10090

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LDC/2013/0068
Property	:	Honeycombe Beach, Honeycombe Chine, Boscombe, Bournemouth, Dorset, BH5 1LE
Applicant	:	WEL (No 1) Ltd
Representative	:	Mr Jonathan Upton, Counsel
Respondent	:	The 168 Leaseholders of the Flats at the Property
Representative	:	-
Type of Application	:	To dispense with the requirement to consult leaseholders about a Qualifying long-term agreement : section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act")
Tribunal Member(s)	:	Judge P R Boardman and Judge N P Jutton
Date and venue of Hearing	:	22 and 23 July 2014 at Menzies Bournemouth East Cliff Court Hotel, East Overcliff Drive, Bournemouth, Dorset, BH1 3AN
Date of Decision	:	6 August 2014

DECISION

Introduction

1. The Applicant seeks dispensation under Section 20ZA of the 1985 Act from all of the consultation requirements imposed on the landlord by Section 20 of the 1985 Act in relation to a goat grazing agreement dated 16 May 2011 made between The Council of the Borough of Bournemouth (1) and BDW Trading Limited (2)

2. The Applicant served a witness statement by Natalie Chambers dated 9 December 2013 in support of the application

3. The Tribunal gave directions following a case management hearing on 20 February 2014

4. The Applicant served a statement of case dated 15 April 2014

5. Respondents from the following flats served statements of case on the following dates:

Flat 1	Dr and Mrs D E Wolstenholme	12 May 2014
Flat 4	Mr I Scrase and Mrs E Garner	May 2014
Flat 5	Michael Lowry	9 May 2014
Flat 6	Samantha Hudson	May 2014
Flat 19	Martyn and Val Edwards	7 May 2014
Flat 29	Martyn Iles and Dawn Iles	13 May 2014
Flats 37, 38, 66	Gordon and Julie Silvester	12 May 2014
Flat 45	John and Maureen Ford	May 2014
Flat 48	Mr and Mrs Bray	10 May 2014
Flat 77	Mrs Daphne Harrington and Mr Robyn Harrington	8 May 2014
Flat 85	Patrick Allen	undated
Flat 86	Mr and Mrs M Street	10 May 2014
Flats 91, 94, 96	Mr Davidson and Mrs Langford	12 May 2014
Flat 98	Ms Caroline Riley and Mr Philip Radcliffe	undated
Flat 120	Stephen Mallett	May 2014
Flat 127	Allan Haigh	12 May 2014
Flat 136	Anne Marie Crosby and John Knowles	16 May 2014
Flat 137	Dr Sharif Ismail	14 May 2014
Flat 138	Stephen Avery and Debra Hickey	May 2014
Flat 156	Alison and Nigel Weir	12 May 2014
Flat 159	Mr J M & Mrs J E Davies	11 May 2014
Flat 166	Andrew and Paul Chatt	10 May 2014
Flat 167	Glenn Hopkinson	9 January 2014

6. The Applicant served a response on 28 May 2014

7. The Applicant served a bundle of papers for use at the hearing, indexed at pages 1 to 310. References in this decision to page numbers are to page numbers in that bundle, unless otherwise noted

8. The leaseholder of Flat 5 served a further statement on 26 June 2014

9. The following leaseholders have applied (either in their statements or by separate application forms) under section 20C of the 1985 Act for orders that the Applicant's costs should not be regarded as relevant costs to be taken into account in determining the amount of any service charge :
   Flat 5
   Flat 48
   Flat 98

10. Several leaseholders have included in their statements a claim, as part of their submissions about whether the Tribunal should grant dispensation on terms, that the Applicant should bear all its legal and other costs in these proceedings

The Applicant's written case

11. The Applicant's case is set out in the statement by Natalie Chambers dated 9 December 2013 and the Applicant's statement of case dated 14 April 2014

12. The Applicant stated that on 5 July 2006 a headlease made between Bournemouth Borough Council (1) and Barratt Homes Limited (2) demised the Property for a term of 150 years from 5 July 2006 (headleasehold Land Registry entries at page 14)

13. BDW Trading Development purchased the Property for residential development

14. Condition 8 of a Town Planning Decision Notice dated 28 February 2006 in respect of Planning Application 7/2002/14555/F (pages 34 to 40) provided :

> *That prior to the commencement of the development hereby approved, a detailed scheme of ecological mitigation measures, to include proposals for the protection of ecological features during the site works, and an appropriately funded long-term management plan, shall be submitted to and agreed in writing by the Local Planning Authority. This shall include an undertaking by the developer that all occupants of the development will be required to enter into an agreement preventing the ownership of cats*
> *Reason : in the interests of nature conservation*

15. By underleases of various dates between 9 July 2008 and 2 July 2012 (headleasehold Land Registry entries at pages 19 to 32) the Flats at the

Property were demised to leaseholders for terms of 150 years less one day from 5 July 2006

16. A sample underlease dated 30 June 2010 is at pages 56 to 111, and describes the landlord as "BDW Trading Limited (trading as Barratt Homes)"

17. On 20 November 2008 BDW and the Council entered into a goat grazing agreement on land owned by the Council for a trial period of 6 months, to find out if goat grazing was viable (pages 145 to 156), which included the following provisions :

    a. recital 1.3 : "following an assessment of the management options it has been agreed that there will be a further exploration of goat grazing"

    b. recital 1.4 : ".....a six month trial.....will be conducted on the Council's own land edged blue on the Plan"

    c. recital 1.7 : "the trial will be conducted by the Council's employees and agents"

    d. recital 1.8 : "at the end of the trial an evaluation will take place"

    e. recital 1.9.1 : "if the evaluation of the trial reaches an overall positive conclusion then the parties to this agreement will enter into a further agreement whereby the goat grazing area will be extended from the land edged blue to include the land edged green both of which are shown on the Plan"

    f. recital 1.9.2 : "the management of the goat grazing including the extended area will continue to be carried out by the Council"

    g. recital 1.10 : "on any sale.....of the Developer's.....interest in.....the land edged green on the Plan the transferee is to assume the Developer's responsibilities under this Agreement"

    h. definition 2.4 : "section 106 Planning Agreement" "means the Agreement dated the 14th day of February 2006 and made between Barratt Homes Limited and the Council consequent upon the grant of planning permission number 7/2002/145555/F"

    i. clause 3.3 : "the intention is to enable the Developer to satisfy its obligation under the Section 106 Planning Agreement to produce a management plan for the land edged green"

    j. clause 7 : "at the end of the trial period the parties agree to exchange records and other information held by each of them relating to the Scheme to allow an effective evaluation of the Scheme in achieving the desired habit management outcomes"

k. clause 8.1 : "in the event of the evaluation.....the parties will immediately commence negotiations with a view to settling the terms of a management agreement extending the Scheme to include the land edged green on the Plan"

18. On 16 May 2011 BDW and the Council entered into a goat grazing agreement for 10 years (pages 42 to 54), which includes the following provisions :

a. recital 1.2 : "included in the Section 106 Planning Agreement entered into by the parties to this Agreement was an obligation on the Developer to produce and implement a viable management plan for the land edged green on the plan"

b. recital 1.4 : "following a report commissioned by the Council by Crew [sic] and Hawes in October 2009 and subsequent discussion with Natural England, it was concluded that the trial had been successful and that the management of the cliffs by goat grazing was the best option for the future management of the land edged green on the plan"

c. an agreement that :
- the land edged green on the attached plan would be used for goat grazing
- the management of the scheme would be carried out by the Council or its agents, who would maintain and repair fences and manage the goats
- BDW would pay a management fee of £8400 plus VAT on 1 April and 1 September in each year of the term
- the management fee would be increased on the third anniversary of the date of the agreement and thereafter every 3 years
- the increases would be negotiated, but would be not less than the last three years Retail Price Index and not less than the sum paid in the previous three years of the term

19. Both the trial 2008 trial agreement and the agreement dated 16 May 2011 mistakenly referred to a section 106 planning agreement between the Council and BDW requiring BDW to produce and implement a viable management plan. However, the Council had confirmed that the requirement to do so had been by reason of condition 8 of the Town Planning Decision Notice, not a section 106 agreement (page 159)

20. The Council had also confirmed that the agreement dated 16 May 2011 was the "appropriate funded long-term management plan" referred to in condition 8 of the Town Planning Decision Notice (page 160)

21. The Applicant first became aware of the trial agreement dated 20 November 2008 and the agreement dated 16 May 2011 in about June 2012, when they were brought to its attention by its conveyancing solicitors and by the managing agents

22. The Applicant became the registered proprietor of the headlease dated 5 July 2006 on 9 July 2012 (headleasehold Land Registry entries at page 14)

23. The underleases contained service charge provisions, which the Applicant contended included a liability by the leaseholders to contribute towards the management fee under the agreement dated 16 May 2011

24. The current management fee under the agreement dated 16 May 2011 was £20160 a year (namely two payments of £8400 plus VAT)

25. In 2012, the Applicant apportioned that fee amongst the leaseholders in accordance with percentages calculated by BDW's managing agents by reference to the floor areas on the plans for the development, as shown in the schedule at pages 165 to 167. In 2013 the Applicant's managing agents recalculated the percentages based on the floor areas as measured after the Property was completed, as shown in the schedule at pages 169 to 171

26. The schedule showed that currently 32 out of the 170 leaseholders paid less than £100 a year towards the management fee under the agreement dated 16 May 2011

27. On 16 May 2014 the management fee would increase. If the RPI were 3%, the increase would result in an additional three leaseholders paying more than £100. Other leaseholders might become liable to pay more than £100 if the management fee were increased in future years

28. The amount demanded by the Applicant from each leaseholder had been capped at £100 by the Applicant, so that, at present, the Applicant recovered from leaseholders £16445.19 of the £20160.00 it paid each year to the Council. The shortfall was some £3700, which over the remaining 142 years term of the headlease amounted to about £525400 based on the current management fee

29. The agreement dated 16 May 2011 was a qualifying long term agreement for the purposes of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations")

30. The Applicant admitted that its predecessor in title, BDW, failed to consult the leaseholders about the agreement dated 16 May 2011 in accordance with the requirements in the 2003 Regulations, which limited each leaseholder's contributions to the management fee to £100 each service charge year

31. The Applicant therefore sought retrospective dispensation under section 20ZA of the 1985 Act, to apply prospectively, in that the Applicant would not seek to recover more than £100 from any leaseholder in respect of any year prior to 2014

32. Under section 20ZA, the Tribunal could exercise its power to dispense if satisfied that it was reasonable to dispense with the requirements

33. The purpose of the consultation requirements was to protect the leaseholders from paying for inappropriate works, or paying more than appropriate, and, in considering dispensation requests, the Tribunal should focus on whether failure to consult the leaseholders prejudiced them in either respect, and could grant dispensation on such terms as it thought fit : **Daejan Investments Limited v Benson** [2013] UKSC 14

34. In this case, it was very unlikely that the leaseholders could have said anything which would have influenced BDW's decision to enter into the agreement dated 16 May 2011. BDW was obliged by condition 8 of the Town Planning Decision to enter into an appropriately funded long-term management plan, such as the agreement dated 16 May 2011

35. By letter dated 27 February 2014 (pages 173 to 174) the Applicant asked the Council whether any other management schemes had been considered in 2008 and 2011, whether alternative management schemes would be considered if the Applicant terminated the agreement dated 16 May 2011, and what, if anything, such schemes would cost. However, the Council's reply by e-mail on 31 March 2014 (page 175) failed to provide the information requested

The Respondents' statements of case

36. The points raised in the various statements served by the Respondents were as follows

37. Reasons for opposing the application
    a. Flat 1 : Dr and Mrs Wolstenholme were not aware of any goat grazing charges when purchasing their flat; they did not see any reference to the goat grazing agreement in the lease; it was completely unfair to pass on a charge without consultation with those affected
    b. Flat 2 : Mr Scrase and Mrs Garner purchased their flat in November 2010; the sales office did not inform them about any goat grazing agreement; it was only when they had paid their deposit and the legal work commenced that their solicitors informed them about the 2008 agreement; until this year was they were not aware of the agreement dated 16 May 2011; the shortfall if the £100 cap remained in place was only for the remainder of the agreement, not for the remainder of the lease; instead of seeking dispensation from consultation, the Applicant should exercise the break clause in the agreement dated 16 May 2011, and then renegotiate and enter into statutory consultation; as it was BDW who failed to consult, the Applicant should attempt to recover from them any excess which could not be recovered from leaseholders
    c. Flat 5 : Mr Lowry acquired his flat in October 2010; the trial goat

grazing agreement was part of the package of documents provided by BDW; in October 2011 he learned from BDW of the agreement dated 16 May 2011; he notified BDW that their failure to consult was a breach of section 20 of the 1985 Act; BDW acknowledged this on 6 October 2011, and accepted that as a result no leaseholder could be required to pay more than £100 a year towards the costs under the agreement dated 16 May 2011, and that BDW would have to bear the excess (pages 195 to 196); as a result of e-mails to the Applicant from 15 June 2012 (pages 199 to 205) the Applicant was aware of the liability under the agreement dated 16 May 2011 caused by BDW's failure to consult prior to completing the acquisition of the Property on 22 June 2012; until April 2013 BDW paid all costs under the trial agreement in 2008 and the agreement dated 16 May 2011, without any contribution from leaseholders; the Applicant's shortfall resulting from being only able to recover £100 from each leaseholder was only for the remaining 7 years of the agreement dated 16 May 2011, not for the remaining 142 years of the lease of the flat; the Applicant could operate the break clause in paragraph 8.1 of the agreement dated 16 May 2011, and agree with the Council a new more cost-effective management plan with or without goats and carry out statutory consultation; there was therefore no need for the Tribunal to grant dispensation under section 20ZA; the Applicant had been aware of BDW's failure to consult before purchasing the Property and had had the opportunity to seek compensation from BDW

