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

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| **Case reference** | **:** | **LON/00AY/LDC/2021/0152** |
| **Properties** | **:** | **Various residential leasehold properties at County Hall Apartments, 5 Chicheley Street, London, SE1 7PY** |
| **Applicants** | **:** | **(1) County Hall Management Company Limited**<br>**(2) County Hall Management Company (N&S) Limited**<br>**(3) County Hall Management Company (Courtyard) Limited** |
| **Representative** | **:** | **Naylor Solicitors LLP**<br>(ref: JRN/15)<br>(email: James@naylorllp.co.uk) |
| **Respondents** | **:** | **Long residential leaseholders of 605 residential flats together with car parking spaces** |
| **Interested Person** | **:** | **County Hall Freehold Limited** |
| **Representative** | **:** | **Taylor Wessing LLP** |
| **Type of application** | **:** | **To dispense with the requirement to consult leaseholders (made under s.20ZA Landlord and Tenant Act 1985)** |
| **Tribunal** | **:** | **(1) Judge Amran Vance**<br>**(2) Mr T Sennett** |
| **Date of Decision** | **:** | **28 October 2022** |

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**DECISION**

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## Description of hearing

The hearing of this matter took place on 19 September 2022 by remote video conferencing (HMCTS code: Remote: CVP). The Applicants provided a primary hearing bundle (1961 pages) and a supplementary bundle (29 pages), both in PDF format. References in square brackets and in bold below are to page numbers in the primary hearing bundle. The supplementary bundle contained copies of correspondence between the parties and the tribunal.

## Decision

1. We grant the Applicants dispensation from all of the consultation requirements imposed by s.20 of Landlord and Tenant Act 1985 in respect of works already carried out to replace water tanks in the subject building, together with associated works.

## Background

2. This is an application, brought under s.20ZA Landlord and Tenant Act 1985 ("the Act") seeking dispensation from the statutory consultation requirements imposed by s.20 of the Act. It is brought by County Hall Management Company Limited ("CHMCL"), County Hall Management Company (N&S) Limited ("N&S") and County Hall Management Company (Courtyard) Limited ("Courtyard"). CHMCL, N&S, and Courtyard are collectively referred to as ("the Management Companies").

3. County Hall Apartments ("the Apartments") is located in the former Greater London Council buildings in Lambeth. The freehold of the building is owned by County Hall Freehold Limited. It is a mixed-use estate, containing both the residential apartments and a number of commercial business premises on the ground floor.

4. The Apartments comprise 605 luxury residential flats, split between four blocks: North, South, East and West, linked by an underground car park. The North and South blocks are managed by N&S, which is a party to the leases of those blocks. The East and West blocks are managed by Courtyard, which is party to the leases of the East and West blocks. CHMCL is owned equally by N&S and Courtyard, and acts as an umbrella management company. The three companies operate together under a single joint board of directors, except in matters which arise that are specific to a particular block. All leaseholders of the Apartments are shareholders in the respective management company for their block.

5. The Applicants seeks dispensation from the statutory consultation requirements in relation to works to replace water tanks in the building and in relation to replacement of a fire escape. The works to replace the water tanks commenced in March 2020, and were completed in about February 2022, at a total cost of £1,046,586.45 **[657]**. The works to replace the fire escapes were also carried out during this period at a total cost of £73,430.51 **[659]**. We were told at the hearing that these figures are inclusive of VAT. None of the objecting leaseholders have made any

submissions regarding the replacement of the fire escape. Their focus has been entirely on the replacement of the water tanks and associated pipework.

6. The tribunal issued initial directions in respect of the dispensation on 25 June 2021, and further directions on 28 September 2021. After the further directions were issued, the leaseholders of 32 flats objected to the application, 14 of whom were represented by Bradys, solicitors.

