UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – application for dispensation from consultation requirements in respect of works completed urgently – assessment of prejudice to leaseholders – appeal allowed – dispensation granted on conditions

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

BETWEEN:

MR CAMERON MARSHALL

Appellant

-and-

NORTHUMBERLAND & DURHAM PROPERTY TRUST LIMITED

Respondent

Kelvin Court,
40/42 Kensington Park Road,
London W11

Martin Rodger QC, Deputy Chamber President

16 February 2022

Royal Courts of Justice

Philip Marshall QC, instructed directly, for the appellant
Ms Kimberley Ziya, instructed by Guillaumes LLP, Solicitors, for the respondent

The following cases are referred to in this decision:

Aster Communities v Chapman [2021] EWCA Civ 660

Daejan Investments Ltd v Benson [2013] UKSC 14

Introduction

1. This appeal is against a decision of the First-Tier Tribunal, Property Chamber (the FTT) by which it granted the respondent landlord, Northumberland & Durham Property Trust Ltd, unconditional dispensation from the consultation requirements of section 20, Landlord and Tenant Act 1985 in respect of the replacement of two boilers and ancillary works at Kelvin Court, a block of 16 flats at 40/42 Kensington Park Road, London W11. The FTT granted the dispensation because it was satisfied that the respondent had started the consultation process and had kept the leaseholders of flats in the block informed until the works became sufficiently urgent that the respondent had had to carry them out without waiting for the consultation to be completed.

2. The appellant, Mr Cameron Marshall, is the leaseholder under a long lease of one of the flats in the block. His case is that he was not consulted by the respondent at all, and that dispensation ought to have been refused by the FTT in view of the prejudice caused to him by the respondent's failure to comply with the consultation requirements.

3. The respondent's appeal raises issues about the exercise of the statutory discretion to dispense with consultation in cases of urgency. Those issues were touched on by the Supreme Court in the leading case of *Daejan Investments Ltd v Benson* [2013] UKSC 14 (*"Daejan"*), and the FTT is frequently required to grapple with them.

4. At the hearing of the appeal the appellant was represented by Mr Philip Marshall QC, and the respondent was represented by Ms Kimberley Ziya. I am grateful to them both for their submissions.

The statutory provisions

5. Sections 18 to 23A, Landlord and Tenant Act 1985 ("the 1985 Act") comprise provisions intended to protect residential tenants from having to pay excessive, unreasonable, unexplained, or unexpected service charges. Sections 20 and 20ZA provide protection by requiring landlords (and others entitled to levy service charges) to consult with tenants before they incur the costs of certain qualifying works or enter into certain long term agreements for the provision of services for which a service charge will be payable.

6. The consultation requirements apply if the costs or estimated costs to be incurred in connection with the matters for which the service charge is payable exceed an "appropriate amount" set by regulations. The appropriate amount is the sum which results in the service charge contribution towards the cost of the relevant works required of any tenant being more than £250 (regulation 6, Service Charges (Consultation Requirements) (England) Regulations 2003) ("the 2003 Regulations"). For Kelvin Court, a block of 16 flats where each tenant contributes an equal proportion of the cost of works, the appropriate amount is therefore £4,000.

7. By sub-sections 20(1) and 21(6) and regulation 6 of the 2003 Regulations a landlord failing to comply with the consultation requirements will be unable to recover more than £250 from each of its tenants as their contribution towards the costs of the relevant works unless it

obtains a dispensation from the "appropriate tribunal". In England, the "appropriate tribunal" is the FTT.

8. The basis on which the appropriate tribunal is to exercise the power to dispense with the consultation requirements is provided for by section 20ZA(1), which states:

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

9. The consultation requirements themselves are prescribed by the 2003 Regulations (section 20ZA(4)). The requirements relevant to this appeal are in Part 2 of Schedule 4. Their effect was summarised by Lord Neuberger PSC in *Daejan,* at [12], as follows:

Stage 1: Notice of intention to do the works

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

Stage 2: Estimates

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

Stage 3: Notices about Estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

Daejan **and other guidance on exercising the power to dispense with consultation**

10. In *Daejan*, the Supreme Court considered the proper approach to an application for dispensation under section 20ZA. By a majority the Court concluded that securing compliance with the statutory consultation requirements was not an end in itself. Sections

20 and 20ZA were intended to reinforce, and to give practical effect to the twin purposes of section 19 which were to ensure that tenants are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.

11. Lord Neuberger gave the only speech in support of the majority view, with which Lord Clarke and Lord Sumption JJSC agreed. He pointed out, at [40], that section 20ZA provides little guidance on how the dispensing jurisdiction is to be exercised, other than that the tribunal must be "satisfied that it is reasonable to do so". He continued, at [41]:

> "However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."

12. Having identified the purpose of the consultation provisions as being the protection of tenants from (i) paying for inappropriate works or (ii) paying more than would be appropriate, Lord Neuberger explained, at [44]-[45], that the issue on which tribunals should focus when determining an application under section 20ZA(1) was "the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements". If "the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements" dispensation should normally be granted, because, "in such a case the tenants would be in precisely the position that the legislation intended them to be – i.e. as if the requirements had been complied with".

13. Lord Neuberger considered, at [46]-[47], that it would not be right to focus on the seriousness of the breach of the consultation requirements; the only relevance of the extent of the landlord's oversight was "in relation to the prejudice it causes". The overarching question was not whether the landlord had acted reasonably but was whether the tribunal was satisfied that it was reasonable to dispense with compliance.

14. In assessing the prejudice to the tenants if dispensation was granted Lord Neuberger explained, at [65], that it was necessary to take account only of the sort of prejudice which section 20 was intended to protect against:

> "… 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."

15. The burden of identifying relevant prejudice would fall on the tenants, but this should not give rise to great difficulties because, as Lord Neuberger explained at [67], "the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically" (at that time the appropriate tribunal was the LVT). He continued, at [68]:

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

16. Lord Neuberger considered the issue of urgency when discussing whether a tribunal must simply choose whether to dispense with the consultation requirements or to refuse to do so, or whether it could instead grant a dispensation on conditions. He concluded that the jurisdiction could be exercised on conditions, and said this, at [56]:

> "More detailed consideration of the circumstances in which the jurisdiction can be invoked confirms this conclusion. It is clear that a landlord may ask for a dispensation in advance. The most obvious cases would be where it was necessary to carry out some works very urgently, or where it only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the requirements on terms which required the landlord, for instance, (i) to convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) 5 days instead of 30 days for the tenants to reply."

17. One such condition of dispensation could be to require that the landlord compensate the tenants for any costs they may have incurred in connection with the application under section 20ZA. At [64], Lord Neuberger considered that a landlord seeking dispensation was in a similar position to a party seeking relief from forfeiture, in that they were "claiming what can be characterised as an indulgence from a tribunal at the expense of another party":

> "Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence."

18. Summarising his conclusions, at [71], Lord Neuberger said that:

> "Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as

> service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the requirements have been satisfied, and they will not be getting something of a windfall."

