57:

> "[C]onsider 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 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) …."

In such a case, Lord Neuberger said in paragraph 58, it would be "reasonable" to grant a dispensation subject to the landlord agreeing to reduce the recoverable costs of the works from £1 million to £975,000.

11. Lord Neuberger further considered there to be "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)" (paragraph 59). The condition, Lord Neuberger said in paragraph 61, "would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a freestanding order for costs".

12. By way of overview of his analysis, Lord Neuberger said in paragraph 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."

13. Addressing the possibility that it might be said that his approach "would enable a landlord to buy its way out of having failed to comply with the requirements", Lord Neuberger said in paragraph 73:

> "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."

14. It is relevant to note, too, that Lord Neuberger observed in paragraph 41 that "the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be described should not be regarded as representing rigid rules". In a somewhat similar vein, Lord Neuberger said in paragraph 54 that the tribunal "has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect".

15. On the facts, the Supreme Court granted dispensation subject to, among others, a condition that the landlord pay the tenants' "reasonable costs … incurred in respect of the proceedings in the Leasehold Valuation Tribunal in reasonably investigating and establishing non-compliance with the Regulations, investigating or seeking to establish prejudice and investigating and challenging the [landlord's] application for dispensation". Another condition provided for the tenants' aggregate liability to pay service charges to be reduced by £50,000, "the reductions to be in proportion to their liability to contribute to the service charges".

Narrative

16. Aster, a substantial social landlord, is the freehold owner of a 1960s development known as Kingsway Gardens in Andover, Hampshire comprising 160 flats. The flats are divided between five blocks: Saxon, Stuart, Tudor, York and Atholl Courts. 114 of the flats are let on long leases, the others being retained by Aster for general letting purposes. Each of the long leases provides for the tenant to pay by way of service charge a proportion of costs incurred in respect of their block.

17. On 31 March 2016, Aster sent each tenant notice of its intention to carry out works at Kingsway Gardens. The notice of intention listed the works as "Concrete repairs and fairing coatings", "Balustrading to walkways & stairwells", "Wing walls partial removal & replacement to facilitate the removal or replacement of the fibreboard infill", "Rainwater goods (guttering, gullies, fascia's, soffits) re-design & replacement", "Repointing", "Cavity fill extraction & replacement", "Stairwell weather protection", "Weather protection of solid walls", "Capping to solid walls", "Cavity replacement/installation", "Stair treads & walkway surface treatment", "Windows", "Patio/French doors" and "External decoration". It was not suggested that the works would involve replacement of the balcony asphalt. In that connection, a "Frequently Asked Questions" document enclosed with the notice included this:

> "**Q5. The balconies and walkways need repairing. Are you going to replace the asphalt?**
>
> Two consultants have said that there are liquid coatings available that carry the same guarantee as new asphalt and are far cheaper to install. Where the asphalt is damaged, we may need to remove some of it. In other areas there are 'bubbles' in it that will also need to be removed. We intend using the liquid coating which comes with a guarantee of least 30 years."

18. The notice of intention elicited observations from four tenants. Three of them related to windows and/or doors. The fourth made the point that the tenant had been advised that no major works were planned when buying the flat in 2013.

19. On 16 December 2016, Aster supplied each tenant with a paragraph (b) statement explaining that it had obtained three estimates for the work to be carried out and was minded to award the contract to the lowest bidder, whose tender sum was about £4.8 million. The statement explained that the estimates were exclusive of VAT and contract administration, which would amount to 15% of the final net cost of the works. The statement further stated that the estimates could be inspected at Aster's offices. The statement listed the proposed works in the same way as the notice of intention, with no reference to replacement of balcony asphalt.

20. The estimates were the tenderers' priced specifications. They included provision for replacement of balcony asphalt. The cost of the balcony works was put at almost £300,000 plus VAT before adding preliminaries and management fees.

21. One tenant (Miss Irina Motovilova of 28 Saxon Court) took advantage of the opportunity to inspect the estimates, and various observations were received from tenants, including Miss Motovilova. None of the observations related to the replacement of the balcony asphalt.

