UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 00290 (LC) UTLC Case Number: LC-2022-139

**Location: Royal Courts of Justice, Strand,
London WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - SERVICE CHARGES – section 20ZA – timing for application – exercise of discretion – importance of finding relevant prejudice

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

BETWEEN:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF LAMBETH

Appellant

-and-

**MS MICHAELA ANN KELLY (1)
CHRISTOPHER NICHOLAS WOODMAN (2)
DORETTE MAUREEN DANVERS-RUSSELL (3)**

Respondents

**Re: 333 Clapham Road,
London,
SW9 9BS**

Judge Siobhan McGrath, Chamber President of the Property Chamber

Heard on: 11 October 2022

Decision Date:

for the appellant - Mr R Fozlay, litigation officer for the London Borough of Lambeth
for the first and third respondent – Mr B McGregor, lay representative
the second respondent did not appear and was not represented

© CROWN COPYRIGHT 2022

The following cases are referred to in this decision:

Daejan Investments Ltd v Benson [2013] UKSC 14
Aster Communities v Kerry Chapman & Ors [2020] UKUT 0177 (LC)

1. This is an appeal by the London Borough of Lambeth against the decision of the First-tier Tribunal (the FTT) where it refused to dispense with the consultation requirements contained in section 20 of the Landlord and Tenant 1985 (the 1985 Act).

2. The appeal was heard on 11th October 2022. At the hearing the London Borough of Lambeth (the council) was represented by Mr Rabby Fozlay who is a litigation officer employed by the council. Mr Bruce McGregor appeared as a lay representative for the third respondent Mrs Danvers-Russell. Mr McGregor also represented the first respondent but her involvement in the proceedings was limited to providing a response to the appeal to the Upper Tribunal. She had not taken part in the proceedings before the FTT. The second respondent did not attend the hearing and took no part in the appeal. I am grateful to Mr Fozlay and Mr McGregor for their thorough and helpful contributions to the case.

Background

3. The council is the owner and landlord of a property at 333 Clapham Road, Stockwell, London SW9 9BS (the property). The property is a Victorian house which has been converted into five flats. Flats 1, 4 and 5 are held on long leases by the three respondents to this appeal and flats 2 and 3 are let by the council on secure tenancies.

4. In outline, the background to the appeal is as follows: in July 2016 a possible roof leak at the property was reported to the council by the first respondent who is the lessee of flat 1. As a result, a job order was raised by the council to address the reported problem. Work was subsequently carried out to the property and eventually in 2018, the lessees were invoiced for the costs as part of their annual service charge.

5. The cost of the work was such that the consultation requirements under section 20 of the 1985 Act were triggered. The third respondent was clear that she had not received the requisite consultation notice. In 2021 she applied to the FTT for a determination that her contribution to the costs of the work should be limited to the statutory cap of £250.00. In a decision dated 29th July 2021 (the first decision), the FTT decided that there had been a failure to comply with section 20 and that accordingly, the sum payable by the third respondent was limited to £250.

6. On 24th August 2021, the council applied to the FTT under section 20ZA of the Act, for dispensation from the consultation requirements. In a decision dated 10th January 2022, the FTT refused to grant the council any dispensation. On 15th February 2022, the FTT also refused the council's application for permission to appeal that decision. On 14th April 2022 the Upper Tribunal granted the council limited permission to appeal.

The statutory provisions

7. Sections 18 to 30 of the 1985 Act make provision for the regulation of service charges payable by a residential leaseholder. So far as is relevant to this appeal, section 18(1) of the Act defines "service charge" as "an amount payable by a tenant of a dwelling …. for

repairs …. The whole or part of which varies … according to the relevant costs." Section 18(2) defines "relevant costs" as "the costs or estimated costs incurred or to be incurred… in connection with the matters for which the service charge is payable."

8. Section 19 provides that relevant costs "shall be taken into account in determining the amount of a service charge

    (a) only to the extent that they are reasonably incurred, and

    (b) … only if the … works are of a reasonable standard.

    And the amount payable shall be limited accordingly"

9. Section 20 imposes a requirement on landlords to consult with lessees in prescribed circumstances before carrying out works or entering into a "qualifying long term agreement." Section 20(1) provides:

    "20(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless consultation requirements have been either –

    (a) complied with in relation to the works or agreement, or
    (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal."