19. Since the FTT issued its decision in this case further relevant guidance on the operation of sections 20 and 20ZA has been provided by the Court of Appeal in *Aster Communities v Chapman* [2021] EWCA Civ 660. In particular, at [44], Newey LJ rejected an argument on behalf of a landlord seeking dispensation that each tenant should be required to show how they would have acted differently if proper consultation had taken place:

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

The facts

20. The leases of flats at Kelvin Court are in a standard form and include, at clause 3(f), a covenant by the landlord to use its best endeavours to provide hot water for heating to the flats from October to April each year and to provide a reasonable supply of hot water for domestic use throughout the year, in each case through the existing apparatus and hot water system. The landlord is entitled to recover from each tenant 7% of the expenses and outgoings identified in the third schedule, amongst which is the expense of periodically inspecting, maintaining, repairing and where necessary replacing the whole of the boilers and other plant and machinery for the supply of hot water to the building.

21. In 2009 the respondent refurbished the main boiler plant room serving the building, replacing the boilers, pumps, pipework and controls. Some elements of earlier installations, probably dating from the 1960s or 1970s, remained. The new installation consisted of three gas fired central heating boilers with a combined maximum heat output of 300kW.

22. In January 2019 the respondent appointed engineering consultants, Integrated Design Associates Limited ("IDA"), to advise following a failure of the heating and hot water system. IDA delivered a comprehensive condition survey and recommendations on 6 February 2019. They reported that only boiler No. 3 was fully operational, and that the master boiler, No. 1, was operating at half capacity and boiler No. 2 was not operating at all. Only 150 kW of capacity was available, which was 50% of the maximum design capacity and less than was required to support the full load of the heating installations. IDA also advised that, contrary to the manufacturers' specifications, the three boilers had been

installed and operated with an open vent; this had caused internal corrosion on the heat exchangers and leaks in the system resulting in power supply failures. The damage was irreversible and all three boilers would need to be replaced. IDA also recommended that the plant for generating domestic hot water be replaced as it dated from the 1960s and presented a legionella risk.

23. IDA suggested that major works, including replacement of all three boilers, be undertaken at the earliest opportunity as the existing system could fail without warning. In the short term boiler No. 2 should be replaced with an equivalent model to maintain heating and hot water until consultation could be undertaken regarding longer term works to replace the remaining plant (including both remaining boilers). IDA suggested that the first phase could be completed by the end of April 2019 if the work was authorised immediately and consultation with tenants was not required. The second more substantial phase of work could follow during the summer months. In an indicative programme of works IDA allowed twenty-eight days for consultation on the second phase of works which it suggested could be completed by 14 August 2019. The suggested budget cost for the phase 1 work was £28,800, and for the phase 2 work it was £86,152, plus IDA's fees of 11% of the cost of works.

24. If the respondent wished to be sure of recovering the cost of the works through the service charge IDA's indicative timetable was unrealistic. The minimum consultation period for each phase of the works was three months, not twenty-eight days, so even if the recommendation was adopted immediately and the design and consultation on both phases proceeded in tandem (which was not what IDA suggested) the full programme of work could not have been completed before the beginning of winter. The best that could have been achieved without an application for dispensation from consultation was for phase 1 to be completed in 2019 with phase 2 to follow during the summer of 2020.

25. Although Mr Marshall QC suggested that no steps were taken until a second boiler failed entirely in June 2019 the documents suggest that some immediate remedial work was undertaken and that Ms Brindell of D&G Block Management ("D&G"), the respondent's managing agent, sought two quotes for the phase 1 works in March 2019. One contractor responded with a quote which was close to IDA's budget figure. Statutory consultation was undertaken in July and September by which time two more tenders had been obtained. A new 100 Kw Ideal Evomax boiler was supplied and installed by the lowest tenderer, N. Carr Engineering Ltd ("NCE"), in November 2019 at a cost of £6,916 plus VAT using a less expensive boiler than originally specified.

26. The appellant completed the purchase of the lease of his flat on 20 December 2019, after the phase 1 work had been carried out. Pre-contract enquiries had previously been made on his behalf and were answered by D&G. In response to a question about section 20 works proposed within the next 2 years he was informed that remedial boiler repairs were due to take place, that there was £20,000 in a reserve fund for major works, and that any additional funds which were required would be collected under the terms of the lease. Copies of the section 20 consultation notices which had previously been served were said to be enclosed with the response. Mr Marshall QC suggested that the information provided by D&G was misleading or incomplete, but I do not think that is a fair criticism. Work to the boilers was already in train when the response was given on 14 October, and further work was

anticipated. The section 20 notices confirmed the respondent's intention to replace all three boilers in two phases.

27. Notice of the appellant's acquisition of the lease was given to D&G on 7 January 2020. Regrettably the agents did not act on that information as they should have done by adding the appellant to future communications intended for leaseholders. Whether because of some direction from their client, or because of a misconception of their own, the agents believed they could not or should not amend their own records to note that the appellant was now the leaseholder until the respondent had approved or acknowledged the assignment of the lease, despite the fact that the assignment was not conditional on any such approval. That error was compounded by the respondent's own delay in acknowledging receipt of the notice of transfer. On 22 January the respondent requested a registration fee of £150 which the appellant refused to pay because the figure specified in the lease was only £10. It was not until 24 February that D&G received a copy of the notice of transfer receipted by their own client and felt able to begin dealing with the appellant. Even then the appellant's name and contact details were not added to the agent's database and he was not finally included as an addressee in emails intended for all leaseholders until 6 April.

28. Important information was communicated to the other tenants in the building before the appellant's interest was finally recognised. D&G notified leaseholders other than the appellant by email on 27 January that the two original boilers were now to be replaced. On 19 February a stage 1 consultation notice was served. Observations on the proposal to install new boilers and associated works and contractor nominations were invited by 25 March. Access to individual flats was also sought to enable chemical disinfection of hot and cold-water pipework to mitigate the risk of bacterial growth associated with inadequate hot water temperature.

29. On 20 February, the day after the stage 1 consultation notice was given, NCE were called to the building to carry out emergency repairs. They found that wiring associated with the master boiler No.1 had burnt out causing the controls on the remaining boilers to be disabled. Boiler No.1 was decommissioned and made safe by the engineers. The only operational boiler providing hot water and heating was now the new boiler installed in 2019.

30. On 21 February IDA advised the respondent that the situation was critical as limited heating was being provided and there was now no backup for the new boiler in the event that it failed. They recommended that the full refurbishment of the plant be pushed forward.

31. As the supply of hot water to the building became more tepid the presence of legionella bacteria was detected on 27 February. On 17 March Ms Brindell sent an email to all tenants, other than the appellant, informing them that to improve water quality a second new boiler was to be installed urgently.

32. In an email to all leaseholders on 3 April Ms Brindell referred to the ongoing section 20 consultation exercise and explained that it was no longer possible to delay placing a contract for a period of months. The work had been simplified and a cost proposal had been provided by "the regular boiler engineers". This was a reference to a quotation provided by NCE on 27 March 2020 to decommission the two remaining original boilers and install a single new

boiler, linking it to the 2019 boiler, at a cost of £15,169 plus VAT. Tenants were informed that the respondent's consultants had advised that the quote was reasonable and competitive and that the scope of the works was appropriate. Installation of the new boiler would commence on 13 April.