d. Flat 6 : Samantha Hudson stated that termination of the agreement dated 16 May 2011 under the break clause in paragraph 8.1 would allow renegotiation and statutory consultation; there was therefore no need for the Tribunal to grant dispensation under section 20ZA; the Applicant had been warned about the agreement dated 16 May 2011 and the £100 cap before completing the acquisition of the Property; it was unfair to expect the leaseholders to finance goats
e. Flat 19 : Mr and Mrs Edwards purchased their flat in June 2012; there was no mention of the goat grazing agreement when maintenance charges were explained; the figure quoted for loss presupposed that the agreement would continue for the full term of the lease; the condition in the Planning Decision Notice was for a long-term management plan to be agreed with the Council, but there was no requirement for a 10-year agreement to use goats or for work to be carried out by the Council or for costs to rise by at least RPI, but not linked to the Council's costs of delivering the service; the Applicant could operate the break clause in the agreement dated 16 May 2011, find a cheaper alternative management plan and consult leaseholders correctly; the use of goats was not a good management plan either in value of results, as the goats had a deleterious effect on both the stability and the visual amenity, causing extensive local erosion and slippage of the top of the cliff face where vegetation had been stripped bare
f. Flat 29 : Mr and Mrs Iles purchased their flat at the end of May 2011, and had seen a copy of the goat grazing agreement as part of the purchase documentation; the Applicant's calculation of loss

appeared to be based on the wrong impression that the term of the agreement dated 16 May 2011 was the same as the term of the lease; BDW had acknowledged their failure to consult, but had not sought dispensation; the Applicant was aware of the failure to consult and the £100 before purchasing the Property, apparently without seeking a remedy from BDW as part of the purchase process; BDW were responsible for the failure to consult, but the Applicant had not provided details of any attempts to recover from BDW the excess of the management fee over and above the individual leaseholders' annual cap of £100; if the Applicant had exercised the break clause in the agreement dated 16 May 2011 at the time of starting this case the 6-month notice period would now nearly have expired, and a new agreement with full consultation could have been close to being implemented; there was therefore no need for the Tribunal to grant dispensation; the Applicant had made no attempt to consult leaseholders before starting these proceedings

g. Flats 37, 38 and 66 : at no time during Mr and Mrs Silvester's purchase in December 2010 had they been informed by Barratt's solicitors that there would be goats at the rear for which they would have to incur an extra cost; their 3 apartments had a view over the rear where the goats were now grazing, whereas prior to the goats' arrival the area was pleasant to look at and a selling point; however, since the goats' arrival there had been a collapse, the cliffs had been fenced off and at times the area had been totally barren; this had affected their view, and at no time had they been consulted; they wished the 6 month termination to be implemented, and were not sure whether they could do this themselves; if the Council wanted to conduct a trial they could have used another piece of cliffside along the 20 miles of coastline owned by the Council and funded it themselves, rather than using this development with the leaseholders having to pay

h. Flat 45 : Mr and Mrs Ford purchased their apartment in September 2010, with an endearing view over the natural beauty of Honeycombe Chine; in 2011 ten goats were introduced, although BDW had not informed them of the goat grazing agreement; in 2012 contractors erected 10m x 1m high timber panelling in the Chine directly opposite their apartment, apparently to minimise the erosion caused by the goats. In 2013 the area round the panelling was completely fenced off to prevent further erosion damage by the goats, which had considerably spoilt the natural beauty of the Chine as viewed from their apartment; the first indication of the long-term commitment to use goat grazing for the management of the land was when they received an invoice for their share of the cost on 25 April 2013, following which they discovered that BDW had entered into the agreement dated 16 May 2011; BDW had had ample time following the 2008 trial agreement to consult with leaseholders about alternatives for maintenance of the Chine; the recitals in both the 2008 trial agreement and the agreement dated 16 May 2011 mistakenly referred to a requirement in a section 106 agreement, as the Applicant had admitted, which meant that they had both been based on a false premise and should be declared null

and void

i. Flat 48 : Mr and Mrs Bray stated that, unlike **Daejan**, where costs had already been incurred after a flawed consultation, this case involved future costs after no consultation and an opportunity to renegotiate the agreement with proper consultation; the Tribunal should therefore not grant dispensation, but direct the Applicant to terminate the agreement dated 16 May 2011 (on grounds that it was not effective), and negotiate a new management plan with the Council, with proper consultation with leaseholders; they acquired their flat on 7 July 2010; a copy of the 2008 trial agreement was in the purchase documents; they heard nothing more until receiving an invoice dated 25 April 2013 for a goat grazing charge of £118 limited to £100, and they discovered that Barratts had entered into the agreement dated 16 May 2011; Barratts were clearly aware of the failure to consult, and the Applicant was aware of the agreement dated 16 May 2011 on purchasing in June 2012, so either the Applicant paid a discounted price for the transfer of the headlease (and was now seeking a windfall by passing the costs of mistakes on to the leaseholders), or should pursue Barratts for non-disclosure of the agreement dated 16 May 2011 or bear the cost of their own omission; the Applicant had started this Tribunal application without first exploring more economical alternative long-term management schemes, which was an example of their approach not to consult but to try to shift the cost of their mistakes on to someone else; the agreement dated 16 May 2011 was not an "appropriately funded" long-term management plan for the purposes of condition 8 of the Town Planning Decision Notice because condition 8 did not require goat grazing as the only solution, and failing to consult leaseholders in contravention of legislation was not appropriate

j. Flat 77 : Mrs Harrington and Mr Harrington purchased in August 2009; BDW's sales representative told them that goats might graze on the Chine, but gave no details; BDW was fully aware of its failure to consult, but did not apply for dispensation; the Applicant became aware of the situation but did not consult; the claim that the Applicant would suffer 142 years of loss was misleading as the agreement dated 16 May 2011 had less than 8 years to run; the present proceedings appeared to be a cover up for the Applicant's failure to perform adequate due diligence before purchasing the headlease

k. Flat 85 : Mr Allen purchased in 2009; his flat looked out over Honeycombe Chine; the initial tree and shrub clearing in readiness for the goats left the Chine in an unsightly condition with a considerable reduction in bird and butterfly numbers in the area; the subsequent activity of the goats had caused erosion of the cliff face, and had necessitated the erection of a large and unsightly fencing structure to enclose and protect the area in question from the goats; the Applicant had sent documents relating to the management plan only with the papers in these proceedings, rather than doing so during the course of a consultation process; he had still not seen the reports on which the claim in the recitals to the

agreement dated 16 May 2011 that the 2008 trial had been a success had been based; the Applicant's calculation of loss was inappropriate, being based on the remaining 142 years of the lease, rather than on the remainder of the 10-year agreement dated 16 May 2011 with a break clause

l. Flat 86 : Mr and Mrs Street stated that the Applicant knew of the agreement dated 16 May 2011 before purchasing the freehold, and would have discounted the purchase price to compensate; the existing agreement was capable of being terminated and a renegotiation would enable statutory consultation to take place; a new contract would explore alternative methods of vegetation control, and, whatever method was used, would result in substantial savings compared with current costs; the Applicant's calculation of loss was based on the wrong impression that the contract term was for the remaining 142 years of the lease, instead of the remainder of the 10-year contract term, with a break clause

m. Flats 91, 94, and 96 : Mr Davidson and Mrs Langford paid deposits "off plan" in 2007, and completed the purchases in about 2009; neither they nor their conveyancing solicitor had heard of the agreement dated 16 May 2011; the Applicant's calculation of loss was based on the incorrect assumption that the remaining term of the agreement dated 16 May 2011 was 142 years, like the lease, whereas it was only for the remaining 7 or so years of its 10 year term, so that the potential shortfall was nearer to £25000 than the £525400 figure put forward by the Applicant; there was no need for the Tribunal to grant dispensation as the Applicant could operate the break clause in the agreement dated 16 May 2011 and negotiate a new agreement after statutory consultation; BDW failed to consult with leaseholders, and the Applicant had provided no information about any attempts to recover from BDW the amount payable in excess of the £100 cap for each leaseholder

n. Flat 98 : Ms Riley and Mr Radcliffe completed their purchase in March 2009, having exchanged contracts in 2007. Their papers included a copy of the Town Planning Consent, including condition 8, but there was no mention of cost; they first became aware of a goat grazing agreement at a meeting of leaseholders with BDW in February 2011 when BDW said that they were paying for the cost of the goats in that year, and would do so in the next year too; the first mention of leaseholders paying for the goats was when they received a bill dated 25 April 2013, separate from the routine service charge, for £100 towards the cost of the goats; the Applicant could operate the break clause in the agreement dated 16 May 2011, negotiate with the Council the costs of any future contract, invite alternative suppliers to tender, and engage in statutory consultation with leaseholders, resulting in a possible reduction in costs and provide better value; renegotiation would allow alternatives to goat grazing to be evaluated, taking into account cliff falls and erosion, degradation of surface and creation of goat paths and human paths; the Applicant's calculation of loss was based on an incorrect supposition that the agreement dated 16 May 2011 ran for the remaining 142 years of the lease, whereas it was only for the

remaining 7 years of the contract, resulting in a liability of £25900 (7 years x £3700 a year), or, if the break clause were operated, one year's liability, namely £3700; this case differed from **Daejan** in that in **Daejan** the works were a one-off event which had to be done in a timely manner, whereas the management of the Property was a long-term situation with the majority of the contract (7 years) and costs still outstanding; in **Daejan**, the money had all been spent and there was no chance to vary the costs, whereas the agreement dated 16 May 2011 allowed termination on 6 months' notice as long as an alternative plan were agreed, so that the Applicant could vary its costs and limit the liability and also follow the statutory consultation with leaseholders on a new contract; it appeared that the Applicant knew of the agreement dated 16 May 2011, knew that it had not been the subject of statutory consultation, and knew that BDW were operating it under a £100 cap for each leaseholder, before completing its purchase from BDW

o. Flat 120 : Mr Mallett purchased his flat in November 2008; prior to the demands for payment for goat grazing he had had no correspondence on the background; termination of the agreement dated 16 May 2011 and renegotiation would allow statutory consultation to take place, so that dispensation from consultation under section 20ZA was unnecessary; BDW were aware of the detailed circumstances behind the setting up of the agreement dated 16 May 2011 and their failure to consult, and decided not to submit an application for dispensation from consultation; BDW appeared to be responsible for the failure to consult; the Applicant had provided no information on any attempts to recover from BDW the amount payable for the management fee in excess of the capped amount recoverable from each leaseholder of £100

p. Flat 127 : Mr Haigh completed his purchase in September 2008; a planning decision dated 5 July 2006 [sic] was one of his purchase documents, but he knew nothing about goat grazing until being asked to pay £100 a year by the property managers; he noted that condition 8 of the Planning Decision Notice required that a detailed scheme be provided "prior to the commencement of the development hereby approved", but this did not happen prior to the commencement of the development, as the trial agreement was in 2008 and the goat grazing agreement was dated 16 May 2011, which was a failure by both Barratt and the Council; the negotiations and agreements had been entered into after he purchased his flat and without his knowledge and agreement, and the Applicant was trying to pass on the costs to leaseholders without consultation; he had been informed that the Applicant had knew of the agreement dated 16 May 2011 when it acquired its interest in the Property, but if it had not then it had not carried out due diligence, but should seek redress from BDW; the agreement dated 16 May 2011 had a break clause, and the costs of this dispensation application were huge compared with the costs up to the date of the break clause; he did not accept that any re-measurement had physically taken place since he purchased his flat

q. Flat 136 : Ms Crosby and Mr Knowles stated that other possibilities

should be pursued to keep the cliffs tidy, and leaseholders should be consulted; the amount being charged for the goats was outrageously high; the level of service charges and maintenance per block was very high, and it would be unsatisfactory for the Applicant to be applying increased charges willy nilly

r. Flat 137 : Dr Ismail stated that goat grazing around the residential area was not a welcome activity for health reasons, such as allergy to animal dust and animal fur; it also affected flat sale and rental values; the leaseholders should have been consulted

s. Flat 138 : Mr Avery and Ms Hickey purchased their flat in September 2007 from plan, and first heard about the agreement on 16 May 2011; it was obvious even from a layperson's perspective that the agreement was not legal and should not be enforceable

t. Flat 156 : Mr and Mrs Weir bought their flat off plan, and so had owned it since it was built 5 years ago; the Applicant should have checked all paperwork and legal issues before purchasing; BDW failed to consult but chose not to submit an application for dispensation from consultation; the Applicant was aware of the agreement dated 16 May 2011, and should seek reimbursement from BDW; leaseholders should not have to pay for a goat grazing agreement of which they had had no knowledge at the time of buying, and of which there was no mention in their paperwork; £17000 a year was a lot to be paying for some goats, and the cost should be less, and the effectiveness should be monitored

u. Flat 159 : Mr and Mrs Davies purchased their apartment in May 2008, and a sales person told them that goats were going to be used to control the grass at the rear as there was a protected species of lizard which could be harmed by mechanical methods or weedkillers, and that the costs were to be fixed and under no circumstances would exceed £100 a year for each apartment; they took that into account when deciding whether to commit and purchase

v. Flat 166 : Mr and Mrs Chatt purchased their apartment in April 2008, having reserved it and exchanged contracts from plan, but the goat grazing agreement was never mentioned; the first they heard of it was when they received an invoice in April 2013; when goats appeared on the land they did not imagine that they would be liable for any costs; the Applicant's calculation of loss assumed that the term of the agreement dated 16 May 2011 was the same as the term of the lease; the goat grazing agreement could not be described as "gardens and/or pleasure grounds" as suggested in the Applicant's statement; BDW appeared to be responsible for the failure to consult originally, and decided not to submit an application for dispensation from consultation; the Applicant had provided no information about any attempts to recover from BDW the amount payable for the management fee in excess of what can be recovered from the £100 annual cap for any leaseholder; termination of the agreement dated 16 May 2011 and renegotiation would allow statutory consultation to take place, so there was no need for the Tribunal to grant dispensation from consultation under section 20ZA

w. Flat 167 : Mr Hopkinson had been the owner of the flat since 2009; in the summer of 2011 he first became aware that a goat grazing trial had taken place when a neighbour told him that a goat grazing agreement was in place and that he was expected to pay £100 year to support the arrangement; however, there was no consultation; Barratts appeared to be responsible for the initial failure to consult, and had not submitted an application for dispensation; the Applicant must have been aware of the agreement when it purchased, but it was not clear whether it had attempted to recover its alleged loss from Barratts; the Applicant should have carried out due diligence and factored the full costs of the agreement dated 16 May 2011 into their bid for their purchase; in any event, there was a break clause, so dispensation should not be granted now; the Applicant had suggested a potential loss over the next 140 years, whereas this was a 10-year contract