10. A "relevant contribution" is defined in section 20(2) as the amount a tenant may be required to pay towards service charge costs under the terms of their lease. Section 20(7) and regulation 6 of the Service Charges (Consultation Requirements)(England) Regulations 2003 limit the relevant contribution to £250 per flat.

11. The cumulative effect of these provisions is that, if the landlord fails to comply with the consultation requirements, the tenant's contribution to the service charge will be limited to £250 unless and until the landlord obtains dispensation from the FTT.

12. The statutory consultation requirements are set out in the 2003 Consultation Regulations. The regulations include five different sets of procedure which landlords must follow depending on whether the landlord seeks either to carry out works to a building or to enter into a qualifying long-term agreement and furthermore whether or not the landlord is obliged to give public notice of those works or that agreement.

13. Where, as is often the case for local authority landlords, works of repair and maintenance to their properties are carried out under a qualifying long-term agreement under a framework with a specified contractor, in which case the consultation requirements are to be found in Schedule 3 to the 2003 Regulations.

14. Schedule 3 is different from other parts of the regulations as the contractor has already been identified under the qualifying long-term agreement and therefor it has, in effect, only one stage. Under the schedule, notice must be given to each tenant, describing the works

(or saying where and when a description may be inspected) stating the reasons for the works, stating the total amounted of estimated expenditure and specifying where to send observations and allowing at least 30 days for responses. The landlord must have regard to those observations and within 21 days provide a response.

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

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

16. The scope and extent of the dispensation power in section 20ZA has been prescribed by the Supreme Court in the case of *Daejan Investments Ltd v Benson* [2013] UKSC 14 (*Daejan*)

17. It is worth noting that although not directly relevant in this appeal, section 20B provides that when costs have been incurred, a landlord is required to make a demand for those costs within 18 months of their having been incurred unless during that period the tenant has been notified in writing that the costs had been incurred and that they would subsequently be required to contribute to them by payment of a service.

18. Finally, the jurisdiction for the FTT to consider the payability of service charges is contained in section 27A of the Act. By section 27A an application may be made to the FTT for a determination "whether a service charge is payable" and if so, to whom, by whom, how much and when it is payable.

The Proceedings in the FTT

19. To understand this case it is necessary to look at the first decision of the FTT as well as the decision under appeal. As indicated above, the council arranged for works to be carried out to a roof (in fact it was works to a balcony between floors) at the property. The total cost of the work was £7,882.41 and therefore section 20 consultation was engaged. The third respondent, Mrs Danvers-Russell, applied to the FTT under section 27A for a determination of whether that sum was payable. In her application she stated that she had been required to pay a service charge of £1,545.46 but that she did not receive a section 20 notice. She said:

> "I do not live at the property and the council knows I have a contact address elsewhere which the council has used for me for many years. But in this case the council says that it sent the section 20 notice to the property and it has told me that it considers this to have been sufficient as my lease provides for service at the property"

20. In its statement of response, the council maintained that it had served the section 20 notice at the property and argued that this was sufficient service and supported that argument by reference to a number of legal principles including reliance on the provisions of section 196 of the Law of Property Act and estoppel. Additionally, the council asked that, if contrary to its primary case, it was found that the council had failed to comply with section 20, the FTT should grant it dispensation under section 20ZA.

21. The FTT gave directions for the case to be decided on the consideration of documents alone and without a hearing. The Tribunal also indicated to the respondent that if it wished to pursue a section 20ZA dispensation application it must complete an application form and pay the required tribunal fee. Additionally, the FTT said that as an application for dispensation may affect other lessees, it would have to be served upon them and it would not be appropriate for such an application simply to be added into the respondent's response.

22. In response, the council said that it did not currently intend to make a separate application for dispensation as it considered that it had complied with section 20 but that "upon determination of this matter, the council shall consider promptly making any further application for dispensation, as necessary."

23. Mrs Danvers-Russell made a full written response to the council's submissions and the matter was considered by the FTT. In a decision dated 29th July, 2022 the Tribunal found in favour of Mrs Danvers-Russell and decided that the service charge costs payable by her in respect of the roof works was limited to £250.00. In its reasons the Tribunal said:

> "4. The parties' representatives spent much time in a detailed legal discussion of whether the lease might have been varied, whether there might be an estoppel or formal "service" might have taken place. However, the issue is far simpler. By paragraph 1(1)(a) of Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003, the Respondent were required to "give notice in writing" of their intention to carry out the relevant works. The Applicant claims that they did not do so.
>
> ……
>
> 6. The Respondent has explained that the reason the section 20 notice went to the property rather than to the Applicant's correspondence address was because they were implementing new working processes. They were automated and, therefore, expected to be more efficient. However, at least when the new system started, the Respondent was unable to use any address for correspondence other than the property itself.
>
> 7. The Respondent has thereby admitted that they knowingly and deliberately implemented a system whereby correspondence would be

sent to the Applicant at an address where she would not receive it. By no possible definition may this be regarded as "giving notice". The Respondent clearly failed to comply with paragraph 1(1)(a).