33. A formal stage 3 consultation notice was attached to Ms Brindell's email of 3 April but she explained that it was sent "as a matter of course" and that the respondent intended to apply to the FTT for dispensation. The notice stated that no contractor nominations had been received and that the respondent considered the works to be necessary to avoid the total failure of the boiler equipment, to mitigate the risk of legionella and fire and to ensure a continued supply of heating and hot water. The notice was in a standard form and invited observations on the tender by 8 May, although it was clear from the body of the email that the work would have been completed by then.

34. On 6 April Ms Brindell sent a further email to all leaseholders, attaching the same material and suggesting that due to warmer weather then being experienced the central heating could be turned off to improve the supply of hot water. There is a dispute whether this email was sent to Mr Marshall QC (who acted as point of contact for his son in all dealings concerning the flat). The FTT found that it had been sent, and the copy of the email provided by D&G shows Mr Marshall as one of the addressees. Mr Marshall says he did not receive it (although it is possible that it was diverted to a spam or junk folder as it was sent to him at his professional address as one of a number of recipients).

35. Mr Marshall QC first became aware of the communications about the boiler replacement works on 15 April when he received a "dear leaseholder" email from Ms Brindell confirming that the work had commenced. His almost immediate reply confirms that he had had no previous notice and cannot therefore have read the email of 6 April which had been addressed to him at the same address. He expressed himself to be extremely surprised and disappointed that none of the emails which he could now see in a chain going back to 27 January had previously been sent to him.

36. On 22 April Mr Marshall QC requested copies from D&G of the advice provided by IDA and others regarding the repair and replacement of the boilers; the scope of works sent out; the quotes received; and correspondence with NCE. Mr Marshall is correct to say that his request was ignored when Ms Brindell responded to his complaint and that it required a number of further requests and applications to the FTT before the material was disclosed.

The application for dispensation

37. On 18 June 2020 the respondent applied to the FTT pursuant to s.20ZA of the 1985 Act for a dispensation from the consultation requirements in respect of the works carried out in April.

38. In his response filed on 22 October 2020 the appellant opposed the application and requested disclosure of the material he had first asked for in April. He asked again on 29 October. On 10 November the FTT directed that it be produced. Some, but not all, of the material was provided on 18 November and it was only then that Mr Marshall QC had access to the report

prepared by IDA in February 2019 and other material relating to the quote submitted by NCE and comments made on it by IDA. At the request of the appellant a further order was made on 15 December and additional documents were then provided on 4 January 2021.

39. The explanation given by the respondent for its lack of transparency when asked to disclose documents was that the statutory consultation requirements did not require the disclosure of advice from professional consultants. That rather misses the point. The work had been carried out without the statutory consultation procedure having been complied with; the respondent was therefore in the position of a party claiming an indulgence, as Lord Neuberger put it in *Daejan*, and a more cooperative approach was called for.

40. Mr Marshall QC asked that the application for dispensation be considered at a hearing, and the FTT agreed. Apparently in response to this direction the respondent notified the tribunal that it no longer sought any relief against the appellant and that it was prepared to limit the service charge recovery from him to £250. It asked that the application be determined on paper and that dispensation be granted against all other leaseholders. The FTT correctly doubted that it could make such an order, although it later suggested (again correctly) that the parties were free to agree the terms on which the appellant would withdraw his objection.

41. Mr Marshall QC welcomed the respondent's proposal but in a supplementary statement of case filed on 27 November he asked that any dispensation granted should be conditional on the payment of costs incurred in responding to the application. The total sum incurred was said to be £2,200 plus VAT. This was later confirmed in evidence by the appellant in March 2021 when he explained that his father had been retained to act for him and was instructed by his solicitors. He exhibited a fee note which confirmed Mr Marshall QC's fees which by that stage had reached £5,640 (including VAT) and which he explained he was liable to pay.

42. The respondent's response to the appellant's original objection to dispensation pointed out that he had failed to identify any prejudice which he could be said to have suffered as a result of the failure of consultation. To meet that point the appellant filed additional evidence exhibiting advice he had received on 26 January 2021 from Mr Jan Wurszt, a director of Green Flame London, a firm of heating engineers. Having visited the site with Mr Carr of NCE, Mr Wurszt took issue with the scope, cost and quality of the works which NCE had carried out. I will refer to his criticisms in more detail later in this decision. In a third and final statement the appellant said that Green Flame had confirmed to him that they "could have attended to do the required work at short notice in early April 2020 without difficulty".

43. Green Flame's letter of 26 January 2021 was shown by the respondent to NCE, who responded in writing on 9 February. I will refer to this response in greater detail later but, in summary, Mr Carr explained that "there was a lot more work involved in fitting the second boiler due to the electrical and mechanical issues from the existing plant." All the work had been inspected by IDA and no issues had been reported.

44. By the time the application was heard by the FTT a further five leaseholders supported the position taken by the appellant, although none filed any evidence or made a positive case of their own.

The FTT's decision

45. In its decision the FTT first recorded the arguments presented by each party, interspersed with comments of its own. Some of those comments are relevant to the appellant's grounds of appeal.

46. At [18] to [20] of its decision the FTT referred to the respondent's offer partially to withdraw the application and to limit the appellant's contribution to the boiler works to £250. The FTT said that it was surprised that the matter had continued notwithstanding this "very generous gesture of goodwill by the applicant" and suggested "this case could have and indeed should have been resolved at the end of November 2020".

47. Referring to Green Flame's criticism of the design and cost of the work, the FTT pointed out at [23] that neither party had sought permission to rely on expert evidence. The appellant's argument that he had been prejudiced by the failure of consultation was "a new argument as far as the tribunal is concerned" and he "had in effect responded to criticisms of his failure to identify prejudice in his original written objection by using largely self-serving evidence." In any event, the FTT went on, the work had been carried out at the height of the coronavirus pandemic and while the leaseholders were not given the opportunity to seek other contractors to quote, "the position in reality was that it was very difficult to get anybody to quote".

48. The FTT then quoted paragraphs 42 to 74 of the speech of Lord Neuberger PSC in *Daejan*, verbatim and without commentary. It reached its own conclusion at [36] to [44].

49. The FTT first said that it could deal with the matter "in short order" because it had no doubt what the proper decision should be, namely:

> "The proper decision is that the applicants should be given dispensation unconditionally. The reason for this is the urgency of the situation that the applicants found themselves in in March 2020. They were planning to carry out a properly consulted programme of boiler replacements in the building. This was notified to Cameron Marshall before he purchased albeit in short form. The other leaseholders were notified of these proposals and indeed the consultation process had started."