38. Whether it might be appropriate to grant dispensation on terms
    a. Flat 1 : if dispensation were granted, it should be on terms that the Applicant should pay all legal costs and other costs associated with terminating the old agreement and setting up a new one
    b. Flat 4 : the Applicant should bear all costs in terminating the current agreement, renegotiating and consulting; the Applicant should pay all costs in these proceedings, both legal and administrative; in the meantime, the Applicant should bear all charges in excess of the £100 a year cap
    c. Flat 5 : there was no need to grant dispensation; the Applicant could terminate the agreement dated 16 May 2011 and negotiate a new agreement with the Council, which would give an opportunity for statutory consultation; this made the case very different from **Daejan**, which concerned works which had already been carried out; the Applicant should bear the costs of terminating the agreement dated 16 May 2011 and renegotiating a revised agreement after statutory consultation; the £100 cap should continue until a new management plan had been agreed, and the Applicant should continue to bear the excess; the Applicant should pay all its legal and other administrative costs in relation to this application, and not to include the costs in any future service charge
    d. Flat 19 : the £100 cap should remain until the Applicant consulted fully with leaseholders
    e. Flat 29 : the Applicant should bear the cost of any termination of the current agreement dated 16 May 2011 and the renegotiation of a revised agreement after statutory consultation; the £100 cap should continue until a new agreement had been implemented, and the Applicant should bear any additional costs; the Applicant should pay all legal and any other associated costs related to this case
    f. Flat 45 : termination of the agreement dated 16 May 2011 and subsequent renegotiation would allow the statutory consultation to take place and therefore nullify the need for dispensation under section 20ZA; the cost of any termination and renegotiation and consultation should be met by the Applicant; the current £100 cap

should continue until a new management plan had been agreed and implemented; the Applicant should continue to bear the costs in excess of the £100 cap until a new management plan had been implemented; the Applicant should pay its legal and other administrative costs

g. Flat 48 : dispensation was not appropriate; a new agreement at reasonable cost should be negotiated after consultation with leaseholders at the Applicant's cost; the £100 cap should continue to apply until then; the Applicant should bear all legal and administrative costs of these proceedings, and should not pass them on to leaseholders through the service charge
h. Flat 77 : the £100 cap should continue to apply; the Applicant should bear all costs in connection with the application, and any subsequent arising in consequence of any action required; the Applicant had not disclosed its position in relation to BDW in this matter
i. Flat 85 : any dispensation to consult should be on condition that the Applicant be obliged to consult within a specified time; the longer the dispensation to consult endured the greater the prejudice to leaseholders; until such time as the consultation process was completed, the leaseholders' contributions should be limited to £100; the Applicant should be directed to look into alternative schemes for the management of the site, and to obtain competitive quotations for any agreed management scheme; the Applicant should pay any costs incurred by the Applicant as a result of its failure to consult leaseholders and any costs relating to the Tribunal proceedings, including costs incurred by leaseholders
j. Flat 86 : the Applicant should bear all costs as they had made no effort to consult or negotiate with leaseholders; the £100 cap should continue until a new management plan had been implemented
k. Flats 91, 94, and 96 : the Applicant should bear the costs of terminating the agreement dated 16 May 2011, and negotiating a new agreement after statutory consultation; the current cap of £100 a year for each leaseholder should continue until a new agreement had been implemented; the Applicant should pay all its legal and other administrative costs in connection with this case
l. Flat 98 : the Applicant should bear all its legal and administrative costs
m. Flat 120 : the Applicant should bear the cost of terminating the agreement dated 16 May 2011, renegotiating a revised agreement, and carrying out statutory consultation with leaseholders; the £100 cap should continue until any new agreement had been implemented; the Applicant should pay its own legal and other administrative costs in connection with this case
n. Flat 159 : the Applicant should bear all their legal and other costs, with no liability to leaseholders; the existing cap of £100 a year should apply for the rest of the term of the agreement dated 16 May 2011; the Applicant purchased the Property with this condition as part of the agreement and should therefore comply with it
o. Flat 166 : the Applicant should bear the cost of any termination of

the agreement dated 16 May 2011 and the renegotiation of a revised agreement after statutory consultation; the Applicant should continue to bear the cost in excess of the £100 yearly cap until a new agreement with the Council had been implemented; the Applicant should pay its legal and administrative costs of these proceedings

p. Flat 167 : the Applicant should bear the cost of termination and/or renegotiation; the existing cap should remain in place until any revised agreement was in place; the Applicant should bear its costs in relation to this case, not the leaseholders

39. Representations which would have been made if consultation had taken place

a. Flat 1 : if consultation had taken place, representations could have been made about the need for goat grazing; they lived in a ground floor flat closest to the goats, and saw how destructive they were and were concerned about the stability of the Chine, and about damage to the Property, because of the erosion so caused; they would argue that if goat grazing were to be continued, it should do so only after a full review of the trial and subsequent grazing, and that there should be a tendering process to ensure that costs were kept down and the best solution settled upon

b. Flat 4 : they would have argued that a 10-year agreement was too long; they would have objected to an automatic increase in management fees linked to RPI; they would have requested information on alternative solutions; the work should have been put out to competitive tender, not a 10-year contract with the Council; they would have liked to see the results of the goat grazing trial; there should have been a provision for audit costs; they would have requested a risk assessment; they would have wanted to have more detail about responsibility for monitoring the standard of the work

c. Flat 5 : he would have sought access to the reports on viability and cost effectiveness of the 2008 trial; he would have asked for information on alternative solutions for managing the land, so as to assess the cost effectiveness of the goat grazing option, and assess the increased risk of erosion caused by goat grazing; he would have asked to see a risk assessment; he would have argued that work needed to implement the management plan should be put out to competitive tender; he would have requested that any agreement should have required all income and expenditure to be audited annually; he would have argued for a shorter term than 10 years; he would have objected to automatic linking of the management fee to RPI; he would have questioned why the leaseholders should pay to manage and maintain land owned by the Council, and he would have wanted to ensure that leaseholders were not being asked to pay for the maintenance of the adjoining land to the east owned by the Council, in which the goats spent more of their time; he would have challenged the justification for setting up the trial agreement and the agreement dated 16 May 2011 in light of the incorrect reference in the recitals to an obligation under section 106 Planning

Agreement; he would have argued that the requirement under condition 8 of the Town Planning Decision Notice for an appropriately funded long-term management plan to be submitted and agreed in writing by the Council did not require a long-term 10-year single-source contract to be placed with the Council to do all the work

d. Flat 19 : there should be an audit of costs; the goats grazed an area far greater than the Property, and the costs should be apportioned fairly; they had never been given details to substantiate that goat grazing was the most cost-effective means of controlling the vegetation; there was no way of checking whether the management fee reflected the fact that the goats were away in winter quarters during the winter months; the 10-year term was excessive; the use of goats was expensive; the Council were the only party to provide a tender, whereas the work should have been put out to competitive tender to see whether other parties could fulfil the contract more cost effectively; the goats could have a detrimental effect on property prices

e. Flat 29 : they would have requested the results of the goat grazing trial, and information on how those results compared with alternative management solutions, both in cost and effectiveness; they would have argued against a contract as long as 10 years; they would have requested that the work be put out to competitive tender; they would have objected to the automatic linking of any increase in the management fee with RPI; they would have requested a provision for the auditing of costs; they would have argued that condition 8 of the Town Planning notice called only for an appropriately funded long-term management plan to be submitted and agreed with the Council, and that it did not require a 10-year contract with an exclusive provider, namely the Council, as distinct from a long-term plan involving several shorter contracts which were open to competition on renewal

f. Flat 45 : they would have asked whether a risk assessment had been carried out, as the cliffs were very prone to erosion; if not risk assessment had been carried out they would have requested the investigation of other management schemes, and put out to open tender; they would have objected to the agreement term being for 10 years, 3 years being a long enough to comply with the long-term plan requirement in the Town Planning Decision Notice; they would have objected to the increase in management fees being not less than RPI, compared to the standard wording of, for, example, 3% or rise in RPI, whichever was the greater; they would have requested that the agreement should have clearly stated whether VAT was included or excluded from the stated sum for management fees

g. Flat 48 : they would have asked for the results of the 2008 trial, and would have submitted photographs showing the deterioration of the cliffside as a result of the goat grazing, such as the photographs at pages 262 and 263; they would have asked for alternative proposals – for example a gardener spending a week a month could have achieved a lot more and caused less destruction; they would

have requested putting the long-term management plan out to tender; they would have asked for a budget and regular reporting, and whether the leaseholders' costs also related to the area to the east of the Property; they would have objected to such a long contract and to it being subject to RPI, whereas other Council costs were being controlled; condition 8 referred to the interests of nature conservation, whereas a report stated that since the goats had been used and trees and shrubs removed there had been less birds and no sightings of foxes

h. Flat 77 : the planning consent did not require a 10-year plan; no information had been provided about whether alternatives had been considered, nor whether the goat grazing was ever put out to tender

i. Flat 85 : he would have wished to see information about how the goat grazing was divided between the land edged green on plan attached to the agreement dated 16 May 2011 and other land; observation indicated that the goats did not spend more than 50% of their time, and often considerably less than 50%, in the land edged green; the management fee was therefore for only approximately 50% of the goats' time, which seemed excessive; he would have wished to see competitive quotes from contractors other than the Council

j. Flat 86 : they would have opposed the contract without exploring more viable alternatives

k. Flats 91, 94, and 96 : they would have wished to see the case for goat grazing being the most cost effective way of managing the land; they would have wished to see competitive tenders

l. Flat 98 : they would have sought a review of the results of the 2008 trial; they would have insisted that alternative management plans for the cliff be developed, costed, presented and debated; they would have insisted that other parties be invited to tender for the management; they would have challenged the Council's costs of managing 10 goats at £16800 plus VAT; they would have challenged the length of the contract, in that while the management plan had to be long-term, individual contracts for carrying it out did not have to be of any particular duration; they would have challenged the 3-yearly RPI addition; they would have insisted on ongoing periodic evaluations of the management, whether using goats or any other method, both on cost and ecological bases; they would have argued that cliff stability was more important than vegetation mix as an objective for the management plan

m. Flat 120 : he would have asked for full details of the goat grazing trial; he would have requested full information on alternative solutions, including, for example, the services of a gardener, and their impact in environmental and costs terms; he would have wanted to see a full risk assessment of the project; he would have suggested that the work be put out to competitive tender; he would have expected all costs to be audited and challenged on a regular basis; he would have argued that a ten-year contract was far too long, and that there should have been break clauses within one or two years; he would have argued that the link to RPI was most

concerning, and that any such link should have been to CPI, but that ongoing efficiencies should have been found so that there was no need for any increases, and, potentially, that costs should have reduced; he would have argued that condition 8 of the Town Planning Decvision called only for an appropriately funded long-term management plan, and did not require a long-term 10-year non-competitive contract to be placed with the Council to do all the work

n. Flat 127 : the Council would have been challenged for not enforcing their planning permission qualification; the costs would have been challenged; an audit of costs and increases would have been challenged; questions about competitive tendering would have been raised; leaseholders could have worked with the Applicant to examine, question, and bring about an equitable and balanced outcome to resolve the goat grazing issues
o. Flat 137 : leaseholders would have been able to scrutinise the agreement and have a say so as to get the best possible deal
p. Flat 159 : they would have made more informed enquiries about the lizard problem and the correct management required; they would have requested information about alternative solutions to protect all aspects, wildlife, damage to cliff and other environmental issues; they would have requested information about the results of the trial; they would have questioned why the contract had to be fulfilled by the Council as it might have been possible to find more cost-effective solutions
q. Flat 166 : they would have asked for further information about, and challenged, the results of the goat grazing trial, alternative solutions and competitive tendering, the reason why the contract should be as long as 10 years, the automatic linking of the management fee increase to RPI, the putting into place of a mechanism to audit the costs, and why there should be a long-term non-competitive contract with the Council when all that condition 8 of the Town Planning Decision Notice required was an appropriately funded long-term management plan to be submitted and agreed by the Council
r. Flat 167 : he would have asked for information about the trial; he would have researched other successful goat grazing agreements, he would have queried the risks of denudation of the grazing land, and the associated risks of landslip; he would have wished to tender competitively this and any other proposed solutions; he would have insisted on fully audited accounts; he would have reduced the term of the agreement in order to review its performance before so extensive a commitment;