22. In January 2017, Aster applied under section 27A of the 1985 Act for a determination in respect of on-account service charges demanded from the tenants at Kingsway Gardens. By the time the application came on for hearing in November 2017, 66 of the tenants, among them Miss Motovilova, were legally represented. The statement of case which had been served on their behalf put Aster to proof that certain works, including "new balcony waterproofing", would not be sufficient. It also alleged that the consultation process had been defective because (a) the circumstances were such that public notice was required, (b) the notice of intention had not been served on a particular tenant and (c) Aster had failed to have regard to observations from tenants. In advance of the hearing, however, the represented tenants confirmed in an agreed statement of issues that they no longer pursued the first and second of these complaints.

23. By then, the represented tenants had obtained an expert report from Mr David Pincott, a chartered building surveyor, who expressed the view that it would be "poor economy … to strip and renew all the balcony finishes when repair and overlaying would be equally effective but at a considerably reduced cost". In the light of this, the represented tenants disputed that full replacement of all balcony asphalt was reasonable.

24. In a decision dated 13 July 2018, the FTT (Judge Morrison, Judge Tildesley OBE and Mrs Bowers MRICS) said in paragraph 133 that, in respect of the main blocks (i.e. Saxon, Stuart, Tudor and York Courts), it was "satisfied that Aster carried out a good faith consultation and did more than that which was statutorily required under section 20 [of the 1985 Act]". On the other hand, the FTT said this as regards the replacement of balcony asphalt:

> "91. The Tribunal is only being asked to determine the reasonableness of on account demands made in June 2017. The assessment must be made based on facts known to Aster at that time. The Welling reports do not provide any justification for wholesale replacement of the asphalt on all the balconies. The only possible justification is the brief reference to core sample readings in July 2016 as set out in Mr Potschynok's expert report, which is entirely lacking in any specificity. Moreover, the

> only evidence that the condition of the asphalt has possibly caused water ingress below is limited to two flats. This cannot justify wholesale replacement of all balcony asphalt. **The Tribunal therefore finds that full replacement of all balcony asphalt is unnecessary** ….
>
> 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."

(The FTT's "Stage 2" corresponded to "Stage 3" of the four identified in *Daejan* as described in paragraph 5 above.)

25. In the light of that decision, on 13 February 2019 Aster made an application for dispensation. The application related to Saxon, Stuart, Tudor and York Courts and explained:

> "Following the works undertaken, the Applicant is satisfied that it has the evidence to justify that the replacement of the balcony asphalt was justified. The Applicant will be seeking the costs of that element of the works in the Final Account, anticipated within a few months of the date of this application. Therefore, the Applicant is seeking dispensation under s.20ZA Landlord and Tenant Act 1985 from the formal consultation requirements in readiness of the final account."

26. The FTT (Judge Morrison) gave directions in respect of the dispensation application on 20 February 2019. Among other things, she directed that the application should be determined without a hearing unless a party objected and that any tenant opposing the application should send Aster a statement setting out why and "Evidence of what they may have done differently if the Applicant had complied with the full statutory consultation process". Paragraph 3 stated:

> "The only issue for the Tribunal at this time is whether or not it is reasonable to dispense with the statutory consultation requirements. **This application does not concern the issue of whether any service charge costs will be reasonable or payable.**"

27. There were four responses. Two of them, from tenants acting in person, did not say anything about what they might have done differently. A response prepared by counsel

on behalf of 41 tenants argued that Aster should not be granted dispensation or, failing that, that any dispensation should be subject to conditions. The tenants in question said in paragraph 31 that they "were deprived of the opportunity to become involved in determining the scope of the asphalt works and as a result are open to the risk of paying for wholesale replacement, in the absence of any evidence that replacement was necessary and that repair would have been inadequate". Paragraph 28 stated:

> "The Respondents submit that the possibility that they would have obtained expert assistance on the scope of the works is a realistic one."

28. The final response was from Miss Motovilova, on this occasion acting in person. She maintained that Aster's "failure to properly consult the lessees … resulted in unnecessary and avoidable costs to the lessees". In a statement of case verified by a statement of truth, she pointed out that she had inspected the tender specifications and found that an accompanying spreadsheet showed a "reduction of some items referred to as 'can we include'", suggesting to her that "some elements of the tender specifications were initially considered to be 'nice to have' and were no longer included in the scope of work". She went on:

> "16. The only information of what was the remaining scope of works I had to rely on were the two Section 20 Notices [i.e. the notice of intention and paragraph (b) statement]. Neither contained the item of replacing the asphalt on all residents' balconies. It was reasonable for me to assume at that point that no such work was intended and that it had been removed from the original tender document together with other 'nice to have' items. As a result, I did not object to this item, neither did I have any reason to enquire into it any further.
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> 17. Had I known that it was indeed [Aster's] intention to fully replace the asphalt on all balconies, I would have compared the prices of this item between the blocks and would have discovered that the cost of the same element in Atholl Ct, for example, is only a fraction of what was planned for Saxon. This would have given me sufficient grounds to question the proposed full replacement versus other options, such as targeted repairs that were employed in Atholl.
>
> 18. Additionally, not being a construction professional, I would have commissioned, as I'm sure many other lessees would, an independent surveyor's report on the available options and the extent of the damage in relation to the balconies' asphalt. It would have found, as subsequently happened, that a repair is a cheaper and viable alternative. I would also have had an expert to analyse the patterns of water staining inside the flats, and it would have been found, as it was later, that hardly any can be credibly explained from water ingress originating through the floor of the balcony above, as was concluded in this Tribunal's hearing during the hearing on 20-22 February 2018.

> 19. Further, I would have insisted on seeing [Aster's] evidence of the necessity of this work and would have found that both of their advisers, Wellings, the surveyors, and the specialist masonry consultants, Bershe-Rolt, recommended repairs to the asphalt rather than complete replacement ….
>
> 20. With the above evidence, it would have been likely that a discussion of appropriate alternative options with [Aster] would have resulted in agreeing an alternative approach and a substantial cost reduction …."

29. In a decision made on the papers on 15 May 2019, the FTT (Judge Morrison once again) concluded that it was appropriate to grant dispensation, but subject to certain conditions. It concluded in paragraphs 32 to 34 that a "credible case of relevant prejudice" had been made out:

> "32. It is common ground in this case that neither of the statutory Stage 1 or 2 Notices mentioned any works to the balcony asphalt, let alone wholesale replacement. Although there was some other extra-statutory information provided with the Stage 1 Notice in March 2016, this just mentioned the possibility that some asphalt might be replaced. The fact that there were only four observations from lessees in response to the stage 1 Notice does not establish that lessees would not have made observations on the asphalt works had they known about them. Nine months later, in December 2016, there was nothing in the Stage 2 Notice to alert the lessees to any change in the scope of the works. To have realised, within the limited Stage 2 consultation period, that costly replacement of all balcony asphalt was now intended, lessees would have had to arrange to inspect, read and understand the 180 page Specification, a highly complex document which the Tribunal does not consider would be readily understood by a lay person.
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> 33. The represented lessees say that had they been aware of Aster's intention to replace all the balcony asphalt, they might have enlisted expert advice on the scope of the works. Miss Motovilova, who did take the trouble to inspect the specification – albeit by standing up at a counter at Aster's premises – did not understand from this that asphalt replacement was intended, and specifically asserts that if she had known it was Aster's intention, she would have commissioned an independent surveyor's report on the available options and asked to see the advice Aster had received. She suggests this might have resulted in a cheaper alternative approach of targeted repairs. Miss Motovilova's position as to what she would have done is given some support by the fact that Miss Motovilova did indeed make extensive observations in response to the Stage 2 Notices ….
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> 34. Viewing the respondents' arguments sympathetically, as sanctioned by *Daejan*, the Tribunal finds this makes out a

> credible case of relevant prejudice, namely that the lessees will be asked to pay for inappropriate works. In the section 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."

30. The FTT proceeded to consider whether, in the light of a witness statement which Aster had put in from a Mr Greenhalgh, it could be seen that the balcony works had been necessary and, accordingly, the tenants could not have been prejudiced by the defective consultation. It rejected that suggestion:

> "39. 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 para 69 he said that lessees 'are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord'.
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> …
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> 42, … In this case, without the lessees having had the opportunity to consider and respond to Mr Greenhalgh's evidence, the Tribunal remains uncertain whether the lessees are being asked to pay for inappropriate works."

31. The FTT stated its conclusions in paragraph 43:

> "Taking into account all the evidence and submissions, and the guidance of *Daejan*, the Tribunal is satisfied that it is reasonable to grant dispensation to Aster but only on terms that will remove possible prejudice to the lessees. The terms will be 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.

Had Aster's evidence from Mr Greenhalgh been provided with the application, the lessees would have had the opportunity to obtain expert evidence and the Tribunal would have imposed the same condition, regardless of whether the advice obtained supported the claim of prejudice. 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 an opportunity to obtain.