50. The fact that Mr Marshall had not been identified as a new leaseholder and had not been consulted until 6 April was regrettable:

> "However, this cannot found an objection to dispensation. … It cannot be the case that one individual leaseholder can seek to object to this dispensation as a result of the fact that in his individual case he did not receive the relevant early-stage consultation letters. This would be entirely impractical to manage. *Daejan* did not envisage this situation neither did the other case [a reference to the decision of this Tribunal in *Aster Communities v Chapman* which had not yet been considered by the Court of Appeal]."

51. As for the appellant's argument about prejudice:

> "… it fails to engage with the urgency of the situation that faced the applicants at the relevant time…. The applicants were not simply facing the problems associated with unhappy leaseholders who had no heating and hot water they were also facing very real risks as a result of Legionella and a fire risk. Notwithstanding the urgency of the situation the applicants sought to keep the leaseholders informed…. Indeed, they had started the consultation process and the tribunal has found that the statement of estimates was sent to Mr Marshall QC on 6 April 2020. In the face of this urgent situation it is fanciful to suggest that the applicants should have done any more than what they did. Even if Cameron Marshall had had the opportunity to put forward Green Flame as a contractor and even if this would perhaps have affected the ultimate cost of the work this ignores the fact that by March the situation had changed and had become extremely urgent such that the applicants had to act in the way that any reasonable landlord would have acted."

52. The suggestion that dispensation should be conditional was also dismissed:

> "There is no need to impose conditions on the applicants in return for dispensation because they have effectively complied with the sort of conditions that the tribunal might impose i.e. starting the consultation process and keeping the leaseholders informed."

53. The FTT subsequently refused to grant permission to appeal. In its reasons for refusal it made additional observations on the evidence which are relied on by the appellant. In particular, it said this:

> "Further the respondent appears to be acting under the misguided impression that if the full consultation process had taken place, Green Flame would have carried out the work within a short period of time. That of course ignores the fact that the consultation process itself would have taken time and Green Flame would not have been able to carry out the work immediately without dispensation. In any event the evidence from Green Flame was self-serving. It was challenged by the contractor used by the applicant because it was critical of their own professional expertise. Green Flame were seeking to be appointed and had much to gain from being critical."

The grounds of appeal

54. The appellant was granted permission to appeal on fourteen separate grounds. On examination, some of these grounds are trivial or inconsequential, but others go directly to the approach adopted by the FTT, which is said to have been inconsistent with both *Daejan* and *Aster Communities*, and to its appreciation and treatment of the evidence. Rather than list the grounds of appeal I will first identify those which appear to me to be determinative of the appeal.

55. The appellant's first ground of appeal was that the FTT had made a fundamental error in not focussing on the issue of prejudice to the leaseholders. Rather than asking how far the leaseholders were prejudiced by the landlord's failure to comply with the consultation requirements as *Daejan* required, the FTT had determined that a dispensation should be granted because, in view of the urgency of the situation, the landlord had acted reasonably. It had, in effect, applied the approach which the Supreme Court in *Daejan* had decided was wrong in principle. Criticism was also made in the appellant's sixth and seventh grounds of appeal of the approach taken by the FTT to the issue of urgency.

56. The appellant's third ground of appeal was that the FTT had been wrong in principle to approach the application on the basis that failure to consult one leaseholder could not be a sufficient reason for refusing a dispensation. The Court of Appeal in *Aster Communities* had concluded that statutory consultation is a "group process" and that dispensation must be sought against tenants generally. Each tenant was entitled to rely on the possibility that if another tenant had been properly consulted the scope or cost of the works might have been limited.

57. The appellant's fourth and fifth grounds of appeal challenged the FTT's consideration of his case on prejudice. Rather than considering whether the leaseholders had put forward "a credible case of prejudice" and, if they had, then adopting the sympathetic approach indicated by Lord Neuberger in *Daejan* by "resolving in their favour any doubts as to whether the works would have cost less … if the tenants had been given a proper opportunity to make their points", the FTT had been positively unsympathetic and, in particular, had been dismissive of the evidence of Green Flame on unjustified procedural grounds and for reasons of fact which simply misunderstood the sequence of events and were wrong.

58. In response to these criticisms of the FTT's approach Ms Ziya submitted on behalf of the respondent, essentially, that the FTT had properly directed itself as to the correct approach and had been entitled to reach the conclusions it did on the evidence. In particular, it had referred throughout its account of the parties' submissions to the issue of prejudice. As for *Aster Communities* the FTT had not dismissed the possibility that prejudice shown by one leaseholder may be sufficient to justify a refusal of a dispensation applicable to all leaseholders, which was the point considered by the Court of Appeal. The FTT had decided that the appellant had not suffered any prejudice. As an expert tribunal it had been entitled critically to evaluate the material put before it and to conclude that it preferred the evidence relied on by the respondent.

Discussion

59. I have no doubt that the approach taken by the FTT was wrong in principle in three important respects.

60. The FTT's reasoning is contained in summary form at [36], which I have quoted in full in [49] above. It consists of three strands. First, and most importantly, the FTT considered that unconditional dispensation should be granted because of the urgency of the situation in which the respondent had found itself in March 2020. Secondly, the

respondent had intended to carry out a proper consultation exercise and the appellant had been made aware of its intention to replace the boilers before he purchased his lease. And thirdly, the other leaseholders had been notified of the proposals and the consultation exercise had begun. These three points were restated in the following paragraphs along with a number of other points, but none of those seems to me to have contributed to the reasoning underlying the FTT's "short order" determination at [36].

61. The question of prejudice to the leaseholders is missing from the FTT's analysis at [36]. Nor is it mentioned in the subsequent paragraphs. There is no doubt that the FTT was aware that prejudice was an important issue which it ought to consider as it is referred to in its explanation of each party's case. But despite recording the parties' submissions and repeating almost a third of the leading judgment in *Daejan,* at no point in the decision did the FTT formulate any direction for itself or identify in its own words the issues it needed to address in order to determine this case. Had it done so it would necessarily have included the issue of prejudice.

62. The FTT did not systematically identify the steps which the respondent had taken and those which it had omitted and for which it required dispensation. It did not ask itself in terms what was the consequence of those steps not having been complied with. It did not say whether it considered the appellant or any other leaseholder had been caused prejudice by the failure of consultation. Each of these is a serious omission. In this Tribunal's decision in *Aster Communities* ([2020] UKUT 177 (LC)) at [17], HH Judge Bridge explained that, after *Daejan*: "The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice". I agree with Mr Marshall QC's submission that the FTT did not adopt that approach.

63. The FTT's focus was on the urgency of the situation faced by the landlord. It clearly considered, as it said at [39], that by March "the situation had changed and had become extremely urgent such that the applicants had to act in the way that any responsible landlord would have acted". It may have considered this extreme urgency negated any prejudice which might have been caused.

64. Mr Marshall QC submitted that an absence of prejudice cannot be assumed simply because there is a need to undertake work urgently (by which I mean within too short a period to allow the full statutory procedure to be followed). I agree. A proper assessment is required of the consequences of failing to take the particular steps which have been omitted. It must of course be recognised that the landlord is likely to be under contractual or regulatory obligations to provide an essential service or to carry out works to make premises or service installations safe, as it was in this case. But such obligations are part of the background to the whole of the statutory regulation of service charges and cannot be a reason for disregarding the safeguards provided for leaseholders or granting blanket dispensation simply because work was urgent. If in this case the FTT concluded that any possible prejudice was negated by the need to carry out works urgently, it did not say so. But even if it is assumed that that was the FTT's unstated conclusion, I do not think it was in a position to make such an assessment, because it had not first considered what prejudice may have been caused or what, if anything could now be done to mitigate it.