40. Prejudice suffered as a result of the failure to consult

a. Flat 1 : they might receive additional charges, and they would have no input in the decision-making process about the continuation of goat grazing and associated charges
b. Flat 4 : they could have assessed the effectiveness of the project, both in terms of the environment and also the costs, and the various ways the land could be managed; they would suffer loss

because of the additional costs incurred, which would impact on the resale and rental value of their flat

c. Flat 5 : all the matters already referred to had caused prejudice, but the prejudice could not be quantified because the Council had so far not supplied information on the alternative options for the management and maintenance of Honeycombe Chine in accordance with his letter dated 14 April 2014 (pages 214 to 215); the unnecessarily expensive agreement dated 16 May 2011 caused increased service charges, which had a potentially adverse effect on resale values of the flats
d. Flat 19 : all the matters referred to had caused prejudice
e. Flat 29 : all the matters referred to had caused prejudice; the failure to consult had resulted in an unnecessarily expensive goat grazing agreement which resulted in higher service charges which might have an adverse effect on the resale and rental value of their flat
f. Flat 45 : all the matters referred to had caused prejudice, plus the possible adverse effect on the resale value of the apartment owing to higher service charges from an unnecessarily expensive goat grazing agreement
g. Flat 48 : they had lost the opportunity to influence the contract; they had lost the opportunity to assess alternatives before being committed to a non-competitive 10-year inflation-proof solution; the result was a cliff side which looked in worse condition and had the risk of landslip, and destruction of vegetation and harm to existing wildlife; the Council were not accountable for the costs or the effectiveness of the agreement dated 16 May 2011, and there was no audit or analysis of the area covered by the goats or the time they actually grazed, which, in the last 6 months, was not much; the additional burden on the service charge directly impacted on the capital value of their flat; granting dispensation would just perpetuate this prejudice
h. Flat 77 : unnecessarily high, RPI-linked, charges relating to the agreement dated 16 May 2011 might adversely affect the value of their flat; the flora and physical appearance of the Chine had been damaged materially
i. Flat 85 : he had been prejudiced by the failure of the Applicant to operate the break clause in the agreement dated 16 May 2011 and pursue alternative management plans, such as those currently operated by the Council elsewhere along the Bournemouth/ Boscombe, and Southbourne cliffs
j. Flat 86 : the goats had done substantial damage to the vegetation which had resulted in cliff erosion and a deterioration in the view for their flat; a grant of dispensation would result in "100%+ increase" in the contribution for their flat, and, with ongoing proposed RPI increases, would decrease the value of their flat
k. Flat 98 : they would not have agreed to the agreement dated 16 May 2011 in its current form; the resale value of their flat was at risk of reduction from the possible increase in service charges if dispensation were granted and from the damage caused by the goats by erosion, degradation of soil surface, erosion of cliff face into goat paths and human paths, and destruction of much of the

stabilising shrub vegetation; leaseholders had lost the opportunity to make a case for the Council to fund the costs of implementing the maintenance of the site through council tax, as the Council did with all its other 10 miles of cliff face; their share of the management costs would increase every three years, so that their share of the excess over the capped limit of £100 was likely to be £126.74 over the remainder of the agreement dated 16 May 2011; the degradation of the cliffs would continue; leaseholders had lost the opportunity to challenge the use of goats to manage the cliff face as a more destructive and expensive option than just using manpower to manage the vegetation, as goats required a Council employee or agent to visit the goats every day in any event, and management of the site using occasional visits, say 20 or 30 man days a year, to cut down the wrong kind of vegetation would be much less costly

l. Flat 120 : he had had no opportunity to assess the evidence for and against goat grazing; the proposed costs were very expensive in relation to the activity, and he had had no chance to examine the cost effectiveness of goat grazing compared with alternatives; there had been no opportunity to express an opinion how the land should best be managed; he had had no opportunity to discuss how the costs should be monitored and challenged; he had been unable to challenge the non-flexibility of a 10-year contract; he had been unable to challenge the non-competitive nature of the contract; he had been unable to challenge the lack of audit provision; he had been unable to challenge the fact that the Applicant had no incentive to challenge and reduce costs; he had been placed in a position where service charges had increased, which would adversely affect the resale value of his flat owing to the unnecessarily high service charges

m. Flat 127 : service charges at the Property were close to, if not, the highest in the area, and if dispensation were granted the annual charges would rise still further, which would do little to help those residents who wished to sell their flats and move elsewhere

n. Flat 137 : the agreement was a long-term one, and would have financial implications for leaseholders for a long time

o. Flat 159 : if they had been consulted about the agreement dated 16 May 2011 they would have rejected it; actions taken might have affected the flat's resale and rental value; there was a potential increase in annual service charges

p. Flat 166 : they had had no opportunity to evaluate the appropriateness, suitability or cost-effectiveness of the goat grazing arrangement; they had had no opportunity to express their own opinion how the land should be managed; they had had no opportunity to comment on the agreement and the unsatisfactory elements of it, such as the non-flexible 10-year term, the non-competitive contract with the Council, the lack of any audit provision, and the minimum RPI index linking; future buyers on resale might be concerned about the arrangements and the costs of the agreement dated 16 May 2011 in addition to the already expensive maintenance charge

q. Flat 167 : he was having to pay for additional costs resulting from the agreement being flawed, in that it was non-competitive, long-term, unaudited, and linked to RPI; he had suffered time and effort in challenging this application; if legal issues were outstanding and/or his service charge increased there would be an effect on the resale value of his flat

The Applicant's response 28 May 2014

41. The Applicant stated that in accordance with the guidance in **Daejan** the Tribunal should focus on the extent, if any, to which the tenants were prejudiced in respect of either paying for inappropriate works or paying more than appropriate by the failure of the landlord to consult. The only disadvantage of which they could legitimately complain was one which they would not have suffered if the requirements had been fully complied with, but which they would suffer if an unconditional dispensation were granted. The starting point was that dispensation should be granted. The burden of identifying some relevant prejudice which they might suffer, or might have suffered, was on the tenants. If they would suffer relevant prejudice, then the Tribunal should still grant dispensation but should require the landlord to reduce the amount claimed as service charge to compensate the tenants fully for that prejudice

42. The Respondents' statements had purported to identify prejudice which they would suffer. However, of the matters referred to, only the cost of the agreement dated 16 May 2011 was capable of amounting to relevant prejudice. For example, the loss of the right to express an opinion was not relevant financial prejudice. In other cases, a tribunal might find that relevant prejudice was shown by evidence that works could have been done more cheaply. However, in this case, the landlord was required to enter into a viable management plan. The landlord might not have been able to implement a cheaper management scheme, even if one existed, because the ultimate decision rested with the Council, not the landlord. Therefore it was for the leaseholders to adduce evidence that a cheaper viable alternative management scheme existed in 2011, and that it was more likely than not that the Council would have accepted that cheaper alternative plan

43. The leaseholders had contended that if they had been consulted they would have :
    a. sought information on the costs effectiveness of goat grazing
    b. explored alternative options for the management of the cliffs
    c. suggested that the work carried out under the agreement dated 16 May 2011 be put out to competitive tender
    d. requested that the agreement should require all expenditure and income to be audited
    e. suggested a lesser term
    f. challenged the management fee
    g. opposed an RPI-linked increase

44. The leaseholders then suggested that if they had been able to make those representations, the cost of the agreement dated 16 May 2011, or an alternative scheme, would have been less

45. It was denied that if any of those representations had been made the Council would have agreed to vary any of the terms of the agreement dated 16 May 2011 or that the Council would have agreed an alternative "appropriately funded long-term management plan"

46. The leaseholders had adduced no evidence that goat grazing was not cost effective, no evidence that any cheaper viable alternative management plan existed in 2011; no evidence that any such plan, if it existed, would have been more cost effective than goat grazing; no evidence that any organisation other than the Council was able to carry out the work performed under the agreement dated 16 May 2011 and/or was willing to contract on terms more advantageous to BDW/the leaseholders; no evidence that the Council was willing to agree a management fee based on audited annual expenditure of the scheme; no evidence that the Council would have accepted an agreement with a shorter term; and no evidence that the Council would have agreed not to increase the management fee in line with RPI

47. The leaseholders could have instructed an expert ecological management consultant to give evidence of viable alternative management plans, and their cost, but had failed to do so, and, as such, had not discharged their evidential burden

48. The Council concluded that the 2008 trial had been successful after considering a report commissioned by the Council and a discussion with Natural England in 2011. Attached to Mr and Mrs Ford's statement (Flat 45) was a report on goat grazing prepared for the Council by Jonathan Crewe [sic] dated 24 February 2013 (pages 232 to 250) which suggested that goat grazing was achieving the desired objectives. Therefore it was more likely than not that the Council would not have agreed to any other management plan in 2011 and was not likely to agree any alternative plan if the Applicant exercised the break clause and terminated the agreement dated 16 May 2011

49. No evidence had been adduced of any costs incurred by any of the leaseholders in opposing the application, and it did not appear that any of them were legally represented

50. The Applicant did not intend to seek to recover its costs incurred in this application from leaseholders through the service charge, and therefore did not oppose a order pursuant to section 20C of the 1985 Act. Alternatively, as the leaseholders had not suffered relevant prejudice, the Applicant would not oppose dispensation on terms that it should not recover its legal costs of this application through the service charge

51. The Applicant was not opposed in principle to the suggestion that it should serve a notice terminating the agreement dated 16 May 2011

and consult the leaseholders on any proposed alternative qualifying long term agreement. However, it was reluctant to do so without first having an indication of viable alternative management plans for the cliffs, and their cost. Any alternative management scheme would have to be agreed by the Council. The recent report at pages 232 to 250 suggested that goat grazing was achieving the Council's objectives. It was therefore more likely than not that the Council would not agree to an alternative management scheme. There was also the risk that the cost of alternative management plans would be greater than the cost of goat grazing, and that that additional cost would be payable by the leaseholders. The Applicant had already written to the Council to explore alternative options, but had not received a substantive response

52. It had been suggested that a condition of dispensation should be that the Applicant should pay all costs associated with terminating the agreement and renegotiating a new agreement following consultation. However, if the agreement dated 16 May 2011 were terminated there would be no agreement and therefore no need for dispensation

53. Similarly, a term that the Applicant should continue to bear the costs in excess of the statutory cap until a new agreement was in place would not be a term of dispensation, but would be the effect of refusing dispensation

54. The fact that the Applicant or its predecessor in title failed to consult or apply for dispensation could not itself be a reason for refusing dispensation. The failure by the Applicant's predecessor was the reason for applying for dispensation. It was impossible for the Applicant to consult leaseholders because the agreement dated 16 May 2011 had already been entered into when it purchased the headlease

55. Similarly, the fact that the Applicant knew at the time it purchased the headlease that BDW had failed to consult was not a reason for refusing dispensation. The issue the Tribunal should focus on when entertaining a section 20ZA application was the extent, if any, to which the tenants would be prejudiced in respect of paying for inappropriate works or paying more than would be appropriate by the failure of the landlord to comply with the requirements : **Daejan**

56. For the same reason, the purchase price paid by the Applicant to BDW for the headlease and/or whether the Applicant negotiated any "compensation" was not relevant to the issue of dispensation. In any event, for the avoidance of doubt, the Applicant did not negotiate any "compensation" or discount" on the basis that BDW had failed to consult on the agreement dated 16 May 2011

57. The question whether the standard of work carried out under the agreement dated 16 May 2011 was satisfactory was not relevant to dispensation, although it might be relevant in an application to determine reasonableness under section 19 of the 1985 Act

58. The environmental impact of the goat grazing on the cliffs was not relevant to the issue of dispensation

59. The suggestion that any increased service charge would have a detrimental impact on the capital value of the flats was not relevant prejudice, as it was not a disadvantage in respect of paying for inappropriate works or paying more than would be appropriate by the failure of the landlord to comply with the requirements. In any event there was no evidence that a relatively modest increase in service charge liability would have any impact on capital values

60. Some leaseholders had suggested that they were not aware of the agreement dated 16 May 2011 and/or the management fee at the time they purchased their flats. It appeared that that was because most of the leaseholders had purchased their flats in 2010, before the agreement dated 16 May 2011. Some leaseholders had admitted that their solicitors had been aware of the 2008 trial agreement. It was therefore likely that the existence of the trial agreement was disclosed to all prospective leaseholders with the pre-contract enquiries. In any event, the fact that leaseholders did not know about the service charge payable under the agreement dated 16 May 2011 when they purchased their flats was not a reason to refuse dispensation

61. It was accepted that the remaining term of the agreement dated 16 May 2011 was about 7 years, and therefore the Applicant's loss would be about £25900 over that period, not £542000 over the remaining term of the headlease

Further Respondent's statement from Mr Lowry of Flat 5 dated 26 June 2014

62. Mr Lowry stated that he had now received a reply from the Council by e-mail dated 23 June 2014 to his letter dated 14 April 2014 (pages 214 and 215)

63. There were two goat enclosures at Honeycombe Beach, namely one on the Property, and the other on land wholly owned by the Council. The breakdown of costs for 2013/2014 given in the attachment to the Council's e-mail appeared to cover the total costs for the management and maintenance of both areas. The agreement dated 16 May 2011 covered the land edged green on the plan attached to the agreement. That was just the land to the north of Honeycombe Beach. The agreement dated 16 May 2011 made no reference to any liability for the costs of managing and maintaining the Council's land to the east edged blue on the plan attached to the agreement

64. The leaseholders at the Property could not be expected to pay for the costs of managing and maintaining the Council's land to the east. Mr Lowry had no way of assessing accurately the exact sizes of the two enclosures. From the plan the two appeared to be of similar size, although the Council's land to the east was probably larger. The

Applicant should be paying only approximately half the costs, with the Council paying the remainder from council tax revenue

65. He wrote to the Council for clarification by e-mail dated 23 June 2014. The Council replied by e-mail dated 25 June 2014, and accepted that the agreement dated 16 May 2011 applied only to the land edged green, but refused to comment on his suggestion that the leaseholders at the Property should be responsible for only a portion of the costs. If the Council were to accept that the management and maintenance costs for goat grazing should be shared between the Council and the leaseholders at the Property according to the sizes of the goat enclosures and agreed to an amendment of the agreement dated 16 May 2011, the Applicant's liability for the failure to consult would be substantially removed or even removed, because the lower amount recovered from leaseholders would greatly reduce the number of leaseholders being asked to pay over £100 a year. The application for dispensation from consultation could become irrelevant

66. The Council had confirmed in their e-mail dated 23 June 2014 that the costs of management and maintenance of all other cliff areas was borne by the Council and paid for through council tax. There were no other cliff areas where owners or leaseholders were billed directly. The Council paid for all costs on the areas leased from the Meyrick Estate

67. The costs details in the breakdown attached to the Council's e-mail gave evidence of the high cost of placing a non-competitive contract with the Council under the agreement dated 16 May 2011

68. The Council had confirmed in their e-mail dated 23 June 2014 that there was no evidence of any attempt by the Applicant or BDW to terminate the agreement dated 16 May 2011