8. The consequence of a failure to comply with the statutory consultation requirements is that the relevant costs are limited to £250. The only way around this is to apply for dispensation from the requirements under section 20ZA of the Landlord and Tenant Act 1985. The Respondent raised this issue in their Statement of Case but, by letter dated 25th June 2021, Judge Vance directed that, "If the Respondent wishes to pursue a s.20ZA dispensation application it must complete the relevant application form and pay the required tribunal fee." By letter dated 2nd July 2021 the Respondent replied, "The Council does not currently intend on making a separate application for dispensation.

9. Therefore, there is no issue of dispensation before the Tribunal and its decision that the relevant costs are limited to £250 stands."

24. On 24th August 2021, the council applied to the FTT for unconditional dispensation under section 20ZA and named all three leaseholders as respondents. The grounds of the application were set out in a supporting statement and were as follows:

> "17.1 Any failure to comply with the consultation requirements was caused by an administrative error; technical difficulties and/or the introduction of a new working process for the creation of s20 Notices.
>
> 17.2 Notice was served at the property of the leaseholder of Flat 5 in respect of the intended works.
>
> 17.3 Despite the respondents being on notice of the works since at least 21 September 2018 (when the costs of the works with demanded by way of invoice) they have not at any time:
>
> (a) identified any relevant prejudice caused by result of any purported failure to be consulted;
>
> (b) identified anything they would have said, if they had been given the opportunity; and/or
>
> (c) identified any relevant prejudice they would suffer if an unconditional dispensation were to be granted."

25. The council relied on the guidance in *Daejan* contending that the consultation requirements are directed towards ensuring that tenants are not required (i) to pay for unnecessary services or services provided to a defected standard; and (ii) pay more than they should for services which are necessary and provided to an acceptable standard. In its statement the council noted that, despite the length of time that had passed, no evidence had been

adduced to suggest that the relevant works were unnecessary or provided to a defective standard and/or unreasonable in amount.

26. Mrs Danvers-Russell was the only leaseholder to respond to the application for dispensation. In her statement in response, she gave details of her difficulties in ascertaining information from the council. She first learnt about the works when she received an invoice (sent to her address in Birmingham) dated 21st September 2018, some 18 months after the works had been completed and the cost demanded by the contractors. However, despite a number of requests seeking details of the works carried out and the reason for the cost, it was not until the 8th February 2019, nearly two years after the completion of the works, that she was sent a copy of the section 20 notice. On receipt of the notice Mrs Danvers-Russell responded to say that if she had received the notice:

> "…. I would certainly have responded within three days to ask why it would cost so much, how many quotes were obtained and the reason for choosing this contractor… I would also have increased my monthly payments to my account to spread the costs. I do not have savings available to take large lump sums to meet bills. I have to budget."

27. By the time Mrs Danvers-Russell prepared her statement in response to the application for dispensation she also realised that the notice stated that the relevant works were completed on 2nd March 2017 which was the dates of the section 20 notice itself. In her statement she said that she had not noticed this in the first proceedings. She also alleged that there was no evidence that any section 20 notice was sent to the other leaseholders at the property. In summary, it was her case that in fact, no section 20 notice was served at all.

28. In respect of prejudice Mrs Danvers-Russell contended that the total failure to consult meant that due to the lack of information provided in advance or even since the works were carried out, she could not assess whether or not she had suffered "prejudice." She said that her own case was very different from *Daejan*, and that, in effect, it should be distinguished. No consultation had been carried out at all and despite her requests to be informed what was done as part of the works and asking "why is the invoice so big, what am I paying for" she had not been provided with the information. She summarised her submission as follows "The failure of the applicant to provide me with so much of the information that I requested and needed is a very good reason why dispensation should not be granted."