7. A Case Management Hearing ("CMH") took place on 20 April 2022, by which point Bradys had stopped acting for the leaseholders it previously represented, and many leaseholders had withdrawn their objection to the application. Some of the leaseholders who withdrew their objections stated, when doing so, that they considered there had been a resolution of internal disputes between leaseholders and the Management Companies following a change of the directors of those Companies. As at the date of the final hearing on 19 September, the leaseholders who still maintained their objection to the application were as follows:

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| William Howe | 54 North Block |
| Anne and Mike Burke | 40 North Block |
| Jeanne Laffan | 109 South Block |
| Alexy Armitage | 246 North Block |
| Jayshika Manekporia | 35 North Block |
| Max Weiner and Parbartie Babs Weiner | 249 North Block |
| Michael Wilkinson | 110 South Block |
| Mr Anthony Hughes | 175 South Block |
| Ms Venetia Glavin | 192 South Block |

8. There appears to be no dispute between the parties as to the chronological and factual background set out in the following paragraphs.

9. On 23 May 2018, Hilson Moran ("HM") a company which provides engineering consultancy services, and which had been commissioned by CHMCL to advise on replacement options for the water tanks serving the building, produced a report **[1658]** in which it concluded, in the Executive Summary **[1659]**, that all of the tanks had exceeded their design lifespan. Although it was of the view that only the South Block tank had major defects, HM recommended that all the tanks be replaced because of the uncertainty as to when the other tanks would fail. HM estimated the approximate costs of replacing the tanks to be £293,000, plus VAT and design costs, but stated that those figures should be validated by a cost consultant.

10. On 25 July 2018, the cold water tank in the South Block failed, resulting in flooding to the basement area and the lift shaft **[45]**. In order to restore a water supply to the South Block, the tank to that block was fed by an supply from the North Block tanks, using temporary 'blue' pipes which remained in situ until the tanks were replaced.

11. The Board of CHMCL wrote to all leaseholders on 14 February 2019, giving an update as to recent developments at County Hall **[78]**which contained a one-line sentence indicating that works to replace the water tanks in the North and South Blocks would commence in 2019.

12. A second report was commissioned from HM. It's initial remit was to review the options for cold water storage serving the North and South Blocks but, in April 2019, this was expanded to include options for replacing the water tanks serving the East and West Blocks as well. In its subsequent report dated 5 April 2019 **[82]** HM identified nine options for addressing the water tank situation, each of which involved a different storage tank arrangement and pipework distribution system **[105]**. These nine options were ranked according to estimated cost, with the cheapest being to replace the tanks with a single tank and single pipework system (£145,000), and the most expensive being to replace all of the existing four tanks, keeping the current pipework distribution system (£255,000). In analysing each of the options, HM state that it had regard to:

    (a) whether the option would provide adequate water storage (four of the options would not);

    (b) whether it would reduce maintenance requirements, which it had identified in its Executive Summary as being made more difficult by the presence of six separate tanks and pump sets;

    (c) whether it would improve the resilience of the system; and

    (d) whether it would avoid disruption to residential areas.

13. Mr and Mrs Burke's position is that at this point HM's report should have been provided to leaseholders, and the s.20 consultation procedure initiated and completed. Instead , what occurred was that in May 2019 the Management Company boards convened and voted for option 2.2 in the second HM report, without any engagement at all with leaseholders. Option 2.2 was to replace the existing individual tanks to the blocks with two larger tanks, and with a ring main pipework distribution, at an estimated cost of £220,000.

14. On 29 May 2019, Henrietta Voake, a director of County Hall Freehold Limited confirmed, by email **[118]**, that the freeholder had no objection to the adoption of option 2.2, but that to preserve the integrity of the Estate, trenched pipework was required between the car park and the South Block, even though this would result in additional expense. Ms Voake said that this was considered necessary for aesthetic reasons, to ensure 'resilience', and to maintain the property values of the flats.

15. This issue of changes needed to the pipework had been highlighted at paragraph 6.4 of HM's second report, in which it stated that the existing arrangements, whereby each tank and pump set served separate blocks, meant that no cross connection of the water supply was possible if an emergency occurred and, for example, a tank failed. Both of HM's

suggested options 1 and 2 required a new system of pipework to be installed to allow for service to be maintained throughout the site in the event of such an emergency. At paragraph 6.4.5 of its report, three options were proposed as how the external pipe could cross from the Car Park to the South Block. These were:

(a) floor mounted pipework with steel covers, which was considered a cheap option, but vulnerable to heavy loads (estimated cost £5,000);

(b) high level pipework secured to a gantry which would be less noisy and less vulnerable to movement than floor mounted pipework (estimated cost £10,000); and

(c) trenched pipework, which was the most expensive option but which offered the best protection from mechanical damage and was not visible to residents (estimated cost £25,000).