69. He had already highlighted the lack of any provision for audit in the agreement dated 16 May 2011. An audit would have revealed that costs were being included which did not apply to land covered by the agreement

70. There were charges in the breakdown of costs provided which he would challenge if the agreement dated 16 May 2011 provided a mechanism. The agreement dated 16 May 2011 needed to be terminated and a new agreement negotiated, or the existing agreement needed to be amended

The decision in Daejan

71. In the Supreme Court decision in **Daejan Investments Limited v Benson** [2013] UKSC 14, the landlord wished to carry out major works. There were 5 long leaseholders, who were all liable to contribute to the cost of the works through the service charge. The landlord sent a specification to the leaseholders. Following comments from the leaseholders, and the appointment of a contract administrator nominated by the leaseholders, the landlord issued a stage 1 notice of

intention to carry out the works, and a few weeks later, sent a revised specification. The leaseholders commented on it, and some of their observations were incorporated. The landlord received 4 tenders, of which 2 appeared to be the most competitive, namely one from a company called Rosewood for £453980 for a 24-week contract period, and the other from a company called Mitre for £421000 for a 32-week contract period. The leaseholders were provided with a copy of the priced specification submitted by Mitre, but not that submitted by Rosewood. The contract administrator indicated a preference for instructing Mitre. The leaseholders made a number of detailed points about the proposed works, which were provisional pending sight of all the priced tenders. The landlord served stage 3 notices on the leaseholders, stating when the priced estimates could be inspected, but, before the estimates were inspected, informed the leaseholders that the proposed works had been awarded to Mitre. Despite this, there were some further communications between the leaseholders and the contract administrator about the proposed works. Some weeks later, the landlord contracted for the proposed works with Mitre, and so informed the leaseholders some 2 weeks after that. Mitre completed the works, but late, and subject to criticisms from the leaseholders

72. Four of the five leaseholders applied to the LVT, challenging the works, and challenging whether the landlord had complied with the section 20 consultation procedure. In relation to the latter, the LVT found that the landlord had failed to comply with the stage 3 requirements in 2 respects, namely that the stage 3 notices did not contain a summary of observations, and that the estimates were not available for inspection as stated in the notices, and were inspected only later

73. The landlord applied for dispensation from the section 20 consultation requirements, and, in the event that the LVT were to find that the leaseholders had been prejudiced by the non-compliance with the section 20 consultation procedure, proposed that the sum of £50000 should be deducted from the cost of the works when calculating the service charge as a fair figure to compensate them for any prejudice

74. However, the LVT found that the failure to comply with the requirements had caused the leaseholders substantial prejudice, and refused the application to dispense with the section 20 consultation requirements

75. Both the Upper Tribunal and the Court of Appeal dismissed the landlord's appeals

76. In the Supreme Court, Lord Neuberger, delivering the majority judgment, defined the provisions of part 2 of Schedule 4 to the 2003 Regulations as "the Requirements", and held that :

- *.....the obligation to consult 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..... (paragraph 43)

- *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* (paragraph 44)
- *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 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* (paragraph 45)
- *.....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 to them* (paragraph 46)
- *furthermore, it does not seem to be 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 LVT.....has power to grant 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)
- *.....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 is only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the Requirements on terms which required the landlord, for instance, (i) to convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) 5 days instead of 30 days for the tenants to reply* (paragraph 56)
- *further, consider a case where a landlord carried out works costing, say, £1 million, and failed to comply with the Requirements to a small extent (e.g. in accidentally not having regard to an observation), and the tenants establish that the works might well have cost, at the most, £25,000 more as a result of 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 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)..... (paragraph 57)

- *I also consider that the LVT would have power to impose a condition as to costs - e.g. that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1)* (paragraph 59)
- *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 contended 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.)* (Paragraph 65)
- *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' argument 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 been carried out would have been carried out a different way), if the tenants had been given a proper opportunity to make their points..... 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* (paragraph 67)
- *the LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenant, 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 the 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 cost 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 (paragraph 68)

- *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 had been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works 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* (paragraph 69)
- *[turning now to this case].....on the basis of the evidence before the LVT, it seems to me.....that it is highly questionable whether any [relevant] prejudice at all would have been suffered. The only "specific prejudice" identified by the Upper Tribunal was in relation to what the LVT called..... "a matter of speculation", namely that the respondents lost the opportunity of making out the case for using Rosewood to carry out the works, rather than Mitre* (paragraph 77)

77. The Supreme Court's decision, by a majority of 3:2, was that :

- the leaseholders had not identified to the LVT any relevant prejudice which they had suffered, or might have suffered, as a result of the landlord's failure to comply with the Requirements
- prejudice had to be measured at the date of the breach of the Requirements
- the leaseholders had then been given a substantial opportunity to comment on the proposed works and had taken full advantage of that opportunity and it was hard to see what further submissions or suggestions the leaseholders could have presented if the landlord had complied fully with the Requirements
- there had been no evidence to support the contention that the

tenants had suffered relevant prejudice worth as much as £50,000 as a result of the landlord's failure to comply with the Requirements

- although there was an undoubted, albeit partial, failure by the landlord to comply with stage 3 of the Requirements, the relevant prejudice to the leaseholders of granting the dispensation could not be higher than the £50,000 discount offered by the landlord; the fact that the £50,000 could fairly be said to have been plucked out of the air was irrelevant: the essential point was that it exceeded any possible relevant prejudice which, on the evidence and arguments put before it, the LVT could have concluded that the leaseholders would suffer if an unqualified dispensation were granted
- the LVT should therefore have decided that the landlord's application for dispensation should be granted on terms that (i) the leaseholders' aggregate liability to pay for the works be reduced by £50,000 and (ii) the landlord pay the reasonable costs of the leaseholders insofar as they reasonably tested its claim for dispensation and reasonably canvassed any relevant prejudice which they might suffer
- the Supreme Court accordingly allowed the appeal and granted dispensation under section 20(1)(b) on the terms indicated

Inspection

78. The Tribunal inspected the Property on 22 July 2014. Also present were Mr Upton, Mr Peter Hosking of Stevensons solicitors, Mr Lowry, and Mr Bray. To the west of the western boundary fence was thick vegetation, whilst on the Property side of that fence the vegetation was sparse, with bare sandy patches and signs of erosion. Mr and Mrs Allen joined the inspection and showed the Tribunal the view from their balcony (Flat 85). The Tribunal noted the fenced area shown in the photographs at page 230. To the eastern side the Tribunal noted a fence with a gate, which the parties said was the boundary between the green land and the blue land shown on the plan to the agreement dated 16 May 2011. The Tribunal noted the length of the blue land from the promenade, and various areas of erosion among the trees. No goats were in sight at any time during the inspection

The hearing on 22 July 2014

79. Present at the hearing were Mr Upton, Mr Hosking, Dr and Mrs Wolstenholme, Mr Lowry, Mr and Mrs Ford, Mr Bray, Mr and Mrs Allen, Mr and Mrs Street, Mr and Mrs Davidson and Mr and Mrs Langford, Mr and Mrs Mallett, Mr Haigh and Mr Hopkinson

80. The Tribunal indicated that the procedure it proposed to adopt at the hearing was to hear opening submissions from Mr Upton on behalf of the Applicant, then to hear submissions from any leaseholders who wished to present their case orally, in addition to their written

submissions, and then, finally, to hear closing submissions from Mr Upton. All parties indicated that they were happy with this procedure

Mr Upton's opening submissions

81. Mr Upton made submissions to highlight the matters referred to in the Applicant's statement of case and response. He produced a few copies of Daejan for the leaseholders present to share. He submitted a coloured copy to replace the black and white copy of the plan at page 148, and a coloured copy of the Land Registry plan referred to at page 14. The Tribunal has inserted that plan in the bundle as page 32a. In answer to questions from the Tribunal, Mr Upton accepted that the various plans in the bundle showed different locations and angles for the eastern boundary of the land edged blue, and different angles for the eastern and western boundaries of the land edged green, but said that the differences were slight and were not material to the current application for dispensation. Mr Upton said that none of the leaseholders had challenged the Applicant's assertion (at pages 136 to 137) that the management fee under the agreement dated 16 May 2011 was payable by the leaseholders under the service charge provisions in the leases

The Respondents' submissions

82. Mr Lowry highlighted the points raised in his written submissions, and said that the proper starting point was that consultation should take place. In **Daejan** consultation had not been possible because the works had already been done, and the money spent. However, in this case, the break clause meant that the agreement dated 16 May 2011 could be terminated and consultation could indeed take place. The Tribunal should be focusing on making consultation possible, not focusing on whether the leaseholders could prove prejudice. The Applicant should have been terminating the agreement and renegotiating with the Council following consultation with the leaseholders, not seeking dispensation from consultation. There was an arbitration agreement at clause 14 of the agreement dated 16 May 2011, but there was no evidence that the Applicant had tried to use it, or had sought a settled outcome with the Council. Instead, the Applicant had been intent on making this application for dispensation, and had done so without even giving prior warning to the leaseholders, despite the Applicant having admitted in earlier correspondence that the Applicant should consider other options for the management of the land (pages 207 and 208). Mr Lowry challenged the Applicant's assertion (at page 302) that relevant prejudice meant financial prejudice. Other prejudice was relevant, such as the denial (by failing to consult) of the opportunity for leaseholders to bring up during consultation the evidence of the goats causing erosion, and causing the risk of a large landslip. It was relevant prejudice that the leaseholders had not been given details of reports or risk assessments to enable them to explore other available options and to put forward their views. Leaseholders had been hampered in putting

forward evidence on costings, because of lack of data from the Council. Leaseholders were being prejudiced by being charged for the grazing of the blue land, not just the green land, as shown by the documents submitted with his statement dated 26 June 2014. The Jonathan Crewe report dated 24 February 2013 was not as positive as the Applicant was seeking to suggest, as the second paragraph on page 246 set out the potential disadvantages of using goats. The Applicant had suggested that the leaseholders had failed to obtain evidence of prejudice from an ecological expert, but the cost of instructing lawyers and experts would have been disproportionate to the amounts at stake. The 2008 trial had taken place on the Council's blue land, not the green land. The Tribunal should reject the dispensation application, send a message that consultation should take place, and order that the agreement dated 16 May 2011 should be terminated and that the costs of renegotiating should be paid by BDW, not the leaseholders

83. When the Tribunal put it to Mr Lowry that the ruling in **Daejan** was that the only prejudice which the Tribunal could take into account in this case was prejudice caused by the failure to consult, not prejudice caused by the implementation of the agreement dated 16 May 2011, as such, Mr Lowry said that condition 8 of the Town Planning Decision Notice required a management plan to be put in place, not a 10-year non-competitive agreement with the Council doing all the work and with the Council claiming from the leaseholders the cost of maintaining the goats not only on the green land but also on the blue land. In **Daejan**, consultation had no longer been possible, whereas here it was possible

84. Mr Ford said that **Daejan** had identified inappropriate works as one of the matters against which consultation was designed to protect tenants. Here, the work under the agreement dated 16 May 2011 was indeed inappropriate, in that the goats had eroded the green land, and the Council had had to erect fencing to prevent landslip

85. When the Tribunal put it to Mr Ford that Daejan required the leaseholders to show that they had been prejudiced by failure to consult, whereas the Council in 2011 would have insisted on the agreement dated 16 May 2011 in light of the reports apparently received following the 2008 trial, Mr Ford said that the Council would have taken account of the views of 168 council tax payers if the leaseholders had been consulted

86. Mr Bray said that this case was very different from **Daejan**, in that in **Daejan** some consultation had taken place, whereas in this case no consultation had taken place at all. The purpose of the consultation requirement was to enable proper scrutiny of the landlord's proposals. BDW, on the other hand, would have agreed anything to obtain planning permission for their development. Although it was said that the burden of proof was on the leaseholders to show prejudice, the Applicant had not been able to obtain a full response to its letter to the Council (pages 173 and 174) and the Council would have been even less

willing to engage with individual leaseholders to enable them to come up with alternative plans. He was aware that rates at which the Council charged for staff were £19 to £25 an hour, whereas the gardeners at the Property, who had been trained at Compton Acres, charged only £10 an hour. One gardener could satisfactorily manage the vegetation on the land edged green, without causing any erosion, without any unsightly stockades, and without any risk of landslips, by spending one day a week, which, even at £15 an hour for every week of the year, would still only cost some £5000 a year. If the Tribunal granted dispensation, there would be no incentive for the Applicant to seek to change the status quo. If the Tribunal refused to grant dispensation, on the other hand, the Applicant would have the incentive to serve a termination notice and renegotiate with the Council following consultation with leaseholders. The Jonathan Crewe report (pages 231 to 250) did not contain a cost-benefit analysis, and gave an insufficient assessment of the risk of landslip. There was a pressing need to avoid other areas succumbing to the same risk. The leaseholders had suffered prejudice from the lack of consultation in that the lack of scrutiny had resulted in leaseholders paying for the maintenance of the blue land, not just the green land. The presence of stockades to prevent landslips would put off a buyer of a flat, as would higher service charges, and would affect the value. The Tribunal should refuse to grant dispensation, and direct the Applicant to serve notice terminating the agreement dated 16 May 2011, to engage in renegotiating with the Council and to consult leaseholders. Employing a gardener, rather than continuing to use goats, would be a better result for everyone

87. When asked by the Tribunal how the leaseholders had been prejudiced by the failure to consult, Mr Bray said that there was no evidence that BDW had come up with any alternative plan, so it was pure speculation to suggest that the Council would have insisted on the agreement dated 16 May 2011 even if the leaseholders had been consulted. The statutory consultation requirements provided for at least 2 quotations, one of which had to be independent, whereas here it was a Council plan to be implemented by the Council. **Daejan** required the leaseholders to be put into the position they would have been in if consultation had taken place, which would require the Council to engage with leaseholders, and implement the Council's own tendering process, which also required more than one quotation, whereas the Council had avoided consultation and tendering by going through BDW. When the Tribunal put it to Mr Bray that the consultation process which should have taken place would have been between BDW (as landlord) and the leaseholders, and that the Council would not have been engaged in the consultation process as such, Mr Bray said that the Council would have had to follow the consultation and be engaged with it because of the Town and Country Planning Act requirements