29. In response, the council maintained that sufficient evidence had been provided to Mrs Danvers-Russell to carry out her own investigations and that the information had been provided in a timely fashion. They also said as follows:

> "33. Secondly, the leaseholder has failed to identify how, if in any way, they would have been assisted by the provision of the requested information. They have also failed to identify how receipt of the requested information would have enabled

them to investigate any relevant prejudice and/or why without the requested information they have been unable to carry out any such investigation.

34. Thirdly, it seems that the leaseholder has let slip the real reason why they have not identified/investigated any relevant prejudice. It is not because the council has not provided the requested information, but rather because the leaseholder has chosen not to carry out their own investigation. The leaseholder mistakenly believes it was not their responsibility to do so.

……

37. The Council submits that the reasonableness of the works is not relevant for the purposes of this application. Rather, the relevant test is whether it would be reasonable to dispense with the consultation requirements. In deciding the question, the tribunal must look for any relevant prejudice which the leaseholder has simply failed to even attempt to investigate or reduce any evidence of. The reasonableness of the works is not presently relevant."

30. Finally, the council submitted that lessees are required to identify what they would have said if they had been consulted and how that would have affected either the scope or cost of the works. Therefore, they said, the relevant inquiry should be based "on the information available to the leaseholder at the time of the service of the section 20 notices. None of the further information sought by the leaseholder would been available at the time of the section 20 notices."

31. The FTT considered the application on the 10th January 2022 and once again, the matter was decided without a hearing. The FTT refused to dispense with the section 20 consultation requirements on two separate grounds.

32. Firstly, the FTT decided that (in effect) the application for dispensation was too late and should have been lodged in response to Mrs Danvers-Russell's application under section 27A. The FTT said:

"10. The Tribunal noted in its previous decision that, by letter dated 25 June 2021, Judge Vance had directed that "if the applicant wishes to pursue a s.20ZA dispensation application it must complete the relevant application form and pay the required tribunal fee." By letter dated 2 July 2021 the applicant replied "The council does not currently intend on making a separate application for dispensation."

11. The fact is that the tribunal has already determined that the Third Respondent's charge for the works is limited to £250 for the relevant works. The applicant has already had the opportunity to raise the issue but specifically eschewed that opportunity. They have not appealed or asked to have that decision reviewed. They cannot seek to have that decision effectively reversed by making an application for

dispensation now. The tribunal has ruled, and the applicant is stuck with that decision."

33. That might have been the end of the matter but as the parties had made arguments for and against dispensation, the Tribunal said that it would address them. The Tribunal then summarised the main principles set out in the *Daejan* decision and continued as follows:

> "13. The applicant asserted that the Third Respondent has failed to establish that she suffered any prejudice by their failure to consult her and that this is sufficient for the application for dispensation to be granted. The tribunal rejects this assertion for a number of reasons:
>
> (a) As the Supreme Court was itself at pains to point out, it is not just a simple equation of no prejudice equals dispensation. If that were the case, landlords could, as a matter of standard practice, get away with avoiding any consultation whenever they can predict the prejudice is unlikely, thus driving a coach and horses through the legislation.
>
> (b) The tribunal accepts the Third Respondent's submission that she suffered prejudice in the form of being unable to budget for the expense of the works. A section 20 notice provides a lessee not only with the opportunity to participate in a consultation process but also with an estimate of the likely cost. The particular form in which the applicant failed to comply with the requirements in this case means that the Third Respondent was unaware of the potential charge until she received the bill.
>
> (c) Perhaps most significant is that the process outlined by the Supreme Court only works if the lessee is given a genuine opportunity to make a case that there has been prejudice. That opportunity depends on having access to the necessary information. If a lessee did not know the relevant facts, it would be impossible for them to demonstrate any prejudice arising from them. In this case, the Third Respondent initiated email correspondence with the applicant in 2018 asking for the relevant information. Two years later, in October 2021, the applicant provided a schedule of the relevant works on the basis of which they asserted that the Third Respondent had everything that she needed. However, the applicant has overlooks a vital aspect, namely why the works were initiated. The only information on this is in the section 20 notice which simply states, "responsive repair works required." This implies that the relevant area was somehow in disrepair, but the applicant has failed to provide any details of this. The Third Respondent specifically asked for such information but she never received it. Therefore, due to the applicant's failure to provide relevant information, she never had the opportunity to make her case.
>
> (d) Further, such information needs to be provided within a reasonable timeframe. The older any works are, the more difficult it will be for any expert to comment usefully on them. What information the applicant did provide came a long time after the event.