65. I am satisfied that for these reasons the appellant is entitled to succeed on his first ground of appeal.

66. The second strand of the FTT's reasoning, after urgency, was that the respondent had intended to carry out a proper consultation exercise and the appellant had been made aware of its intention to replace the boilers before he purchased his lease. The first of those points refers to the stage 1 notice of intention given to leaseholders other than the appellant on 19 February 2020 (covering the whole of the intended summer programme of works) and possibly also to the notice of NCE's estimate (for more limited work) sent to all leaseholders on 3 April 2020; the second refers to the information provided to the appellant in answer to pre-contract enquiries given in October 2019.

67. The FTT obviously placed some weight on the fact that consultation had already begun. The only passage from *Daejan* which it identified as being of particular significance was at [56], where Lord Neuberger said that the most obvious example of a case where a landlord may need to ask for dispensation in advance was where it was necessary to carry out some works very urgently. In such a case the FTT could impose conditions reducing the statutory consultation periods as a condition of dispensation. That, the FTT considered, was effectively what the landlord had done by beginning and then aborting the consultation. I do not think that is a helpful way of analysing what happened in this case. The respondent did not make an urgent application to the FTT, as it could have done after Legionella was discovered in the period between 17 March, when leaseholders were told that it had decided to install one boiler urgently ahead of the main works to be carried out in the summer, and 3 April when the decision to proceed with NCE's quote appears to have been taken. It is not helpful to assume what directions the FTT might have given, or what conditions it might have imposed, when it was not asked. Moreover the suggestion that the respondent had already followed the sort of steps which the FTT might have laid down as a condition of granting dispensation on an expedited basis overlooks the fact that, whatever information had been supplied to other leaseholders, the appellant was not informed of the need for urgent work until, at the earliest, 6 April 2020, by which time it was too late for him to influence the course of events.

68. In view of the importance it placed on the fact that consultation had commenced before the need for urgency was appreciated, the FTT seems seriously to have underestimated the significance of the respondent's failure to include the appellant as one of the recipients of the stage 1 notice of intention sent on 19 February 2020. While I do not agree with Mr Marshall's complaint that the answers to pre-contract enquiries were misleading, I do agree that they are irrelevant to the issues in the respondent's application for dispensation. They did not describe the scope of the works in any detail and they gave no timescale other than that further work to the boilers was anticipated within two years. They were not in any sense a substitute for statutory consultation and they did nothing to mitigate any prejudice caused by its absence.

69. The stage 1 notice would have been a very important document if it had been sent to all leaseholders, especially if none of them had taken the opportunity to nominate a contractor by 25 March. But it can be of little significance in view of the respondent's refusal at that time to add the appellant to the list of those who needed to be consulted. The FTT needed to assess the prejudice caused by the steps which the respondent failed

to take (including its failure to inform the appellant); what it did instead was to award marks for the limited steps which the respondent did take.

70. *Aster Communities* was not a case in which only one leaseholder was left out of a consultation, or where, as in this case, different leaseholders were consulted to different extents. The decision of the Court of Appeal nevertheless emphasises the importance of giving every leaseholder the chance to have their views taken into account. The FTT had no opportunity to consider the Court of Appeal's decision (which had not yet been published) but its view, at [37], that the failure to consult one leaseholder "cannot found an objection to dispensation" is inconsistent with *Aster Communities* and represents a second error of principle on which the appeal must succeed.

71. The final ground of appeal which it is necessary to consider is the appellant's complaint that the FTT effectively ignored the views expressed by Mr Wurstz of Green Flame about the extent, cost and quality of the work undertaken by NCE. There seems little doubt that the FTT did not give weight to that material, because when it refused permission to appeal it said specifically that "evidence from either Green Flame or N Carr was not a matter that swayed the tribunal in any great direction".

72. The FTT gave a number of reasons for not attending more closely to the debate between Green Flame and NCE. First, it said that neither party had permission to rely on expert opinion evidence (permission to rely on such evidence is required by rule 19(2) of the FTT's procedural rules). The FTT's directions given on 2 October 2020 assumed that the application would be determined on paper, without a hearing, and it gave no direction for exchanges of evidence and no guidance to either party if they wished to refer in their submissions to advice they had received from experts. When the FTT later decided that the application should be determined at a hearing it gave no additional directions. Both parties had notice of the material on which the other wished to rely and there was no good reason why the FTT could not have dispensed with the formal requirement for permission or treated the evidence as evidence of fact (for example, as evidence of what Green Flame might have charged to do the same work).

73. The FTT's second reason for disregarding the views expressed by Mr Wurstz was that the evidence was "self-serving". It used that description in its main decision, at [23], and in its refusal of permission to appeal it explained what it had meant, namely, that "Green Flame were seeking to be appointed and had much to gain from being critical." That explanation was mistaken. The source of the FTT's misunderstanding is probably Green Flame's own letter of 26 January 2021, which contains an error in the narrative of that company's involvement; it is said that Mr Wurstz attended at Kelvin Court on 12 January 2020 to inspect the plant room, whereas he in fact attended a year later, on 12 January 2021. Thus, Green Flame inspected the boiler room and prepared their comments nine months after the work had been completed in April 2020. Its letter was a commentary on the work which had already been done and not an alternative tender. The FTT's characterisation of Mr Wurstz's views as self-serving was therefore not justified.

74. There is accordingly considerable force in the criticism made by Mr Marshall QC of the approach taken by the FTT to the evidence relied on by the appellant to demonstrate

prejudice. Applying the approach taken in Daejan, it was for the appellant to demonstrate "a credible case of prejudice". He sought to do so relying on a document which the FTT dismissed without proper justification. While the weight to be given to any evidence is a matter for the fact finding tribunal, an appellate tribunal can interfere with its conclusions if they have been arrived at based on a fundamental misunderstanding of the facts, as appears to have occurred here in respect of Mr Wurstz's letter. In my judgment the appellant is therefore also entitled to succeed on his fourth and fifth grounds of appeal.

75. In view of the conclusions I have reached so far it is not necessary for me to address the remaining grounds of appeal. For the reasons I have given I allow the appeal and set aside the FTT's decision.

76. Neither party suggested that, if I were to allow the appeal, I should remit the application for dispensation to the FTT for further consideration. The total sum in issue is modest (the difference between the £4,000 the respondent could collect without dispensation and the VAT inclusive cost of the works is less than £15,000) and is likely already to be exceeded by the costs incurred in the proceedings. The appellant does not oppose the grant of dispensation on appropriate terms and both parties made submissions in the course of the appeal on the conditions which could be imposed. Where, on an appeal, the Tribunal sets aside a decision of the FTT, section 12 of the Tribunals, Courts and Enforcement Act 2007 gives the Tribunal the power to re-make the decision and to make any decision which the FTT could make. That is clearly the most appropriate course to adopt in this case.