88. Mr Haigh disputed the Applicant's suggestion (at page 308) that it was likely that the existence of the 2008 trial agreement had been disclosed to all leaseholders in pre-contract enquiries. He had been through all his purchase documentation, and, although condition 8 of the Town

Planning Decision Notice was mentioned, there was not one word about goat grazing, or about leaseholders being responsible for fees in that respect. Condition 8 started with the words "Prior to the commencement of the development", which had not been complied with, but which did not require BDW to enter into a non-competitive 10-year agreement with the Council at leaseholders' expense. Mr Haigh had suffered financial prejudice from the failure to consult because there had been no mention of the goat grazing agreement when he purchased. BDW, on the other hand, could have absorbed the whole cost of the goat grazing. This application was the wrong vehicle for settling this matter. **Daejan** was different. There was no Council involved as a third party

89. Mr Davidson said that the first he had known that there was a goat grazing agreement was when he received a bill for service charges in that respect. He had seen a reference to a management plan, but no mention of additional cost. This had caused him prejudice, as he might not have gone ahead with his purchase if he had known about the extra costs involved because the service charge was quite high already. He had received no evidence of the results of the 2008 trial. Neither the Council nor the managing agents had been willing to help him to obtain the information he had asked for. It was difficult to formulate alternative plans without knowing what the existing plans were, so as to be able to compare them, and their cost-effectiveness. **Daejan** involved different circumstances. Here, the leaseholders had suffered not only financial prejudice but also other prejudice. The Applicant had said that there was no evidence that an alternative plan would have been more effective. However, there was no evidence that an alternative plan would not have been more effective

90. Mr Street said that the requirement for the leaseholders to show prejudice was akin to saying that they were guilty until proved innocent. Leaseholders could not show prejudice when the Council had not provided the information they needed. All that was needed was for the Applicant to serve a notice terminating the agreement and to renegotiate, following consultation. Condition 8 of the Town Planning Decision notice required a plan before the development started, whereas the agreement dated 16 May 2011 was some 4 years after the development started. The Applicant had provided no evidence in support of its suggestion that the Council would have refused to agree any other plan. There was no mention of the agreement dated 16 May 2011 in their deeds when they bought their flat

91. Mr Ford said that the upwards only RPI-linked increase in management fees was extraordinary. When asked by the Tribunal how this showed prejudice as the result of failure to consult, Mr Ford said that he would have objected if consulted. When asked what he was saying the result of that objection would have been, he said that they (the Council) would have agreed to revise the clause in accordance with standard industry wording

92. Mr Allen said that consultation would have enabled leaseholders to insist on competitive quotations and an analysis of the alternative methods of achieving the objective. The Applicant was hiding behind **Daejan** and condition 8 of the Town Planning Decision Notice instead of renegotiating with the Council

93. Dr Wolstenholme said that he was a retired civil engineer and was worried about the goats causing a risk of landslip. In any event, there was a question whether the management fees under the agreement dated 16 May 2011 could be included in the service charges under the leases at all. The definition of reserved property on page 75 did not mention the land edged green, and it could not be regarded as part of the gardens or pleasure grounds because it was fenced off and the leaseholders had no access to it

94. After hearing further submissions in this respect from Mr Upton, who said that he had been taken by surprise by this submission, as it had not been included in written submissions, Mr Mallett, Mrs Langford, Mr Davidson, Mr Lowry and Mr Street, the Tribunal adjourned the case until the following morning to enable Mr Upton to prepare his response, and to present any relevant authorities. The Tribunal indicated that the procedure which it proposed to adopt at the hearing the following day was to ask Mr Upton to distribute to the Tribunal and the leaseholders any authorities about the point raised by Dr Wolstenholme, to hear Mr Upton's submissions in that respect, to adjourn for a reasonable period, say 30 minutes, to enable the leaseholders to prepare their response, and then to hear Mr Upton's closing submissions. The parties indicated that they were happy with this procedure

The hearing on 23 July 2014

95. The same parties were present

96. The Tribunal repeated its indication about the procedure which it proposed to adopt for this second day of the hearing. Again, all parties indicated that they were happy with this procedure

97. The Tribunal invited Mr Upton to include in his closing submissions a comment on whether if the Tribunal were minded to grant dispensation, whether an appropriate term would be for there to be consultation on the continuance of the agreement dated 16 May 2011

The question of whether the leases allow the management fees under the agreement dated 16 May 2011 to be included in the service charge

98. Mr Upton's distributed copies of the following :
    a. the Court of Appeal decision in **Methuen-Campbell v Walters** [1978] 1QB 525
    b. the House of Lords decision in **Investors Compensation**

Scheme Limited v West Bromwich Building Society and others [1998] WLR 896

c. pages 57 to 59 of Hague on Leasehold Enfranchisement Fifth Edition (2009)

99. Mr Upton said that the purpose of interpretation was to ascertain what the parties intended, having regard to admissible background facts

100. There could be included in the service charge the landlord's costs of maintaining the "reserved property". The reserved property was defined in clause 1.36 (page 64) as "that part of the Development not included in the Apartments being the property more particularly described in Part II of the First Schedule hereto"

101. The "Development" was defined in clause 1.9 (page 61) as "the property described in Part III of the First Schedule hereto", and, in Part III of the First Schedule (page 75) as "ALL THAT leasehold plot of land situate at "Honeycombe Beach", Honeycombe Chine, Boscombe, Bournemouth, Dorset more particularly delineated and described on Plan A and thereon edged red"

102. Plan A (at page 110) showed the red edging as including the green land

103. Part II of the First Schedule (at pages 74 and 75) provided that "the reserved property shall comprise (but not exclusively)
1 The gardens pleasure grounds.....forming part of the Development
2 [common parts]
3 [main structure]
4 the Facilities"

104. The first question was whether the green land was included in the term "gardens", in paragraph 1 of Part II of the First Schedule (it being conceded that it was not included in the term "pleasure grounds")

105. In **Methuen-Campbell**, at paragraph C on page 538 of the case report, Goff LJ (as he then was) said

> *So far as the garden is concerned [counsel for the tenant] says that you can have a formal cultivated garden and a wild garden, and no doubt it is true that some people do have such a corner, or part, in their pleasure garden. But when you have, as here, a cultivated garden and a piece of rough pasture land separated from one another, and apparently marked as separate on the lease plan, I do not think it is possible to regard that rough pasture (the paddock) as being garden*

106. The Tribunal invited the leaseholders to comment on the question whether there were any gardens at the Property. Mr Bray said there were raised flower beds around the various ground floor flats, common gardens by the drive inside the main gate, and a formal Japanese garden between blocks 7 and 8 (shown on the plan at page

32a) and the fence forming the southern boundary of the green land (also shown on that plan). All of those gardens were accessible by all leaseholders, whereas the green land was fenced off and inaccessible to leaseholders. Mr Haigh pointed out the location of the raised flower beds on the plan at page 109, and, in answer to a question from Mr Upton, said that there was a paved walkway giving access to them. Mr Hopkinson said that part of the service charge was for a gardener to look after the garden areas mentioned. Mr Lowry said that he had helped to draft the gardening contract, and the gardener's duties did not include any part of the green land. He said that there was a seat in the middle of the courtyard for leaseholders to enjoy the garden beds. In answer to a question from the Tribunal, none of the leaseholders present could remember the date when the fence along the southern boundary had been erected. Mr Haigh said that he had bought in 2008, and he thought that there had been a contractor's hoarding all along where the fence now was. Mr Hopkinson said that he had bought in 2009, and the had been a fence along the southern boundary of the green land then, although he could not remember whether or not it was the same fence. Mr Ford said that he remembered the whole area being a municipal car park before the development was built, and he remembered a fence then

107. Mr Upton said that he was nevertheless not conceding the question whether the green land was included in the term "garden"

108. However, and in any event, the words "but not exclusively" in the description in Part II of the First Schedule of what was included in the reserved property had to be read in the context of :

a. the general principle that words should where possible be construed to mean something, whereas if the list in Part II of the First Schedule were an exclusive list, the words "but not exclusively" would be otiose
b. the fact that the parking areas and the basement storage areas were clearly part of the reserved property as leaseholders had rights in each respect under the Second Schedule paragraphs 9 (page 78) and 16 (page 79), but neither was mentioned in the list at in Pat II of the First Schedule
c. the fact that paragraph 8 of the Third Schedule (page 82) enabled the landlord to modify the layout of the reserved property supported the submission that the list in Part II of the First Schedule was not an exclusive list
d. the fact that clause 1.36 (page 64) provided that the reserved property was everything included in the red edging on the plan at page 110 which was not included in the apartments; the green land was within the red edging and was not included in the apartments, and was therefore clearly part of the reserved property

109. The Tribunal then adjourned the hearing for some 30 minutes, following which the leaseholders indicated that they had sufficient time to consider Mr Upton's submissions and authorities, and were ready to respond

110. Dr Wolstenholme said that the green land was no more part of the "garden" referred to in paragraph 1 of Part II of the First Schedule than the paddock had been part of the garden in the Methuen-Campbell case. The green land was fenced off, it did not form part of the reserved property, and the developer did not have the right to modify it because of the agreement dated 16 May 2011. In answer to a question from the Tribunal, Dr Wolstenholme accepted that many of the leases had been granted before the agreement dated 16 May 2011, but said that there had been the trial agreement in 2008. However, in answer to a further question from the Tribunal, Dr Wolstnholme accepted that the 2008 trial agreement had been in relation to the blue land, not the green land

111. Mr Ford said that the green land was marked as "SNCI" (site of nature conservation interest) on the plan at page 110, which meant that it was not part of the development. In relation to Mr Upton's suggestion that the developer must have intended the green land to be part of the reserved property so as to be able to pass on maintenance costs to leaseholders through the service charge, Mr Ford said, on the contrary, that BDW could equally well have intended to absorb the costs itself, as evidenced by the fact that it made no demands under either the 2008 trial agreement or the agreement dated 16 May 2011 until 2013

112. Mr Bray said that either BDW did not intend to pass on the costs to leaseholders, or the Applicant should have sorted out any liability with BDW when purchasing from BDW

113. Mr Lowry (who also referred to condition 4 of the Town Planning Decision Notice), Mr Street, Mr Mallett, Mr Davidson and Mr Haigh all added comments to similar effect

Closing submissions

114. Mr Upton's submissions were that :

a. in ascertaining the parties' intentions so as to interpret the lease, the Tribunal could consider only the facts at the date the lease was entered into; any later facts, such as whether BDW had sought to pass on costs to leaseholders, could not be taken into account in the interpretation exercise
b. in answer to questions from the Tribunal, Mr Upton accepted that the Land Registry entries at pages 19 to 32 indicated that leases had been granted over a 4-year period from 8 July 2008 to 2 July 2012, that the factual situation had changed in the meantime (for example, the agreement dated 16 May 2011 had been entered into), and that theoretically the interpretation of the lease at the date of grant could therefore produce a different result for different leases; however, it was unlikely to produce such a result in practice
c. contrary to the submissions by the leaseholders, the purpose of the Tribunal's dispensing power under section 20ZA was not to achieve consultation, but to allow a landlord to recover through the service

charge its full costs, perhaps subject to conditions, where full consultation, or no consultation, had taken place

d. the fact that there was a break clause in the agreement dated 16 May 2011, the question whether the Applicant had attempted to negotiate with the Council (whether through the arbitration clause 14 or otherwise), or had attempted to recover money from BDW, or had attempted to settle with leaseholders, were all irrelevant to this application to dispense with the consultation requirements
e. the Tribunal should focus not on whether the agreement dated 16 May 2011 should continue, but on whether the leaseholders had suffered relevant prejudice by the failure to consult
f. the Applicant's conduct was not relevant to that exercise, save to the extent that it had caused relevant prejudice
g. this was in contrast to the position before **Daejan** when a landlord's failure to consult might itself have amounted to prejudice
h. the leaseholders had suggested that they had been prejudiced by not having been given the opportunity to see any assessments or reports on the viability of goat grazing; however, **Daejan** had made it clear that that was not relevant prejudice, in that consultation was a means to an end, not an end in itself
i. in relation to the question whether the leaseholders were being asked to pay for management of the blue land as well as for the management of the green land :
    - this was relevant to the dispensation application only to the extent that the leaseholders were asserting that they would have made a representation to that effect if they had been consulted before the agreement dated 16 May 2011 was entered into and that the Council would then have reduced the fee payable for the green land : the difference was capable of amounting to relevant prejudice for the purposes of the consultation dispensation application
    - however, the agreement dated 16 May 2011 created an obligation only to pay for fees for managing the green land, and, contrary to the submissions by the leaseholders, it was not clear from the Council's e-mail dated 23 June 2014 that the Council's fees were in fact for managing both the green land and the blue land
    - in any event, even if it had been the Council's intention in 2011 in practice to include in the fees for the green land some fees for the blue land, there was no evidence that the Council would in 2011 have agreed to reduce the fees payable under the agreement dated 16 May 2011 at all, let alone by half as contended for by the leaseholders
    - if the leaseholders wished to pursue the point, their remedy was to make an application under section 27A of the 1985 Act and claim that the fees were unreasonably incurred for the purposes of section 19 of that Act
    - however, it was common for local authorities to cross-subsidise projects by conditions in planning permissions or

conditions in section 106 agreements (such as imposing an obligation on a developer to pay for social housing in a separate area)

j. it was accepted that condition 8 of the Town Planning Decision Notice did not require BDW to contract with the Council

k. the leaseholders had said that BDW should have put the goat grazing agreement out to competitive tender; however, there was no evidence of the existence of any other service providers in 2011, or that any such service providers would have agreed to provide a quotation, or that their price would have been cheaper than the Council's, or that the Council would have agreed to a competitive tender