(ii) Aster is to pay the respondent's 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."

32. The FTT was asked by Aster for, but refused, permission to appeal against the imposition of conditions (i) and (ii). In the course of its decision on the application, the FTT said:

> "Although it is correct that there are no other extant proceedings, it is clear that the lessees will in due course be asked to pay for balcony works in a very substantial amount. If the lessees have the benefit of expert advice this should assist in resolving any dispute, hopefully avoiding the need for further proceedings (likely to be far more costly than the expert report). It is fair and reasonable to require [Aster] to pay for the report as a condition of dispensation."

33. Permission to appeal having been granted to Aster by the Upper Tribunal, the matter came before Judge Bridge. In a decision dated 15 June 2020, he dismissed the appeal. In the course of his decision, he said the following:

i) In paragraph 62:

> "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";

ii) In paragraph 65:

"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 …) 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";

iii) In paragraphs 74 and 75:

"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] …."

34. Aster now challenges Judge Bridge's decision in this Court, Judge Bridge having granted permission to appeal on 10 August 2020.

The issues

35. As Aster's case was developed by Mr Ranjit Bhose QC, who appeared for it, three main issues seem to me to arise:

    i) Was the FTT wrong to conclude that Miss Motovilova would have acted differently if the notice of intention had referred to replacement of the balcony asphalt?

    ii) Can a tenant rely on the fact that another tenant would have acted differently if the consultation requirements had been complied with?

    iii) Was it in any event impermissible for the FTT to impose conditions (i) and (ii) in the circumstances?

Was the FTT wrong to conclude that Miss Motovilova would have acted differently?

36. As can be seen from paragraph 29 above, the FTT cited Miss Motovilova's evidence in paragraph 33 of its 2019 decision before concluding in paragraph 34 that a "credible case of relevant prejudice" had been made out. Although the FTT did not state in terms that it accepted what Miss Motovilova had said, Mr Bhose agreed that the decision must be so read. In other words, the FTT is to be understood to have found that, if the notice of intention had referred to the balcony works, Miss Motovilova would have been "given … sufficient grounds to question the proposed full replacement versus other options, such as targeted repairs that were employed in Atholl", would have "commissioned … an independent surveyor's report on the available options and the extent of the damage in relation to the balconies' asphalt" and would have "insisted on seeing [Aster's] evidence of the necessity of this work".

37. Mr Bhose challenged this finding both on the basis that it was not one reasonably open to the FTT and on the basis that the FTT had ignored a relevant consideration, viz. that none of the tenants had complained in the section 27A proceedings that the notice of intention was defective because it failed to mention the balcony works. Any tribunal properly directing itself (including "sympathetically", if that be requirement), Mr Bhose argued, would have been bound to conclude that no tenant would have acted differently if the notice of intention had included reference to the replacement of the balcony asphalt.

38. Mr Bhose pointed out that neither Miss Motovilova nor any other tenant obtained an expert report in response to either the notice of intention or the paragraph (b) statement despite the fact that both disclosed Aster's intention to carry out very significant works. To the contrary, the notice of intention led to just four observations between 108 tenants. Why, Mr Bhose asked rhetorically, would mention of balcony works costing some £300,000 have prompted Miss Motovilova or any other tenant to obtain an expert report when no one had done so following receipt of a paragraph (b) statement revealing

Aster's intention to accept a tender of more than £4.8 million, exclusive of VAT and contract administration? The idea that Miss Motovilova or anyone else would have sought expert advice lacks credibility, Mr Bhose submitted. Although Miss Motovilova and other tenants had the benefit of legal representation and alleged that the consultation process was defective in certain respects, there was no suggestion in the section 27A proceedings that the notice of intention was flawed because of the omission of the balcony works until the FTT itself identified the issue in its July 2018 decision (noting in paragraph 92 that the point had not been addressed during the hearing). In fact, the represented tenants themselves positively asserted until October 2017 that new balcony waterproofing was needed.