16. A leaseholder meeting, including the AGMs of N&S and Courtyard took place on 19 June 2019. Minutes of that meeting **[120]** record that Ms Shabana Fardous, the CEO of CHMCL, provided confirmation to leaseholders that invitation to contractors to tender for the water tank works would be sent out in the following two weeks, and that the "programme" would run until the end of September.

17. HM issued a specification of works for the replacement of the tanks on 11 July 2019 **[157]** and on 17 July 2019, at a meeting of Management Companies, a decision was taken for the water tanks works to be sent out to tender.

18. Three contractors tendered for the works, and on 13 September 2019 HM produced a tender analysis report **[315]**. The initial costs tendered were as follows:

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| (a) Sowga | £1,207,570 |
| (b) Virtus Contracts Ltd | £750,603 |
| (c) E&B | £1,318,645 |

19. In its concluding remarks, HM recommended that given the scale of the project, and the costs differences between the received tenders, that all three bidders should be called in for interview to discuss their bids.

20. In an email dated 13 September 2019 **[328]**, Ms Fardous asked Barry Ellis at HM to clarify why the anticipated costs had increased so much. Mr Ellis responded on 1 October 2019 **[329]** saying that HM's initial report was a feasibility report, and not a detailed design. He identified the extensive pipework through the car park now under consideration; the uncertainty over Brexit, including the weak pound against the Euro; and the substantial increase in the prices of materials, as all contributing to the increased costs.

21. In the Autumn of 2019, a newsletter was sent to all leaseholders **[332]** in which it was said that initial tenders for the works had been received, and that "Instead of replacing the tanks on a like for like basis, a more robust approach is being adopted with a two-tank solution".

22. Minutes of a meeting that took place on 25 November 2019 **[334]** record that CHMCL wished to proceed to appoint Virtus to carry out the works.

23. On 5 December 2019, Virtus issued a contract sum analysis **[338]** in the sum of £965,898.90 exc. VAT, building regulations and district surveyor fees, and by letter dated 13 December 2019 CHMCL appointed Virtus to carry out the works **[337]**.

24. On or about 16 December 2019, a copy of CHMCL's Budget for 2020 was published **[341]**, and a copy uploaded to a residents' website portal. The document contains a single sentence about the water tank works in which it is said that a contractor had been appointed, with initial works already commenced, and completion due in March 2020. The statement about initial works having commenced clearly does not relate to the substantive works, because a pre-start meeting regarding the project did not take place until 14 January 2020, as evidenced by minutes of that meeting **[360]**.HM were appointed to project manage the works, details of its brief appearing in its letter to Ms Fardous dated 31 January 2020 **[366]**, and confirmation of its appointment given by letter from Ms Fardous dated 31 January 2020 **[372]**. It appears that works commenced shortly after this meeting, with the JCT contract between CHMCL and Virtus entered into on 24 February 2020 **[374]**.

25. By letter dated 26 March 2020, Virtus gave HM formal notification of delay to the progress of the works, caused by the announcement of the first UK Covid-19 lockdown on 23 March 2020. Minutes of a meeting between CHMCL, HM, and Virtus on 1 April 2020 show that Virtus had closed all its sites because of the lockdown, and that it had issued a claim for additional costs as a result of the delay to the project.

26. It appears that the first phase of the contract was completed in August 2020, with snagging taking place in September 2020. A pre-AGM Zoom meeting with leaseholders took place on 24 September 2020. The agenda and introduction to the AGM **[386]** contains one sentence about the progress of the water tank works in which it was simply stated that the tanks had been replaced, and new tanks and related equipment installed.

27. In her skeleton argument, Ms Bretherton KC, counsel for the Applicants states that completion of the entire project was delayed because some of the pipework needed to go through a basement/lightwell to enter the building. This required an application for retrospective planning approval which was made on 18 January 2021, and granted on 10 May 2021. We were informed at the hearing that practical completion of all works finally occurred on 11 February 2022.