l. the prejudice suggested by Mr Haigh, namely that he had become liable for the goat grazing fee despite not being told about the agreement dated 16 May 2011 in pre-contract enquiries, was not prejudice caused by the failure to consult, but was simply the result of BDW entering into the agreement dated 16 May 2011

m. it had been suggested that if the leaseholders had been consulted they would have been able to persuade the Council not to include an unlimited increase in fees linked to RPI, and that that increase mechanism was not to the industry standard; however, there was no evidence that the Council would have agreed any other wording, and, in any event, it was unlikely that the Council would have so agreed in light of the arbitration clause 14 in the agreement dated 16 May 2011

n. the suggestion by Mr Ford that the services under the agreement dated 16 May 2011 were inappropriate was, in principle, capable of amounting to relevant prejudice; however :
    - there was no evidence that they were in fact inappropriate
    - although the leaseholders' opinion was that the goats were eroding the cliffs and that the erosion was so serious that goat grazing was inappropriate, the Jonathan Crewe 2013 report took the erosion into account but still concluded that goat grazing was meeting the Council's objectives (page 246)
    - in any event, the evidence in 2011 was that the 2008 trial agreement had referred to assessments having taken place and that it was considered appropriate for goat grazing to be trialled, and that the 2011 agreement followed that trial (with the inference that the trial had been successful) and recited a 2009 report and discussion with Natural England and the conclusion that goat grazing was the best option
    - that evidence should be preferred to the leaseholders' opinions

o. it had been suggested by Mr Bray that a gardener would be just as effective, less damaging, and cheaper; it was accepted that employing a gardener was an obvious alternative option; however, it was so obvious that it should be inferred that the Council had taken it into account when deciding that goat grazing was the best option; in any event, Mr Bray's costings were speculative

p. the suggestion by Mr Lowry that the amount of money at stake,

namely the relatively small increase in the service charges above the statutory cap of £100, indicated that the leaseholders' opposition to the dispensation application was perhaps because they did not like the effect on the cliffs of the goat grazing, rather than because they objected to the amount of the service charge increase which would occur if dispensation were granted

q. in any event, it was for the leaseholders to show relevant prejudice, and they could have jointly commissioned an ecological report on alternatives with costings; the cost of that report would probably have been ordered by the Tribunal as a condition of dispensation even if the report had concluded that there were no viable alternatives : **Daejan**

r. it had been suggested that the Tribunal should make an order that BDW pay the cost of negotiating a new agreement; however, the Tribunal had no jurisdiction to make such an order

s. the Applicant was seeking dispensation with effect only from 2014, and had conceded that it should pay its own costs of this application, either by way of a condition of dispensation or by way of a section 20C order

t. the leaseholders had not shown relevant prejudice, so that the costs term should be the only condition of dispensation

u. the purpose of any other condition should be to compensate the leaseholders for any relevant prejudice they had suffered because of the failure to consult; in this case they had shown no relevant prejudice, so there was nothing to compensate

v. the purpose of the dispensing jurisdiction was not to ensure compliance with the consultation requirements; the jurisdiction presupposed that the requirements had not been complied with

w. the purpose of a condition was to compensate, not to ensure compliance

x. the Tribunal's suggested term of granting dispensation, namely that the Applicant should now consult, could not properly be a term of granting dispensation because the agreement dated 16 May 2011 was already in place, and the Applicant could not therefore consult about whether to enter into the agreement, and the presence of the break clause made no difference to that principle

y. however, if, contrary to Mr Upton's submissions in that respect, the Tribunal were minded to impose a term of that kind, it would be more appropriate for the Tribunal to invite the leaseholders to submit to the Applicant written observations on the agreement dated 16 May 2011 and proposals for viable alternative management schemes, and to direct the Applicant to have regard to any such proposals received by a specified date and to consider whether to operate the break clause in the agreement dated 16 May 2011

z. dispensation would take effect only when the condition had been satisfied

aa. in answer to a question from the Tribunal, Mr Upton submitted that it would be inappropriate to include a term that the £100 cap should continue until the specified date, because the purpose of a term should be to compensate the leaseholders from relevant

prejudice, and they had shown none

115. The Tribunal indicated that it would now hear any further submissions from leaseholders about the proposed term, if, contrary to the leaseholders' primary submissions, the Tribunal were minded to grant dispensation on terms, following which Mr Upton would have the last word

116. Mr Lowry said that the term did not mention the Council, and that it would be very difficult for leaseholders to put forward plans without co-operation from the Council, although, in answer to a question from the Tribunal, he accepted that the Council was not a party to this dispensation application, and that the Tribunal had no jurisdiction to order the Council to take any action

117. Mr Bray said that **Daejan** required the parties to be put back into the position they would have been in if consultation had taken place. The only meaningful consultation which could take place would be after the Applicant served a notice terminating the agreement dated 16 May 2011 in order to bring the Council back to the negotiating table

118. Dr Wolstenholme asked about the practical effect of requiring the Applicant "to have regard to" leaseholders observations and proposals. The Tribunal indicated that the consultation requirements themselves only required a landlord "to have regard to" a tenant's submissions in making a decision, whereas, as made clear in **Daejan**, it was in the end the landlord who made the decision

119. Mr Ford said that without the involvement of the Council he had no confidence in how the Applicant would react to leaseholders' observations

120. Mr Mallett said that he did not have confidence in the Applicant making decisions of the standard and quality the leaseholders were entitled to expect. The sums involved were not insignificant. If they had been, the Applicant would not be fighting the case

121. Mr Haigh said that in order to make representations as suggested, leaseholders would need access to all the contracts between the Council and the Applicant

122. Mr Bray said that leaseholders could not offer alternatives without knowing what the Council wanted

123. Mr Mallett said that the Applicant and the Council needed an open mind on what could be achieved in a free market

124. Mr Davidson asked whether the Tribunal had jurisdiction to require the Council to reply. The Tribunal indicated that it did not, as the Council was not a party to this dispensation application. Mr Davidson said that they needed to get round the table with the Council,

not merely submit proposals

125. Mr Hopkinson said that he had suffered prejudice because he was paying £100 a year for goat grazing. BDW had bought the land for £1 and sold it for £100m. The cost of managing the green land was part of BDW's obligation under their deal with the Council, as was evidenced by the fact that they did not seek the cost of the agreement dated 16 May 2011 from leaseholders

126. Mr Street said that the confusion demonstrated by the mistaken reference to a section 106 agreement in the documents was relevant

127. Mrs Langford said that the Applicant should pay all leaseholders' costs of submitting observations and alternative schemes

128. Mr Lowry said that he could not submit meaningful proposals and the Council would not talk to him unless the Applicant first terminated the agreement dated 11 May 2011. However, in answer to questions from the Tribunal, Mr Lowry accepted that if statutory consultation had taken place in 2011 it would have been consultation between BDW and the leaseholders and not, as such, between the leaseholders and the Council

129. Mr Allen said that the only viable option was to terminate the agreement dated 16 May 2011. However, in answer to questions from the Tribunal, Mr Allen accepted that the only decisions which the Tribunal could make were either to refuse dispensation (if the Tribunal were satisfied that there had been relevant prejudice) or to grant dispensation, either unconditionally, or on terms, but that the Tribunal could not include as a term of granting dispensation a direction that the Applicant should operate the break clause, for reasons already advanced by Mr Upton. However, Mr Allen said that the leaseholders had indeed suffered relevant prejudice because they were being charged fees for the maintenance of the blue land

130. Mr Upton's closing submissions were that :

a. the purpose of imposing a condition was to compensate leaseholders for relevant prejudice
b. it was accepted that the cost of instructing an expert to investigate alternative management schemes for use at this hearing would have been relevant prejudice and that the Tribunal could have ordered the Applicant to pay the cost as a term of granting dispensation
c. however, it would be wrong in principle to make it a term of granting dispensation that the Applicant should pay future, as yet unknown and unknowable, costs of doing so
d. the leaseholders had had the opportunity to investigate prejudice at the Applicant's expense; it was now too late for them to do so at the Applicant's expense

131. The Tribunal thanked all parties for their attendance, and for the helpful spirit in which the hearing had been conducted, despite the

strong feelings which the issues had generated, and declared the hearing at an end. The Tribunal would send its decision in writing within 2 to 4 weeks. Mr Lowry and Mr Upton made representations about whether all leaseholders should receive a copy, or only those who had indicated a wish to participate, and whether the decision should be sent by the Tribunal or the Applicant

132. Mr Davidson then said that he wished to claim legal costs of £700. He had been advised by his solicitor and by the Tribunal office to wait until the end of the hearing before mentioning this claim, and had not expected the Tribunal to end the hearing "so abruptly"

133. The Tribunal indicated that the hearing had not finished "abruptly", and that it had indicated to all parties in advance, both yesterday and today, the procedure which it proposed to adopt for the hearing, and the fact that after all leaseholders had had the opportunity to make all their representations, Mr Upton would have the last word on behalf of the Applicant

134. The Tribunal asked Mr Davidson whether the basis of his claim for costs was as a term of granting dispensation or whether he was alleging that the Applicant had acted unreasonably in bring or conducting the hearing. He said it was the former. The legal costs involved were in seeking advice how to oppose the Applicant's dispensation application. In answer to questions from the Tribunal, Mr Davidson said that he had incurred the costs after submitting his written statement of case, and so had not been able to include the claim in his statement of case. However, he had not submitted his claim in writing subsequently either, but was happy to submit the claim in writing after the hearing

135. Mr Upton said that Mr Davidson's claim appeared to be that he had suffered relevant prejudice by seeking legal advice. If so, he should have included it in his statement of case in order to give the Applicant notice of the claim and to enable the claim to have been considered yesterday, on the first day of the hearing. If his solicitor had told him to wait until the end of the case before making his claim, that was wrong advice. It would not be fair to the Applicant to incur costs in having to respond in writing to Mr Davidson's claim, which, in any event, would not give the Applicant the opportunity to cross-examine him on the claim, and it would be disproportionate to adjourn the hearing to another day to enable the claim to be fully explored. The hearing had ended. Mr Davidson's application was effectively to re-open the hearing and adduce further evidence. It should be dismissed

136. After considering both parties' submissions, the Tribunal indicated that it found that Mr Davidson's application to recover legal costs incurred in responding to the dispensation application was effectively to give evidence about relevant prejudice. The Applicant's statement of case specifically put the leaseholders to proof of any relevant prejudice, and the leaseholders, including Mr Davidson, had

submitted written representations. At the hearing yesterday, Mr Davidson had been given every opportunity to make representations, and had done so, but had not raised this issue. In all the circumstances it would not be proportionate to admit the claim now

The Tribunal's decision

137. The Tribunal's findings are as follows

Whether the fees under the agreement dated 16 May 2011 can be included in the service charges under the leases

138. The Tribunal finds that :

a. the fees under the agreement are stated in the agreement to refer to management of the green land
b. the green land is not part of the "gardens" referred to in paragraph 1 of Part II of the First Schedule to the leases, because, as in the case of the paddock in **Methuen-Campbell**, the Tribunal accepts the evidence of the leaseholders that there are gardens at the Property which are separate from the green land, the green land is separated from the rest of the Property to the south by a fence, and a gardener, whose fees are included in the service charge, carries out gardening services on the rest of the Property, but not on the green land
c. the green land is nevertheless part of the "reserved property", as defined in the leases, in respect of which the cost of maintenance can be included in the service charge, because :
    - clause 1.9 and Part III of the First Schedule define "the development" as the land edged red on the plan at page 110
    - the land edged red includes the green land
    - clause 1.36 defines "the reserved property" as that part of "the development" not included in the Apartments being the property more particularly described in Part II of the First Schedule
    - the green land is not "included in the Apartments" for the purposes of clause 1.36, but is separated from the Apartments by a fence
    - although the green land is not specifically mentioned in the list in paragraphs 1 to 4 in Part II of the First Schedule, it is not specifically excluded from the list, and the preamble to Part II of the First Schedule expressly states that the reserved property shall comprise, "but not exclusively", the matters listed in paragraphs 1 to 4
    - the words "but not exclusively" are wide enough to indicate that the omission of any mention of the green land from the list in paragraphs 1 to 4 of Part II to the First Schedule does not mean that the green land is omitted from the definition of "reserved property"

139. The fees under the agreement dated 16 May 2011 may therefore

in principle be included in the service charge under the leases and it is accordingly appropriate for the Tribunal to consider the Applicant's application for dispensation from the section 20 consultation requirements

Whether the Tribunal should dispense with the consultation requirements

140. The Tribunal finds that it is bound to follow the guidance in **Daejan**. The Tribunal accepts the facts of **Daejan** were different, in that that case involved major works which had already been carried out following a consultation, albeit in some respects flawed, with the tenants, whereas this case involves a qualifying long term agreement in respect of which the then landlord, BDW, failed to carry out any consultation with leaseholders at all. However, the Tribunal finds that it is clear from the wording of paragraph 44 of the **Daejan** decision that the Supreme Court intended its guidance to apply to all applications for dispensation, not just those in respect of major works, and not just those where some consultation had taken place

141. The Tribunal must therefore focus on whether the failure by BDW has caused leaseholders any relevant prejudice

142. The Tribunal reminds itself that this is an application for dispensation of the section 20 consultation requirements, and not an application under section 27A of the 1985 Act about the payability of service charges. The Tribunal is therefore not concerned in this application with questions such as whether it was reasonable for BDW to enter into the agreement dated 16 May 2011, whether the fees payable under the agreement are reasonable, whether the fees payable under the agreement also include fees for maintenance of the blue land, or whether the standard of maintenance of the green land is reasonable, except, in each case, to the extent that any such matters show relevant prejudice