Re-making the decision

77. Mr Marshall QC asked that dispensation be granted only on the respondent satisfying three conditions: first, that the recoverable cost of the works be limited to the sum of £10,404 (£8,760 plus VAT) suggested by Green Flame as the proper cost of the works in January 2021; secondly, that certain fees be paid (the fee charged by Green Flame of £150 plus VAT; a fee for obtaining a transcript of the proceedings before the FTT; and his own professional fees charged up to the hearing before the FTT on 19 March 2021, totalling £4,700 plus VAT); and finally that the fees charged by the Tribunal in connection with the appeal be reimbursed or paid by the respondent.

78. Ms Ziya submitted that no relevant prejudice had been caused and that dispensation should be granted unconditionally. Any prejudice caused as a result of the failure of consultation should be balanced against the prejudice which would have been caused to the leaseholders if the work had not been undertaken urgently when it was. She also challenged the proposition that the work would have been done more cheaply, or that less work might have been done, if consultation had taken place. It was for the respondent to determine the scope of the work to be undertaken. It had had great difficulty in finding contractors to tender for work at the building and NCE was already familiar with the boilers at Kelvin Court as a result of its involvement in 2019. Ms Ziya suggested that it was unrealistic to suppose that a different firm, without that relevant background knowledge, could have done the same work at a lower cost with the urgency which had been required.

79. Before determining whether or on what condition it would be reasonable to dispense with the consultation requirements it is first necessary to identify the respects in which they were not complied with.

80. A stage 1 consultation notice was given to all but one of the leaseholders on 19 February which included the work in issue, as well as other work. No prospective contractor was nominated by any of those who received the notice. At stage 2, the respondent sought estimates for the work but it was able to obtain only one, from NCE, which meant that it was unable to comply fully with the requirement of stage 3 to supply details of at least two estimates. It did invite observations and notionally allowed a period of 30 days for these to be received, but the reality was that the decision had already been taken, and there was therefore a failure at stage 3 meaningfully to invite observations or to take account of any which might be received. As there was only one estimate and no other contractor had been nominated, there was no requirement to comply with stage 4.

81. The significant failure was the omission at stage 1 to give notice of the intended works to the appellant, making it impossible for him to nominate a contractor or express a view on the scope of the work. The fact that only one of those required to be consulted was missed out does not mean that the omission can be ignored, as is clear from *Aster Communities.* Although the respondent may have intended to follow the required procedure, its failure at the outset to give notice of its intentions to the appellant infected each of the subsequent steps it took.

82. What prejudice can be said to have been caused by the failure to comply fully with the consultation requirements?

83. When answering that question it is necessary to remember that it arises substantially because of the respondent's refusal to treat the appellant as a tenant, and to consult him accordingly, despite having had notice of his interest for six weeks by the time the stage 1 notice was given. In this case the respondent's need for dispensation is not simply a consequence of the urgency of the situation it found itself in. The most significant omission preceded the time when immediate action became required and it was due to the respondent's own failures of administration and misguided instructions to its managing agents. If any tenant is entitled to the sympathetic reception recommended by Lord Neuberger in *Daejan* it is surely one who has been consciously excluded from consultation, as was the appellant.

84. I can see no reason to doubt that, if Mr Marshall had been notified on 19 February of the respondent's intention to install new boilers and had been given the opportunity to nominate a contractor, his immediate reaction would have been very similar to his response in April when he did become aware of what was being proposed. On 15 April he questioned why he had not been informed of the impending works in answer to pre-contract enquiries. On 22 April he requested copies of the technical advice which the respondent had received and identified a number of issues concerning the work carried out in 2009, the wisdom of replacing one boiler as an interim measure in 2019, and the additional costs said to have been generated as a result of not obtaining competitive quotes for the whole package of works and additional fees for the managing agents. In short, he

wished to be fully informed and to have his views properly taken into account, and his approach would have been the same if he had been allowed to participate in the process more than six weeks earlier.

85. Nor is there any reason to think that Mr Marshall would have passed up the opportunity to nominate a contractor within the period of 30 days expiring on 25 March. When it became necessary for the appellant to obtain the advice of an engineer to respond to the charge that he had produced no evidence of prejudice (which was first made in the respondent's statement of case in reply dated 6 November 2021) Mr Marshall was able to identify Green Flame as suitably qualified and arrange for them to undertake an inspection on 12 January 2021. The statutory period of 30 days is intended to be sufficient to enable leaseholders to identify alternative contractors and it is reasonable to assume that Mr Marshall would have nominated Green Flame within that period if he had been given the chance. He might even have done so quite early in that period, perhaps even within one full working week, by 1 March.

86. The respondent had already been advised by its consultants, IDA, on 21 February that the new boiler installed in 2019 was now the only remaining operational boiler and that the situation had become "critical". Following consultations between D&G and IDA about the possibility of splitting the proposed programme of work and installing a single additional boiler, NCE was asked at the end of February to quote for that option. On 4 March Ms Brindell of B&G said that she hoped to receive that quote "very soon" but in the event it was not received until 27 March.

87. Against that background it can safely be assumed that Ms Brindell would have responded favourably to the nomination of Green Flame or another contractor by the appellant early in March. She would have been aware that the consultation requirements called for more than one quote to be obtained and that she was obliged to seek a quote from a potential contractor nominated by a tenant. She clearly wanted to expose NCE to a degree of competition and as can be seen from the fact that on 30 March she asked IDA if they could obtain another urgent comparable quote to compare with NCE's.

88. Almost four weeks elapsed between the earliest date on which a nomination might reasonably have been expected to be made by the appellant, which I take to be 1 March, and the date on which NCE provided its quote, 27 March. It is true, as Ms Ziya pointed out, that it was not always easy to find contractors willing to quote. A year earlier, when D&G sought quotes for the phase 1 works from at least two contractors, they had received only one. In July 2019 Mr Reading of IDA also indicated that most of the contractors he dealt with were not looking for further work at present or were too big to be interested in a job of that scale. It nevertheless seems to me to be perfectly possible that, had the appellant been given the opportunity to nominate a contractor, as he should have been, a contractor nominated by him would have been interested in the work and that two quotes would have been obtained by the end of March instead of the single quote which was actually procured. The prejudice which was the result of the failure to consult properly must therefore be assumed to be such prejudice as was caused by NCE carrying out the work without a second quote having been obtained.

89. The first national lockdown in response to the Coronavirus pandemic was announced on 23 March 2021 but there is nothing in the material put before the FTT or this Tribunal which suggests that public health restrictions delayed the commencement of the work. The restrictions which became law on 26 March did not prohibit essential work being carried out in residential buildings and did not prevent NCE from beginning work on 13 April and proceeding thereafter to complete the installation of the new boiler. There is no reason to assume that an alternative contractor would have been unable to undertake the same work within a similar time. The only positive evidence that Green Flame would have been able to do so consists of a statement by the appellant that he had been informed by the company (in March 2021) that they could have attended at short notice to do the required work in early April 2020. That evidence is very thin, but it cannot be ignored. Ms Brindell's request of IDA on 30 March that they try to obtain a further urgent quote suggests that she considered that a competent engineer would not only be able to provide one before it became impossible to wait any longer but would then also be able to carry out the work without delay.