39. In my view, however, the FTT was entitled to find that Miss Motovilova would have commissioned a surveyor's report had the notice of intention referred to the balcony works. Miss Motovilova said so in terms in a statement of case confirmed by a statement of truth. Further, Aster raised no objection to the dispensation application being determined without a hearing so Miss Motovilova was not cross-examined. The fact that Miss Motovilova went to the trouble of inspecting the estimates and putting in observations makes it the more plausible that she would have instructed an expert. As, moreover, was observed by Mr Philip Rainey QC, who appeared for the represented tenants with Miss Robyn Cunningham, the fact that a person did not object to the listed heads of work does not mean that they would not have objected to the balcony works, had those been identified. After all, they might have accepted that the 13 items were necessary, while the FTT's 2018 decision shows that the case for the balcony works had been open to question. It is significant, too, that Judge Morrison, who determined the dispensation application, had the benefit of having presided over the hearing of the section 27A proceedings.

40. Nor have I been persuaded that the FTT's approach can be impugned on the footing that it failed to have regard to the fact that none of the tenants had taken the point in the section 27A proceedings that the notice of intention was defective because it failed to mention the balcony works. Paragraph 26 of the FTT's 2019 decision referred to Aster's reply in the dispensation proceedings, which stressed that no tenant had argued in the section 27A application that the notice of intention was flawed in this respect. The point was one of those relied on in support of the contention summarised in paragraph 26 of the decision as "none of the respondents have begun to advance a case of relevant prejudice, or have in fact been prejudiced so as to warrant refusal of dispensation", reflecting paragraph 27 of the reply. In the circumstances, there is no good reason to doubt that the FTT took account of the tenants' failure to complain of the relevant shortcoming in the notice of intention. The fact that the FTT did not specifically say so when refusing Aster permission to appeal seems to me to be neither here nor there.

41. In short, I would answer the question posed by this issue in the negative. In my view, the FTT was entitled to conclude that Miss Motovilova would have acted differently if the notice of intention had referred to the balcony works and its finding to that effect is not vitiated by failure to have regard to a relevant consideration.

Can a tenant rely on the fact that another tenant would have acted differently if the consultation requirements had been complied with?

42. Mr Bhose submitted that, even supposing that Miss Motovilova would have acted differently if the notice of intention had been compliant, the other tenants should not be

considered to have suffered relevant prejudice. It is incumbent on each tenant, Mr Bhose said, to demonstrate what *they* would have done and a tenant who would have done nothing different should not benefit from the terms of a conditional dispensation ordered because *another* tenant was prejudiced; tenants cannot ride on each other's coat tails. Mr Bhose postulated a block of 20 tenants only one of whom would have acted any differently. It cannot be the case, Mr Bhose argued, that the tribunal is entitled (far less bound) to treat all 20 cases in the same way. That would penalise the landlord without any good reason and give 19 tenants an unwarranted windfall.

43. Disputing Mr Bhose's contentions, Mr Rainey said this about the 20-tenant block example:

> "Say one lessee is a retired surveyor, and had they been told that proposed qualifying works included item alpha, they would have pointed out why item alpha need not be done, which would have omitted £100,000 from the major works package. None of the other lessees would have made that point because none had that personal expertise. The Appellant seems to think that only the retired surveyor would have £5,000 knocked off his bill as a condition of dispensation. This is wrong. All 20 lessees suffered the same prejudice; all are entitled to the benefit of the same condition that their service charge be reduced by £100,000 (pro-rated)."

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

45. That is not to say that the positions of individual tenants will be irrelevant. Thus, there could be no question of all tenants in a block having their service charges cut by the same figure if they shared the relevant service charges in differing proportions. If, say, one tenant bore 10% of service charges and another just 5%, a reduction in recoverable service charges should benefit the two tenants in the ratio 2:1, in line with the order which the Supreme Court made in *Daejan* (see paragraph 15 above). Likewise, supposing that in the present case the FTT had found that a failure to consult correctly had resulted in higher service charges for, say, Saxon Court, but not for any other block, it would have been appropriate to impose a condition limiting the service charges for only Saxon Court.

46. Here, the FTT decided that the respondents had made out "a credible case of relevant prejudice, namely that the lessees will be asked to pay for inappropriate works". It arrived at that conclusion having cited in particular the evidence of Miss Motovilova, to the effect that *she* would have commissioned a report and asked to see Aster's advice

and that that might have resulted in a cheaper approach. Had a cheaper approach been adopted, service charges would have been lower for all tenants, not merely Miss Motovilova. The failure to refer to the balcony works in the notice of intention accordingly gave rise to a "credible case of relevant prejudice" to every tenant, and the FTT was entitled to take that into account. The fact that the prejudice might be attributable to what Miss Motovilova alone would have done does not mean that the FTT was confined to considering prejudice to her.