## The Hearing

28. At the final hearing the Applicants were represented by Ms Bretherton . Also present for the Applicants were:

    (a) Mr Gopal Srinivasan, one of directors of CHMCL;

    (b) Mr Allan Craven, a principal Facilities Engineer at HM; and

    (c) Mr Stephen Marshall, a chartered engineer and expert witness for the Applicants.

29. As for the leaseholders, Mr and Mrs Burke were present, and made oral submissions to the tribunal, as did Mrs Weiner. Mr and Mrs Burke had some initial technical problems accessing the video hearing, but these were resolved, enabling the hearing to commence at 10.30 am. Mr and Mrs Weiner also experienced some technical issues with their microphone during the course of the hearing but these were resolved by them telephoning into the hearing whilst at the same time maintaining their video connection. We are satisfied that no procedural unfairness resulted from these technical issues.

30. The hearing bundle included witness statements from Mr Srinivasan **[1646]**; Mr Craven **[1651]**; and an expert report from Mr Marshall **[1716]**. We heard oral evidence from all three of these witnesses.

31. Also included in the bundle were witness statements from Ms Fardous **[43]** and Mr Christopher Baker, a chartered accountant and former director of CHMCL. We were informed that Ms Fardous is no longer employed by the Management Companies and Mr Baker is no longer a director. As such, neither of them attended the hearing for cross-examination, and Ms Bretherton invited us to give such evidential weight to their statements as we considered to be appropriate.

## The Law

32. Section 20 of the Act requires landlords to consult with tenants before they incur the costs of qualifying works, or enter into long term agreements for the provision of services for which a service charge will be payable. The consultation requirements apply if the costs in question will result in the service charge contribution of any tenant being more than £250 (regulation 6, Service Charges (Consultation Requirements) (England) Regulations 2003).

33. The consultation requirements relevant to this application are those set out in in Part 2 of Schedule 4 of those Regulations, which consist of four stages. In summary, stage 1 requires that notice of the intended works be given, stating the reasons for the works, and specifying how observations, and nominations for possible contractors, should be sent. The landlord must have regard to any observations received. Stage 2 obliges the landlord to seek estimates for the works, including from any

nominee identified by a tenant or residents association. Stage 3 concerns the provision by the landlord of a statement summarising the observations received, and its responses, together with two or more estimates, including any nominee's estimate. The statement must say where and when estimates may be inspected, and where and by when observations can be sent. Again, the landlord must have regard to such observations. At the final stage, stage 4, unless the chosen contractor is a nominee, or has submitted the lowest estimate, the landlord must, provide a statement to each tenant and the residents' association of its reasons, or specifying where and when such a statement may be inspected.

34. 20ZA(1) of the Act provides where an application is made to the tribunal for the grant of dispensation with all, or any of the consultation requirements, the tribunal may make such a determination if it satisfied that it is reasonable to dispense with the requirements.

35. The leading authority in relation to s.20ZA dispensation requests is *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 ("*Daejan*") in which the Supreme Court set out guidance as to the approach to be taken by a tribunal when considering such applications. This was to focus on the extent, if any, to which leaseholders were prejudiced in either paying for inappropriate works or paying more than would be appropriate, because of the failure of the landlord to comply with the consultation requirements. In his judgment, at [44-45] Lord Neuberger said as follows:

> "44. Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT [now the FTT] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
>
> 45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with."

36. At [46]-[47], he rejected the view that a dispensation should be refused solely because a landlord has seriously breached, or departed from, the consultation requirements. The requirements are, he said, a means to an end, and not the end itself. and that the end to which they are directed is the protection of tenants in relation to service charges. He said as follows at [46]:

> "After all, the Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them."

37. This tribunal's focus should not, therefore be on the seriousness of the breach of the consultation requirements, but on any prejudice caused by the breach. The overarching question is not whether the landlord had acted reasonably, but is whether the tribunal is satisfied that it is reasonable to dispense with compliance.

38. At [65- 69] Lord Neuberger set out what, in his judgment, was the correct approach to the identification of prejudice. He said that:

> "65 … 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."

39. He explained that "the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants" but that a landlord could scarcely complain if the tribunal viewed the tenants' arguments sympathetically [67]. The tribunal should be sympathetic to the tenants because it is the landlord that is in default of its statutory duty to the tenants, and who is therefore asking the tribunal to grant it a dispensation. The tribunal "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", but this does not mean that it 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". However, once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it [68].