90. What then would a quote provided by Mr Wurstz of Green Flame have said?

91. It is clear from the letter of 26 January 2021 that when Green Flame inspected the work undertaken by NCE its engineer took the view that less work should have been carried out and that it could have been done at a reduced cost. There were three limbs to that suggestion.

92. First, IDA's initial report of the installation in 2019 had explained that the three boilers installed in 2009 each provided two thirds of the anticipated heat load for the building, so that one boiler could provide backup in the event that another was to fail or be taken off line for maintenance. Mr Wurstz commented that IDA's report "indicates only 2 operational boilers were actually needed" and that in his view "two boilers with 100kw capacity that were operating efficiently ought to have no difficulty in supporting peak load".

93. Secondly, Mr Wurstz considered that the work carried out by NCE had been defective because they were said to have installed flow and return pipes and magna clean filters of the wrong size which meant there was an inadequate flow of water and the efficiency of the new boilers was reduced to approximately 60% of capacity. He recommended upgrading the pipes and magna cleaner filters from the original 22mm and 28mm to 35mm. He considered that this defect justified a discount of 20% on the cost of the work.

94. Thirdly, Mr Wurstz suggested that his company would have been able to carry out the work which was required at a cost of £8,670 plus VAT (that figure was based on NCE's charge for installing the single Evomax boiler in November 2019 plus an additional sum to cover a further flue, new port valve and pump).

95. In total, therefore, instead of NCE's charge of £15,169, Green Flame considered that the necessary work could have been carried out for £8,670 (plus VAT in each case).

96. The first issue raised by Mr Wurstz concerns the scope of the works. It is clear from *Daejan* that if the result of a proper consultation may have been the avoidance of

"unnecessary services" or "inappropriate work" a dispensation should not be granted in respect of the cost of those works or services. The question is therefore whether it is realistic to think that if in March 2020 Mr Wurstz had proposed to replace only one boiler his quotation would have been accepted. I am satisfied that such a proposal would not have been accepted, for the following reasons.

97. Mr Wurstz's interpretation of the findings of the IDA report of February 2018 which proposed the replacement of the boiler installed in 2009 was that the required capacity of the system was 200kW and that the provision of a third 100kW boiler was unnecessary. But that was clearly not the view taken by the author of the report, Mr Reading, nor had it been the approach adopted in 2009 when the previous boiler replacement had taken place.

98. The IDA report was a thorough document whose stated object was to identify "the most appropriate and practicable method to overcome the issues" which had caused the 2009 boilers to fail and to provide "both a short term and long term solution and achieve the most energy efficient solution to the problems identified". The report explained that, when installed, the three 2009 boilers could provide a total output of 300kW and had been configured to work as one energy source, with each boiler operating at below its full capacity. This enabled load and capacity to be maintained using two boilers if one should be unavailable because of maintenance or failure; it also avoided any one boiler being required to work at full capacity. Mr Reading's report described this approach to the design of the system as "that which we would have expected to have found in such an installation" and commented:

> "… we believe the original boiler load proportions identified are those which we would consider to be good design practice both at the time of the original design and specification, [and] in accordance with current good practice guidelines and the recommendations of the Chartered Institute of Building Services Engineers".

The report recommended "replacement boilers of equivalent size complete with redundant standby provisions". An alternative replacement proposal of relying on only two boilers was mentioned but rejected. It would require the separation of the heating and hot water systems and the provision of new independent gas water heaters; "this option would result in the need for only 2 heating boilers rather than 3" and would "offer a number of benefits" but "would not necessarily prove to be a cost effective solution".

99. When commenting on NCE's March 2020 quotation for the replacement of the second boiler Mr Reading specifically advised Ms Brindell that she should "ask the contractor to develop into the design the future installation of a 3rd boiler as this is necessary for there to be redundant capacity in the system to take over the load when a boiler is offline."

100. Mr Wurstz's letter of 26 January 2021 quoted part of the IDA report but did not refer to the statement that the three boiler arrangement was in accordance with current good practice, nor did he suggest that his preferred two boiler approach was compliant with CIBSE recommendations nor explain how it would allow for future maintenance requirements or boiler failure. In view of the advice received by the respondent from its consultant that

provision for a third boiler was both "necessary" and in accordance with the current good practice and CIBSE recommendations there seems to me to be no realistic prospect that a tender provided by Green Flame based on a two boiler solution would have been accepted.

101. Even if it could be said that a body of engineering opinion would have regarded two boilers as sufficient, that was clearly not the view of the respondent's advisers. The respondent was entitled to adopt a design which was likely to provide a higher quality of service to leaseholders and prolong the life of the new apparatus, rather than one which might have been cheaper in the short term. That principle had already been settled and there is no reason to think it would have been revisited, especially in the pressured circumstances of March and April 2020.

102. The second criticism raised by Mr Wurstz was that the NCE had used inappropriately sized flow and return pipes. Mr Marshall QC suggested that this complaint had not been addressed by NCE and ought to be accepted and the sum recoverable for the work limited as a result. I reject that submission, for two reasons.

103. First, as Mr Carr pointed out in his response to Green Flame's letter, the work was inspected by IDA after it was completed and no issue of incorrect sizing of pipes was reported. Of course, that does not exclude the possibility that Mr Wurstz's criticism is justified, but it is relevant to determining whether a dispensation ought reasonably to be granted.

104. Secondly, this issue does not go to the scope of the work but to their quality, and whether they have been carried out to a reasonable standard. Proper consultation with the appellant, and the opportunity for him to propose an additional contractor, would not have avoided the risk of poor workmanship in the installation of the new boiler (if that is what it is). That is highly relevant when considering on what terms dispensation ought to be granted. As Lord Neuberger explained in *Daejan* at [65] "the only disadvantage of which they [the tenants] 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". I do not intend to suggest that poor workmanship is irrelevant to dispensation, but there must be some basis on which it can be suggested that proper consultation might have avoided it. If, for example, proper consultation would have elicited information that the landlord's proposed contractor was not properly qualified or had a record of providing poor quality work I can see that that might justify a refusal of dispensation, but the suggested performance issue in this case is quite different.

105. The only possible connection between the respondent's failure to consult properly and the quality of the work carried out by NCE is that had an additional estimate been obtained and Green Flame been awarded the contract, the suggested error might have been avoided altogether. But, having concluded that an estimate provided by Mr Wurstz would have been rejected because it would have proposed doing less work than the respondent's consultant considered necessary, any tenuous connection between the failure to consult and the quality of the work undertaken is severed.