14. In summary, the Tribunal's earlier decision precludes the ground of dispensation now but, even if that were not the case, the Tribunal would conclude that it is not reasonable to grant it."

34. In February 2022, the council sought permission to appeal on nine separate grounds. The FTT refused permission and the application was renewed to the Upper Tribunal. On 14th April, 2022, Judge Cooke granted permission on grounds five grounds as follows:

    Ground 1: the FTT erred in law by concluding that, there was no jurisdiction to make a determination under section 20ZA once a determination under section 27A had been made;

    Ground 5: the FTT misdirected itself as to the importance of "prejudice" in the *Daejan* test;

    Ground 6: the FTT erred, when considering its power to dispense, by giving weight or excessive weight to the Third Respondent's alleged inability to budget;

    Ground 7: the FTT erred, when considering the power to dispense, by giving weight or excessive weight to the alleged insufficiency of information provided by the applicant;

    Ground 8: the FTT erred, when considering the power to dispense, by giving weight or excessive weight to the alleged delayed by the applicant in providing the necessary information.

The Appeal

35. Before I consider the arguments and submissions of the parties, I would observe that I consider the council has adopted a disproportionately heavy-handed approach to this case. The dispute relates to works that cost a total of £7,175.91 and the proportion payable by the only active respondent to the dispensation application is £1,545.46. But notwithstanding this, there have been two FTT determinations and a full days' hearing in the Upper Tribunal. Furthermore, in its application for permission to appeal the council sort a rehearing of the matter although in the event, Judge Cooke ordered that the appeal be conducted by way of a review.

36. In this case the council had clearly failed in its statutory duty to consult the leaseholders not only because it failed to serve the notice at the correct address but also because on the council's own case the notice was served after the works had been completed and an invoice issued.

37. At the hearing, I asked Mr Fozlay about proportionality and he submitted that the council had decided to appeal the determination as it was important for them to have a decision on the issue of whether a section 20ZA application may be made even after a section 27A decision had been issued in respect of the same costs. He also said that the Council would like guidance on the amount of information that should be provided to leaseholders as part of the section 20 procedure.

38. Be that as it may, the council had made detailed submissions to the FTT on the issue of the service of the section 20 notice at a stage when it should have been obvious to them (but

not to the FTT) that the consultation notice was invalid even if service had been effective because on the council's own case, it was served after the works had been carried out and the contractors demand for payment made.

39. Turning now to the submissions, it was agreed at the outset that I would deal with the appeal in two parts and would hear argument first on the question of the timing of section 20ZA applications and then secondly on the decision not to dispense on the merits.

Ground 1 – jurisdiction to make a determination under section 20ZA once a determination under section 27A has been made

40. The parties could not agree how the issue should be framed before the Upper Tribunal and Mr McGregor suggested that the FTT's decision was confined to the facts of this case. Whilst it is correct that there is a certain amount of ambiguity about the FTT's approach, I propose to deal with Ground 1 on the basis suggested by the council namely that the FTT decided that the Tribunal has no jurisdiction to make a determination under s.20ZA once a determination under s.27A has been made. On that basis I have no difficulty in deciding that the FTT was wrong to decide, (in its words) that "The tribunal has ruled and the applicant is stuck with that decision."

41. Firstly, there is nothing in the statutory scheme of the Landlord and Tenant Act 1985 which could support the conclusion that a section 20ZA application cannot be made after a section 27A determination has been issued.

42. Secondly, and although not directly relevant to the appeal, rule 9(3) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 gives the FTT discretion to strike out a matter where "the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal." That is not the basis upon which the FTT made its decision in this case nor would it have been appropriate to do so.

43. The council had clearly expressed its decision not to make an application under section 20ZA during the course of the section 27A proceedings. Instead, it indicated that it would consider whether or not to make an application after the section 27A determination had been issued. The Tribunal did not reply to the council to say that failure to make a section 20ZA application at the same time as the section 27A proceedings would operate as a bar to a future application. Furthermore, it did not decide that the section 27A proceedings were final in respect of all issues that might fall to be determined under sections 18-30 of the 1985 Act.

44. Section 20 operates by imposing a cap on the relevant contributions of tenants. That cap may be lifted or modified by the FTT on an application under section 20ZA. Although the consideration of such an application concerns the same background facts as those dealt with in the section 27A proceedings, the issues for determination are not the same and may well require additional evidence and submissions in particular on the question of prejudice.