Was it in any event impermissible for the FTT to impose conditions (i) and (ii) in the circumstances?

47. As already mentioned, the terms on which the FTT granted dispensation included, by condition (i), Aster paying the reasonable costs of an expert to consider and advise the tenants on the necessity of replacing all the balcony asphalt at the main blocks and, by condition (ii), Aster paying the respondents' reasonable costs of the dispensation application.

48. Mr Bhose challenged condition (i) on the basis, essentially, that it neither served to compensate the tenants for the prejudice which the FTT had identified as arising from the defect in the notice of intention nor related to costs of the dispensation application. The "relevant prejudice" for which the FTT found there to be a "credible case" was the possibility that the tenants would "be asked to pay for inappropriate works". Obliging Aster to fund an expert report could not of itself provide the tenants with compensation for such extra service charges as they might be required to pay. In fact, far from indemnifying the tenants against expense occasioned by the flaw in the notice of intention, condition (i) compels Aster to bear an expense which one or more tenants might have incurred if there had been due consultation (because expert advice would then have been sought) but which they have in the event been spared. The condition thus gives the tenants a windfall. While, moreover, it can be seen from *Daejan* that it may be appropriate to order a landlord seeking dispensation to bear the tenants' costs of that application, including costs of obtaining expert advice in connection with it, there can be no question of the advice for which condition (i) provides playing any part in the dispensation application since the application has been concluded and the advice has yet to be commissioned. Dispensation having already been granted, the advice cannot be for the purposes of the application for it. Once dispensation has been ordered, Mr Bhose argued, the question of prejudice is closed and no longer of any relevance.

49. For his part, Mr Rainey accepted that condition (i) does not alleviate the potential prejudice of having to pay for the balcony works, but submitted that the FTT was entitled to impose it as part of the price of the indulgence which Aster was seeking. Normally, Mr Rainey said, the extent (if any) to which a tenant had been prejudiced by non-compliance with consultation requirements would be determined in the dispensation application itself and the landlord would be required to bear costs incurred by the tenant in connection with that. In the present case, the FTT in effect accepted that the question of how far, if at all, there had been prejudice to the tenants should be deferred, if necessary to an application under section 27A of the 1985 Act for a determination as to what service charges are payable having regard to the requirement of reasonableness imposed by section 19. That being so, it was proper for the FTT to require Aster to bear a cost which it would have had to meet if the issue of prejudice had not been left for later but had rather been settled in the course of the dispensation application.

50. I accept this submission. It is true that in *Daejan* Lord Neuberger spoke of dispensation being conditional on the landlord paying the tenants' reasonable costs "incurred in connection with the landlord's application under section 20ZA(1)" (paragraph 59) and "in connection of investigating and challenging that application" (paragraph 73). Taken in isolation, those passages lend weight to Mr Bhose's submission that Aster should not have been required to bear costs to be incurred only *after* the dispensation application had been determined. On the other hand, Lord Neuberger also referred in more general terms to tenants being "likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord" (paragraph 69) and to the tribunal "not [being] too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice" (paragraph 68). More importantly, perhaps, I agree with Mr Rainey that in this particular case the FTT was in effect proceeding on the basis that the potential prejudice to the tenants remained to be addressed, with any future section 27A application providing a forum for the investigation into prejudice which might otherwise have been undertaken – at Aster's expense – in the context of the dispensation application. Given, moreover, Lord Neuberger's recognition that "the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be described should not be regarded as representing rigid rules" (paragraph 41) and that the tribunal "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" (paragraph 54), I do not consider that condition (i) can be faulted. It was a condition which the FTT was entitled to impose in the specific circumstances of this case.

51. Turning to the challenge to condition (ii), Mr Bhose wisely did not press this with any vigour. In seeking dispensation, Aster was asking for an indulgence and so could fairly be expected to bear the tenants' costs of the application. A condition along these lines was of course imposed in *Daejan*. Moreover, the fact that the respondents have succeeded in having condition (i) imposed confirms that this was not a case in which there was nothing relevant for them to say in response to the dispensation application.

Conclusion

52. I would dismiss the appeal.

Postscript

53. Very sadly, Judge Bridge died suddenly in September of last year. I would like to end by recording my admiration for his achievements as, variously, academic, Law Commissioner and judge.

Lord Justice Phillips:

54. I agree.

Lady Justice King:

55. I also agree.