106. Mr Marshall QC submitted that the sympathetic approach directed by Daejan meant that any uncertainty about the quality of the work should be resolved in the appellant's favour, but

for the second of the reasons I have just given I do not consider that is correct in principle. It would be unsatisfactory to resolve this issue on the basis of identifying where the burden of proof lay and I am satisfied that it is not necessary to do so. Proper consultation would not have resulted in a different contractor being appointed, or different work being done; there is therefore no need to determine at this stage whether the suggested deficiencies in the quality of the work were real or illusory. If the appellant considers that there is substance in the complaint that poor quality work was carried out by NCE which ought to result in a reduction in the cost charged to leaseholders, that point can be made in a separate application under section 27A, 1985 Act, challenging the amount of the service charge.

107. I should add that Mr Marshall QC's suggestion that there had been no answer to the complaint about the size of the pipes used in the new installation is not necessarily correct. In his letter answering Mr Wurstz's criticisms Mr Carr explained that it had been necessary to adapt the existing manifold to accommodate the new boiler. The manifold connections had been 22mm, but he had combined the two flows and two returns into one and added an extra pump to help with performance. I take this part of Mr Carr's response to be his answer to Mr Wurstz's criticism about the size of the flow and return pipes and I understand Mr Carr's point to be that the sizing of the pipes was dictated by those parts of the system which (for the time being at least) were not being replaced. Whether my understanding is correct, and if it is, whether Mr Carr's point is an answer to Mr Wurstz's complaint, is not something which is possible to resolve on the basis of the very limited material relied on by the parties.

108. The third of Mr Wurstz's criticisms concerns the cost of the works. The estimate provided by NCE was for work to install one new boiler and included the cost of materials at £5,996, electrical works at £3,651, and engineers' labour at £5,040. The engineers' work would take 5 days to complete and the electrical work two and a half days. In the event, NCE also rebuilt and reinstalled boiler No. 3 using parts from two of the original boilers.

109. In his letter of 26 January 2022 Mr Wurstz said that the installation of one new boiler, an additional flue, a new port valve and pump should not have cost more than £8,670. There are two difficulties with that proposition. The first is that it does not take account of all of the work carried out by NCE. The second is that Mr Wurstz did not suggest that NCE's charges were generally unreasonable or expensive; on the contrary, he based his own estimated charges for installing a single boiler on NCE's 2019 charge for the same work. It is also notable that NCE's tender for the installation of the previous boiler in 2019 was less than half of the other tender notified to leaseholders as part of the section 20 consultations in September that year. Those two points provide some confidence that leaseholders are unlikely to have been charged more than was reasonable at least for the part of the work which Green Flame considered was necessary.

110. When NCE's estimate of 27 March 2020 was reviewed by Mr Reading of IDA he raised a number of points concerning the cost of the works, using the 2009 work as a comparator. It appeared to him that the cost of boiler materials, pipework, electrical work and engineer's labour were all higher than he would have expected. He recommended that NCE be asked to explain and provide a more detailed breakdown, and on 1 April Mr Carr responded to the request. He described the work in greater detail than he had in his original quotation and explained that the cost was considerably higher due to the amount of additional work involved. When the previous boiler had been installed in 2019 it had been intended as a

backup and had not necessitated rewiring of all three boilers. This time it would be necessary to make one of the new boilers the lead boiler, which required work to the control panel. Ms Brindell also reported that Mr Carr had explained to her that the boiler installed in 2019 was no longer available and that the quotation included "the next model" (which I assume meant a more expensive model).

111. IDA gave further advice on 2 April. Mr Reading had by now been admitted to hospital suffering from Coronavirus and his fellow director (also a Mr Reading) was advising. He was satisfied with Mr Carr's further explanation of the higher cost of works which, he said, "now appear fair and reasonable".

112. In his response to Mr Wurstz's criticisms Mr Carr provided further details of the work actually carried out. It had included rebuilding boiler No. 3 and "replacing a lot of parts", decommissioning the control panel and rewiring it to make boiler No. 3 the master boiler, decommissioning the whole of the wiring in the plant room and rewiring with new isolators for each of the boilers. In summary, he said, "there was a lot more work involved in fitting the second boiler due to the electrical and mechanical issues from the existing plant".

113. I have already concluded that an opportunity for Green Flame to tender for the work would not have resulted in their being appointed to carry it out. I nevertheless take at face value the suggestion that a tender would have been prepared by Mr Wurstz covering work comparable to that done in 2019 at a cost of £8,670. That tender would not have been accepted for the reasons I have given, but it would have put the respondent's advisers in a stronger bargaining position with NCE. As it was, at the beginning of April 2020 they faced an urgent situation and had only one contractor offering to do the work at what initially at least appeared to them be a surprisingly high cost. It seems to me to be quite likely that a quotation at a significantly lower figure (even if it is partly explained by a lesser amount of work) would have enabled Ms Brindell to negotiate down the price agreed with NCE. I do not think the difference would have been as much as Green Flame suggested, because NCE proposed to carry out additional work associated with the rebuilding of boiler No. 3 and the electrical work, and because the cost of materials seems likely to have been higher than the 2019 figure relied on by Mr Wurstz as his comparator. For the necessarily inexact purpose of determining the terms on which dispensation should reasonably be granted I will assume that, in the more competitive environment which proper consultation may have created, a price of £13,000 plus VAT might realistically have been negotiated (representing a reduction of about 15%).

114. The grant of a dispensation should therefore be conditional on the respondent not seeking to include more than £13,000 (plus VAT) as the cost to be recovered from the leaseholders in respect of the work undertaken by NCE in April 2020.

115. Dispensation should also be conditional on the payment by the respondent of the costs reasonably incurred by the appellant. The FTT was satisfied that Mr Marshall QC was instructed to represent his son and had rendered a fee note to his solicitors for £4,700 plus VAT. The charging rate shown in that fee note is a modest one and much of the work undertaken referred to the preparation of documents, including in relation to disclosure. Having put the appellant to the expense of applications for disclosure it is appropriate that

money paid out should be reimbursed, including the cost of representation at the hearing on 19 March (Mr Marshall QC did not ask for reimbursement of any costs of the appeal other than fees paid to the Tribunal). I agree with Ms Ziya that the cost of a transcript of the proceedings before the FTT ought not to be made a condition of dispensation.

Disposal

116. For these reasons the appeal is allowed and the decision of the FTT is set aside. I am satisfied that in respect of contributions by the leaseholders of Kelvin Court to the work carried out by NCE in April 2020 it is reasonable to dispense with the statutory consultation requirements on terms. Those terms are that:

    1. The relevant costs to be reclaimed through the service charge should be limited to £13,000 plus VAT.

    2. The respondent should reimburse the sum of £150 plus VAT paid by the appellant to Green Flame and £4,700 plus VAT paid to Mr Marshall QC, in each case within 14 days of receiving a receipted copy of the invoice or fee note confirming payment by the appellant.

    3. The respondent should reimburse the fees paid by the appellant to the Tribunal of £495.

117. I will also direct that the hearing fee for the appeal should be paid by the respondent, rather than by the appellant.

Martin Rodger QC

Deputy Chamber President

28 March 2022

Right of appeal

Any party to this case 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.