40. Lord Neuberger also concluded that dispensation from the consultation requirements could be granted on terms [55], and that the tribunal had the power to impose a condition as to costs, for example that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1) [59].

41. Further guidance was provided by the Court of Appeal in *Aster Communities v Chapman* [2021] EWCA Civ 660. In his judgment, Newey LJ [42-46] said that where a landlord seeks dispensation from the consultation requirements against a group of tenants, if all of that group suffered prejudice because the failure to comply with the consultation process there was no reason why the FTT should be unable to make dispensation conditional on every tenant being compensated. Any reduction in the scope or cost of works that would have occurred if consultation had been carried out would have accrued to the benefit of each of the tenants, and so, if dispensation is to be granted against them all, the totality of the prejudice should be addressed. It was not

necessary for each tenant to show how they would have acted differently if proper consultation had taken place, where one of them had established a case of relevant prejudice.

42. In *Marshall v Northumberland and Durham Property Trust Ltd* [2022] UKUT 92 (LC) Martin Rodger QC, Deputy Chamber President of the Upper Tribunal concluded that it was reasonable to dispense with the consultation requirements where a boiler system required extra works. However, the landlord's failure to consult a leaseholder a resulted in it failing to obtain a quote from his suggested contractor and had, on the facts of that case, put the landlord in a weaker bargaining position so that the costs were higher than they would otherwise have been the case. In those circumstances, conditions were attached to the grant of dispensation, including the reimbursement of legal costs incurred in respect of the dispensation application.

## The Objecting Leaseholders' Case

43. After the tribunal issued its initial directions, many of the original objecting leaseholders returned an identically worded response to the tribunal **[577-656]** in which they argued that:

    (a) the works were neither urgent, nor performed as an emergency (the temporary water system having been in place for two years after the 25 July 2018 failure);

    (b) a like for like system, rather than an improvement, could have been installed at considerably less cost;

    (c) there had been a total lack of consultation and engagement with leaseholders;

    (d) the new system would be more expensive to replace than the old one

44. Mr Weiner, in his capacity as chair of the County Hall Owners and Residents Association provided the tribunal with some written objections **[598]** in which he said that there had been ample opportunity for the Board to consult with leaseholders regarding the works but, instead, the commissioning of reports from HM, the tendering exercise with contractors, and the appointment of Virtus had all been done "in secret". In his view, the temporary 'blue pipe fix' was working adequately, and there was no need to incur such large costs in replacing the tanks.

45. In the initial statement of case filed by Bradys **[603]** it was argued that leaseholders had been significantly prejudiced by the Applicants' failure to comply with the consultation requirements, because the works undertaken were inappropriate and had resulted in leaseholders being asked to pay more by way of contribution to those works than would have been the case if they had been appropriately consulted. It was said that had the leaseholders been given the opportunity to make

observations as to the proposed works, and also to nominate contractors to tender for the works, that the overall costs of the said works would have been substantially less and the scope of the works likely different.

46. Bradys also stated that if their clients had been consulted, they would have made the following observations:

    (a) removal of individual tanks to each block and replacing them with fewer but larger tanks linked by a dual pipe ring main system was not necessary in order to repair or replace the existing water tanks;

    (b) the works carried were not like for like replacement or repair;

    (c) the additional cost of removing the individual tanks to each block and replacing them with fewer but larger tanks, re-routing of pipework necessitated by this, and improvements such as new state of the art ultraviolet light water treatment, were not necessary.

47. Accompanying Bradys initial statement of case was a draft report compiled by Mr Burke in which he set out his observations as to the scope and costs of the works undertaken **[612]**. Mr Burke is a chartered quantity surveyor and a Fellow of the Royal Institute of Chartered Surveyors. He was also a board director of CHMCL between April 2016 to January 2019. Further representations were received from Mr and Mrs Burke in a letter to the tribunal dated 22 February 2022 **[1570]** and in his reply to submissions made by the Applicants **[1572]**.