If dispensation is given, then it might be conditional and it is a matter for a landlord to decide whether to accept the conditions imposed or whether instead to accept the cap. This is a very different matter from the consideration of payability under section 27A.

45. Finally, it is common practice in the FTT for applications under section 20ZA to be made after section 27A proceedings. Sometimes it is possible for an application for dispensation to be decided within a section 27A hearing. But this is not a requirement. As happened in this case, the council as landlord were responding to a section 27A application made by a single leaseholder. In order to make a section 20ZA application the council was informed that it should pay a fee and notify other leaseholders. This would inevitably have caused a delay and may have been unnecessary. Whether or not it was necessary would not be known until the first determination had been given.

46. For all those reasons, I consider that Ground 1 of the appeal succeeds.

The Exercise of the section 20ZA discretion

47. Turning now to the remaining submissions. In some respects, Mr McGregor was under a misapprehension as to the ambit of the Upper Tribunal's powers when dealing with an appeal by review and sought to introduce extraneous issues and matters. I explained to him that this was not permissible. This is not a criticism of his approach but an explanation of the constraints in this case.

48. On behalf of the council, Mr Fozlay invited me to approach this part of the appeal as if no section 20 notice had been served at all. It was Mr McGregor's case that as a matter of fact, no notice was served on either Mrs Danvers-Russell or the other leaseholders and that there was no evidence to demonstrate otherwise. I do not need to determine that issue but did proceed on the basis that there was a wholesale failure to comply with section 20.

Ground 5 – the importance of "prejudice" in the Daejan test

49. On behalf of the council Mr Fozlay contended that the FTT had approached the question of reasonableness to dispense under section 20ZA on a far broader basis than permitted under *Daejan*. I was referred to paragraph 65 of the judgement in *Daejan* where Lord Neuberger said:

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

50. In this case Mr Fozlay submitted that Mrs Danvers-Russell had failed to demonstrate she would suffer any "relevant" prejudice in that she had not shown any disadvantage which she would suffer as a result of the grant of unconditional dispensation. In support of this contention he relied also on the remaining grounds of appeal which I deal with below.

51. In response, Mr McGregor's argued that the total failure of the landlords to consult and the subsequent failure of the roof works were sufficient to establish "relevant" prejudice. He referred to paragraph 45 of *Daejan* where it is said that:

> "45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirement, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with"

52. He said that there was evidence that the works had not successfully dealt with the leaks and he relied upon a statement provided by the first respondent which asserted that the works had indeed failed and that problems continued. He said therefore that prejudice could and should be inferred. It does seem to be correct that the works failed to resolve the problem of the leaks at the property. However, there are a number of difficulties with Mr McGregor's argument. Firstly, even if the works were ineffective there is no evidence that Mrs Danvers-Russell or other leaseholders suffered financial or other prejudice as a result. Secondly, the evidence was not considered by the FTT and it would not be appropriate for me to take that into account in this appeal with is being conducted by way of a review. Finally, it would also not be sensible for me to do as that would entail a consideration of evidence which would be more appropriately given at a hearing of a section 27A application. Even in the first respondent's statement there is an ambiguity whether the leaks concerned were caused by disrepair or by the conduct of the tenant in occupation of the relevant flat.

53. At the hearing Mr Fozlay argued that the reasonableness and payability of the cost of the works were indeed only suitable for determination at a section 27A hearing. I did ask whether the council would expect Mrs Russell-Danvers to take such proceedings and expressed the view (again) that this would be a disproportionate approach and that I would expect the council to consider whether the costs were in fact reasonable without resort to another Tribunal hearing. I also pointed out that on the documentation before me there was no evidence at all that a section 20B notice had been served on the leaseholders. The demand for payment by the council's contractors seemed to have been served more than 18 months before the service charge invoices were sent to the lessees. The very fact that Mrs Danvers-Russell was taken by surprise by the invoice in September 2018 would suggest that no section 20B notice had been served and that it is quite possible the costs were not payable in any event because of the limitation imposed by section 20B. Mr Fozlay could not deal with that question at the hearing and I would not have expected him

to be able to do so, but it is matter which the council should consider if payability remains in issue.