143. In considering whether the failure by BDW has caused leaseholders any relevant prejudice, the Tribunal has borne in mind the guidance in the decision in **Daejan** that it is for the leaseholders to identify any prejudice which they claim to have suffered as a result of the Applicant's failure to comply with the section 20 consultation requirements, and has taken into account all the assertions in the leaseholders' written and oral submissions before the Tribunal, including the assertions that the failure by BDW to consult :

a. prevented the leaseholders from :
    - challenging the justification for the 2008 trial agreement and the agreement dated 16 May 2011, in light of the planning requirement being in condition 8 in the Town Planning Decision, not in a section 106 agreement as mistakenly stated in the recitals of both the 2008 trial agreement and the agreement dated 16 May 2011
    - pointing out that condition 8 in the Town Planning Decision

required only a long-term management plan to be agreed with the Council, not an agreement to use goats
- seeking access to the reports and assessments on the viability of the 2008 trial
- insisting on the investigation of alternative methods of achieving the Council's aims, such as employing a gardener
- insisting on a risk assessment
- insisting on competitive quotes
- challenging the Council's fees
- arguing that the maintenance of the cliffs should be paid through council tax, as with the Council's adjoining 10 miles of cliffs, not through the leaseholders' service charges
- arguing against an agreement for as long as 10-years
- insisting on the inclusion of a provision for the auditing of costs and for the monitoring of the standard of work
- arguing for an industry-standard fee review clause, linked to the Council costs of delivering the service, not an upwards-only revision linked to RPI

b. meant that the leaseholders did not know about any liability for goat grazing fees until each received a demand in April 2013, and might have made a difference to their decisions to purchase their flats at all
c. should have led the Applicant to seek compensation, or a reduction in purchase price, when the Applicant purchased from BDW, and should not now result in the Applicant seeking payments from the leaseholders
d. had resulted in a plan which was too expensive, which had caused damage to the cliffs, the vegetation, and the visual amenity, and which had caused cliff falls and the risk of landslip
e. had resulted in the Council charging leaseholders for the maintenance of not only the green land, but also the Council's blue land
f. had resulted in lower flat resale and rental values, as a result of the higher service charges and the damage to the cliffs and the risk of landslip
g. should now result in the Applicant terminating the agreement dated 16 May 2011 under the break clause and negotiating a new, more cost-effective agreement after consultation with the leaseholders, rather than seeking payments from the leaseholders
h. should now result in the £100 cap continuing to apply until the new agreement was in place
i. should now result in the Applicant paying all costs of these proceedings and of terminating the agreement dated 16 May 2011 and setting up the new one

144. However, the Tribunal finds that :

a. the suggestion that the failure to consult deprived the leaseholders of the opportunity to point out that the recitals to the 2008 trial agreement and the agreement dated 16 May 2011 referred mistakenly to a section 106 agreement rather than to condition 8 in

the Town Planning Decision is not evidence of relevant prejudice, in that there is no evidence before the Tribunal that the Council would have decided not to enter into the agreement dated 16 May 2011 if the mistake had been pointed out to them

b. the suggestion that the failure to consult deprived the leaseholders of the opportunity to point out that condition 8 in the Town Planning Decision required only a long-term management plan to be agreed with the Council, not an agreement to use goats is not evidence of relevant prejudice, in that there is no evidence before the Tribunal that the Council would have decided not to enter into the agreement dated 16 May 2011 if the precise terms of condition 8 had been pointed out to them

c. the suggestion that failure to consult deprived the leaseholders of the opportunity to seek access to the reports and assessments on the viability of the 2008 trial is itself not evidence of relevant prejudice, in that the leaseholders have not now provided reports and assessments to show that viable alternatives to goat grazing were available at the time consultation should have taken place

d. the suggestion that failure to consult deprived the leaseholders of the opportunity to insist on the investigation of alternative methods of achieving the Council's aims, such as employing a gardener, is itself not evidence of relevant prejudice, in that the leaseholders have not now provided reports and assessments to show that viable alternatives to goat grazing were available at the time consultation should have taken place, nor have the leaseholders provided quotations from, for example, gardening contractors, to support the suggestion by Mr Bray that gardeners would be willing to carry out the work, that the work carried out by gardeners would meet the Council's objectives, or that the cost of gardeners would be cheaper than the Council's current fees

e. the suggestion that failure to consult deprived the leaseholders of the opportunity to insist on a risk assessment is itself not evidence of relevant prejudice in that there is no evidence before the Tribunal that the Council would have decided not to enter into the agreement dated 16 May 2011 if a risk assessment had been available at the time consultation should have taken place

f. the suggestion that failure to consult deprived the leaseholders of the opportunity to insist on competitive quotes is itself not evidence of relevant prejudice in that there is no evidence before the Tribunal that there were any other potential service providers at the time consultation should have taken place, or that any such service providers would have agreed to provide a quotation, or that their price would have been cheaper than the Council's, or that the Council would have agreed to a competitive tender

g. the suggestion that failure to consult deprived the leaseholders of the opportunity to challenge the Council's fees is itself not evidence of relevant prejudice in that the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and not between the Council and the leaseholders, and there is no evidence before the Tribunal that the Council would have agreed to reduce the Council's fees

h. the suggestion that failure to consult deprived the leaseholders of the opportunity to argue that the maintenance of the cliffs should be paid through council tax, as with the Council's adjoining 10 miles of cliffs, not through the leaseholders' service charges, is itself not evidence of relevant prejudice in that, again, the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and not between the Council and the leaseholders, and there is no evidence before the Tribunal that the Council would have agreed to pay for the maintenance through council tax, rather than insisting that BDW make the payments
i. the suggestion that failure to consult deprived the leaseholders of the opportunity to argue against an agreement for as long as 10-years is itself not evidence of relevant prejudice in that, again, the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and not between the Council and the leaseholders, and there is no evidence before the Tribunal that the Council would have agreed to an agreement for anything less than 10 years, particularly as the agreement dated 16 May 2011 did contain a break clause
j. the suggestion that failure to consult deprived the leaseholders of the opportunity to insist on the inclusion of a provision for the auditing of costs and for the monitoring of the standard of work is itself not evidence of relevant prejudice in that, again, the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and not between the Council and the leaseholders, and there is no evidence before the Tribunal that the Council would have agreed to an include an auditing provision or a monitoring provision in the agreement dated 16 May 2011, particularly as the agreement dated 16 May 2011 did contain a break clause
k. the suggestion that failure to consult deprived the leaseholders of the opportunity to argue for an industry-standard fee review clause, linked to the Council costs of delivering the service, not an upwards-only revision linked to RPI is itself not evidence of relevant prejudice in that, again, the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and not between the Council and the leaseholders, and there is no evidence before the Tribunal that the Council would have agreed to an include a fee revision clause which was more favourable to BDW, particularly as the agreement dated 16 May 2011 did contain an arbitration provision
l. the suggestion that failure to consult meant that the leaseholders did not know about any liability for goat grazing fees until each received a demand in April 2013, and might have made a difference to their decisions to purchase their flats at all, is itself not evidence of relevant prejudice in that the consultation which BDW should have carried out could, by its very nature, only be carried out with those who were already leaseholders at the time, and so the failure to consult could not have made any difference to those leaseholders' decision to purchase as they had already made that decision at an earlier time; similarly, the failure to consult could not

have made any difference to the decision to purchase by subsequent leaseholders, as they were not leaseholders at the time when consultation should have taken place, and were therefore not entitled to be consulted at that time; the question whether the failure to inform any leaseholders who purchased after the agreement dated 16 May 2011 that the agreement had been entered into had caused those leaseholders to suffer loss, is not a question for this Tribunal in this application for dispensation, but would be a matter between such leaseholders and the landlord at the time, or between such leaseholders and their advisors

m. the suggestion that failure to consult should have led the Applicant to seek compensation, or a reduction in purchase price, when the Applicant purchased from BDW, and should not now result in the Applicant seeking payments from the leaseholders, is itself not evidence of relevant prejudice as a result of the failure to consult, as, again, the consultation which should have taken place would have been between BDW as landlord and the leaseholders, and the question whether the Applicant should subsequently have sought compensation from BDW when the Applicant purchased the headlease does not amount to relevant prejudice caused by the earlier failure by BDW to consult with leaseholders

n. the suggestion that failure to consult had resulted in a plan which was too expensive, which had caused damage to the cliffs, the vegetation, and the visual amenity, and which had caused cliff falls and the risk of landslip is itself not evidence of relevant prejudice as a result of the failure to consult, in that the leaseholders have not now provided reports and assessments to show that viable alternatives to goat grazing were available at the time consultation should have taken place, or that the Council would, at that time, have agreed to any other plan than goat grazing

o. the suggestion that failure to consult had resulted in the Council charging leaseholders for the maintenance of not only the green land, but also the Council's blue land is itself not evidence of relevant prejudice as a result of the failure to consult, in that the Tribunal accepts Mr Upton's submissions that :

p. the agreement dated 16 May 2011 created an obligation only to pay for fees for managing the green land, and, contrary to the submissions by the leaseholders, it was not clear from the Council's e-mail dated 23 June 2014 that the Council's fees were in fact for managing both the green land and the blue land

q. in any event, even if it had been the Council's intention in 2011 in practice to include in the fees for the green land some fees for the blue land, there was no evidence that the Council would in 2011 have agreed to reduce the fees payable under the agreement dated 16 May 2011 at all, let alone by half as contended for by the leaseholders

r. if the leaseholders wished to pursue the point, their remedy was to make an application under section 27A of the 1986 Act and claim that the fees were unreasonably incurred for the purposes of section 19 of the 1985 Act

s. the suggestion that failure to consult had resulted in lower flat

resale and rental values, as a result of the higher service charges and the damage to the cliffs and the risk of landslip is itself not evidence of relevant prejudice as a result of the failure to consult, in that the suggestion amounts to no more than the suggestion that if consultation had been carried out BDW would not have entered into the agreement dated 16 May 2011 with the Council, whereas, for reasons already given, there is no evidence before the Tribunal to that effect

145. Having taken account of all the submissions by the leaseholders in this case, the Tribunal finds that there is no evidence before it of relevant prejudice in accordance with the guidelines in **Daejan**, and that it is therefore appropriate for the Tribunal to grant dispensation, and to consider whether that dispensation should be unconditional, or upon terms

Terms of dispensation

146. The Applicant has very fairly and properly conceded that it will not oppose an order under section 20C of the 1985 Act, or, if the Tribunal thinks fit, a term of dispensation to a similar effect

147. The leaseholders have suggested that if, contrary to their primary submission that dispensation should be refused, the Tribunal were minded to grant dispensation, it should also be on terms that :

a. the Applicant should terminate the agreement dated 16 May 2011 under the break clause and negotiate a new, more cost-effective agreement after consultation with the leaseholders; however, the Tribunal finds that it does not have jurisdiction to order the Applicant to do so as a term of granting dispensation from consultation
b. should now result in the £100 cap continuing to apply until the new agreement was in place; however, although the Tribunal finds that it would be illogical to grant dispensation, but at the same time to order that the statutory cap should continue to apply as if dispensation had not been granted, the Tribunal will consider later in this decision whether it is appropriate, or permissible following **Daejan**, to grant dispensation but effective only from a particular date
c. should now result in the Applicant paying all costs of terminating the agreement dated 16 May 2011 and setting up the new one; however, again, the Tribunal finds that it would be illogical to grant dispensation, but at the same time to order that the Applicant should pay the future costs referred to

148. The Tribunal has considered Mr Upton's submission that :

a. the purpose of imposing a condition was to compensate leaseholders for relevant prejudice, whereas they had shown none
b. the purpose of the dispensing jurisdiction was not to ensure compliance with the consultation requirements; the jurisdiction presupposed that the requirements had not been complied with

c. the purpose of a condition was to compensate, not to ensure compliance
d. the Tribunal's suggested term of granting dispensation, namely that the Applicant should now consult, could not properly be a term of granting dispensation because the agreement dated 16 May 2011 was already in place, and the Applicant could not therefore consult about whether to enter into the agreement, and the presence of the break clause made no difference to that principle
e. however, if, contrary to Mr Upton's submissions in that respect, the Tribunal were minded to impose a term of that kind, it would be more appropriate for the Tribunal to invite the leaseholders to submit to the Applicant written observations on the agreement dated 16 May 2011 and proposals for viable alternative management schemes, and to direct the Applicant to have regard to any such proposals received by a specified date and to consider whether to operate the break clause in the agreement dated 16 May 2011

149. The Tribunal finds that :

a. it is clear from the guidance in paragraph 56 of **Daejan** that where a landlord is asking for dispensation in advance it may be appropriate for dispensation to be granted on terms requiring the landlord, for example, to convene a meeting with leaseholders at short notice to explain and discuss the forthcoming works or to comply with some of the statutory consultation requirements but with foreshortened periods for the tenant's responses
b. in this case, of course, the agreement dated 16 May 2011 has already been entered in to, so, in that sense, there is nothing about which to consult, unlike the example in **Daejan** of forthcoming works
c. however, in this case :
    - the agreement dated 16 May 2011 does contain a break clause, which would enable the Applicant, if it thought fit, to terminate the agreement and negotiate a new agreement with the Council
    - if the Applicant were to do so, statutory consultation about any proposed new agreement would then take place with leaseholders
    - it would therefore be just in all the circumstances for the Tribunal to require the Applicant to have regard to any observations from leaseholders, and to any proposals for viable alternative management schemes, submitted by 1 February 2015, being, as the Tribunal finds a date long enough away to give leaseholders a reasonable time to prepare such observations and proposals for viable alternative management schemes, but near enough in the interests of justice from the Applicant's point of view, to enable the Applicant then to consider whether or not to operate the break clause in the agreement dated 16 May 2011
    - it would also be just in all the circumstances of this case for dispensation to take effect on 1 February 2015

Summary of the Tribunal's decision

150. The Tribunal grants dispensation from the consultation requirements referred to in section 20 of the 1985 Act on the following terms :

a. the Applicant will pay its own costs of these proceedings, and the Applicant's costs shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge
b. the Applicant shall have regard to any written observations from leaseholders, in respect of proposals for viable alternative management schemes, submitted by 1 February 2015, to enable the Applicant then to consider whether or not to operate the break clause in the agreement dated 16 May 2011
c. the dispensation granted by this decision shall take effect on 1 February 2015

Appeals

151. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

152. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision

153. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal

154. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 6 August 2014

.....
Judge P R Boardman
(Chairman)