54. Mr McGregor also submitted that the facts of the *Daejan* case were very different from the facts in this case. In *Daejan* there was not a total failure to consult and the lessees were aware of the ambit and extent of the works and the anticipated costs. He said that *Daejan* provides guidance rather than setting rigid rules and he referred me to *Aster Communities v Kerry Chapman & Ors* [2020] UKUT 0177 (LC) at first instance where at paragraph 71, HHJ Steward Bridge observed that:

> "It is axiomatic that each case must be decided on its own particular facts. Moreover, the FTT should be guided, but not led, by the principles laid down in *Daejan*. I note what is said by Lord Neuberger at [41]
>
> > '…the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the [FTT's] exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further the circumstances in which a section 20ZA application is made could be almost infinitely various so any principles that can be derived should not be regarded as representing rigid rules.'"

55. This is clearly correct and the exercise of the FTT's power to dispense or to refuse to dispense under section 20ZA is governed simply by its determination of whether "it is reasonable" to dispense with the requirements. However, *Daejan* gives a direction of travel for the exercise of that discretion and a clear steer that where an FTT is unable to identify relevant prejudice, dispensation should be granted.

Ground 6 – the inability to budget

56. The first type of prejudice identified by the FTT was actual prejudice caused to Mrs Danvers-Russell by her inability to budget for the costs. The FTT said that "the Tribunal accepts the Third Respondent's submission that she suffered prejudice in the form of being unable to budget for the expense of the works. A section 20 notice provides a lessee not only with the opportunity to participate in a consultation process but also with an estimate of the likely cost…." That finding seems to have been based on Mrs Danvers-Russell's assertion that "…. I would have increased my monthly payments to my account to spread the costs. I do not have savings available to make large lump sums to meet bills. I have to budget."

57. However, in her response to the appeal Mrs Danvers-Russell stated that: "although the [FTT] decision referred to me being unable to budget for the cost … I did not put great importance on this so I do not agree with this point in the decision." At the hearing Mr. McGregor confirmed that no reliance was placed by Mrs Danvers-Russell on any inability to budget as causing prejudice. I therefore did not hear argument on the issue. However, I do not consider that the FTT can be criticised for its reliance on the statement that had been made by Mrs Danvers-Russell in the first instance proceedings.

Ground 7 – the alleged insufficiency of information.

58. The second basis for the FTT's decision was that Mrs Danvers-Russell had not been given an opportunity to make a case that there had been prejudice. At paragraph 13(c) of its decision the Tribunal said:

> "Perhaps most significant is that the process outlined by the Supreme Court only works if the lessee is given a genuine opportunity to make a case that there has been prejudice. That opportunity depends on having access to the necessary information. If a lessee did not know the relevant facts, it would be impossible for them to demonstrate any prejudice arising from them. In this case, the Third Respondent initiated email correspondence with the Applicant in 2018 asking for the relevant information. Two years later, in October 2021, the Applicant provided a schedule of the relevant works, on the basis of which they asserted that the Third Respondent had everything she needed. However, the Applicant has overlooked a vital aspect, namely why the works were initiated. The only information on this is in the section 20 notice which simply states, "Responsive repair works required." This implies that the relevant area was somehow in disrepair but the Applicant has failed to provide any details of this. The Third Respondent specifically asked for such information but she never received it. Therefore, due to the Applicant's failure to provide relevant information, she never had the opportunity to make her case."

59. Mr Fozlay referred to the consultation requirements applicable to this case which are at at paragraph 1 (2) of schedule 3 which require a landlord to:

"(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;"

60. He said that on the evidence before the FTT, it was clear that Mrs Russell-Danvers had sufficient information as follows:

Firstly, describing the works that were carried out:

(1) on the s20 Notice, under "Description of Work" it said: "Flat Roof Renewal – Strip out existing flat roof asphalt and underlay and lay 20 mm two coats work to deck and gutter on new isolating membrane. 13mm work to upstands" and

(2) a more detailed specification of the works was provided via email on 21 October 2021.

Secondly giving the Council's reasons for considering it necessary to carry out the works as:

(1) on the s20 Notice under "Reasons for carrying out works" it said "Responsive repair works required" and

(2) on the invoice, the job description said "[…] There May Be A Possible Leak Affecting Flat 1 And Possibly Also Flat 3" and

(3) in its email Mrs Danvers Russell, dated 21 October 2021, the council explained that the issue of the leak had been reported by a lessee and various inspections had been carried out and

Thirdly, in stating total expenditure (likely to be) incurred in connection to the works in the section 20 notices and the invoice

61. However, despite being able to identify all of that information, the difficulty for the council is that the section 20 notice was not served on Mrs Danvers-Russell at her correspondence address and was not served (if it was served at all) until the works were completed and payment demanded. Mrs Danvers-Russell was not given a copy of the notice until January 2019, nearly two years after the works had been carried out and after repeated requests. The rest of the information relied upon was not given until October 2021, four and a half years after the works were carried out.

62. Mr Fozlay had asked that the Upper Tribunal give guidance on the extent and quality of information that should be provided under the consultation requirements. I do not propose to give general guidance. As Lord Neuberger observed the circumstances in which a section 20ZA application is made could be almost infinitely various and I take the view that the sufficiency of information will vary from case to case.

63. In this case however, it is indisputable that there was a failure to provide the leaseholders with adequate information in advance of the costs being incurred as the section 20 notice was not served on them before the works were begun.

Ground 8 – the FTT gave excessive weight to the alleged delay by the council to provide the necessary information

64. At paragraph 13(d) of the Decision, the FTT said:
"Further, such information needs to provided within a reasonable time frame. The older any works are, the more difficult it will be for any expert to comment usefully on them. What information the Applicant did provide came a long time after the event."

65. At paragraph 11 of the FTT's Refusal of Permission to Appeal, the FTT said:

"The Applicant appears to have misunderstood the relevance of the delay in providing information to the Third Respondent. The delay was part of what denied the Third Respondent a genuine opportunity to make a case that there had been prejudice."

66. The council submitted that the FTT erred in finding there had been a delay and in support of that submission made detailed reference to correspondence between the parties following the service of the invoice on 26th September 2018. I do not propose to examine that correspondence in detail. There can be no doubt at all that there was a delay. The works were completed before the section 20 notice was served and Mrs Danvers-Russell did not

even receive a copy of that notice until nearly two years afterwards. The finding that "the older any works are, the more difficult it will be for any expert to comments usefully on them. What information the Applicant did provide came a long time after the event." Is wholly unobjectionable.

Discussion

67. Standing back and taking an overview of this case, there was a wholesale failure to comply with the section 20 process. The requisite notices were either not served at all or not served until after the works had been completed. The lessees were not informed that the costs had been incurred until about 18 months after they had been demanded by the contractor. Despite making inquiries of the council, Mrs Danvers-Russell was not provided with a copy of a section 20 notice until 2019, nearly two years after the works were carried out. She was also not provided with more detailed information until 2021. The Tribunal found that the Mrs Danvers-Russell suffered prejudice because she was unable to budget for the costs and that she had lost the opportunity of establishing prejudice because of the inadequacy of the information provided by the council and the delay in its provision.

68. As to the grounds of appeal, Ground 6 was not argued, and I leave that out of account in my consideration and it must be disregarded as a justification for the FTT's decision. Grounds 7 and 8 are rejected. I consider that the Tribunal was correct in its conclusions about the adequacy of the information provided to Mrs Danvers-Russell and about the impact of delay.

69. That leaves me with Ground 5. I bear in mind the observation of Lord Neuberger at paragraphs 67 and 68 of *Daejan* as follows:

> "67. As to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption said during the argument, if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice."

70. I have no doubt that Mrs Russell-Danvers is aggrieved about the way in which the issue of the cost of the works was handled by the council. She should have been notified about the works before they took place and she should have been provided with information about the works without having to enter into lengthy correspondence with the council. The council have specific duties under section 18-30 of the 1985 Act which have been disregarded.

71. However, there is no evidence of actual prejudice. The prejudice identified as a consequence of being unable to budget is disregarded and what is left is in my view insufficient. Even accepting that Mrs Danvers-Russell was hampered in demonstrating prejudice by delay, I consider that it was still incumbent upon her to show some type of loss. For example, if she had shown that she had been asked to pay additional service charges because the works needed to be re-done or that additional unnecessary works had caused her inconvenience then that might have amounted to relevant prejudice. Even then, it might have been reasonable to give the council dispensation but on conditions.

Decision

72. This had not been an easy decision as the council's failures to communicate with the leaseholders and its rather careless attitude to leasehold management have distracted from the main issue. On balance however, I have decided that the appeal must be allowed and unconditional dispensation from the requirements of section 20 of the 1985 Act is granted.

73. At the hearing Mr Fozlay said that the council did not propose to seek to recover its costs of the proceedings from the lessees and therefore the section 20C orders made by the FTT stand. Additionally, I make an order under section 20C of the 1985 Act in respect of the proceedings in the Upper Tribunal.

Judge: Siobhan McGrath 17 November 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.