48. As well as relying on Bradys' initial statement of case, Mr and Mrs Burke's made their own written submissions and Mr Burke gave oral evidence at the hearing. In summary, they contended that:

    (a) once the Management Companies were in possession of HM's 5 April 2019 report they should have initiated and completed the statutory consultation process instead of the board itself deciding to proceed with option 2.2;

    (b) if consultation had taken place, they would have suggested a like for like replacement, as this was a more cost effective solution, and a more appropriate response to an emergency situation. According to Mr Burke's calculation **[1576]** the costs of a like for like replacement would have been approximately £710,000;

    (c) some leaseholders may have suggested carrying out emergency works as needed, with works to tanks that did not need immediate replacement being addressed as part of the long-term planned maintenance programme for the building;

    (d) the board should have, but did not, instruct a construction costs consultant to validate the indicative costs estimates provided in the April report, as was recommended by HM. This would have enabled leaseholders to have a better understanding of the likely costs to be incurred;

(e) when tenders were received which were substantially in excess of the indicative figures provided by HM, the board should have consulted with leaseholders and invited their observations. There was ample time for the board to consult with leaseholders, both before receipt of the tenders, and afterwards;

(f) the costs incurred were excessively high for the works carried out and funding the works has depleted the service charge reserve fund;

(g) the decision to proceed with option 2.2 rather than a like for like replacement caused prejudice to leaseholders as it resulted in additional and unnecessary costs being incurred, together with likely excessive costs of ongoing maintenance and repair;

49. Mr and Mrs Weiner agree with Mr Burke's submissions and were particularly aggrieved with the absence of consultation with leaseholders. In Mrs Weiner's oral submission, leaseholders should have had the right to decide what works were to be carried out. Mrs Weiner was adamant that this disregard of the statutory consultation procedure should not reoccur in future.

**The Applicants' position**

50. The Applicants concede they did not take any steps in relation to the statutory consultation process which, in his oral evidence, Mr Srinivasan acknowledged was, with the benefit of hindsight, a mistake. He agreed that consultation should have taken place, and that only very limited information had been given to leaseholders in the newsletters and meetings referred to above. Ms Bretherton also acknowledged that the Applicants could have, but did not, make an urgent application to the tribunal seeking dispensation at a much earlier date than it did.

51. However, she emphasised that in light of *Daejan* and the authorities that followed, the relevant issue for the tribunal is what prejudice, if any, has been caused by the non-compliance with the statutory consultation requirements. In her submission, a credible case of relevant prejudice had not been established by the objecting leaseholders. She argued that it was clear from the evidence of Mr Baker, Ms Fardous, Mr Srinivasan, and Mr Craven that the Applicants had engaged in a careful tendering exercise, with appropriate and proper scrutiny given to the proposed works, and the costs of the works. In her view, it could not be said (to paraphrase Lord Neuberger in *Daejan*) that the extent, quality and cost of the works were affected by the failure to comply with the statutory requirements. The leaseholders are, she said, in same position that they would have been if consultation had taken place.

52. Ms Bretherton also pointed out that in the expert evidence of Mr Marshall, replacement of the water tanks was necessary **[1723]**; it was reasonable and prudent to replace them all at the same time; and on a cost/benefit analysis, option 2.2 was the appropriate option to pursue **[1725]**. The costs incurred were, she argued, proportionate and properly incurred. She also pointed out that HM's initial assessment was

that to replace on a like for like basis would have been the most expensive option for the Applicants to pursue.

**Reasons for decision**

53. The Applicants concede that they made no attempt to comply with the statutory consultation obligations imposed by the 1985 Act. Neither Mr Baker, nor Ms Fardous, suggest in their witness statements that they, or other members of the joint board of directors, were unaware of these obligations, and we find, on the balance of probabilities, that they were so aware. We conclude that the board made a deliberate decision not to follow the consultation requirements.

54. Mr Baker said at paragraph 11 of his witness statement that "the Board always likes to keep lessees up to date with what is happening". The evidence, however, suggests that the contrary was true, at least as far as these works are concerned. The 14 February 2019 board update referred to in paragraph 11 of Mr Baker's statement said no more than that the water tanks were going to be replaced. No information was provided to leaseholders as to the extent of the works, and whether the intention was to replace just the tank serving the South block, or more than one tank. Nothing was said about the likely cost or timescale for the works.

55. Nor does it appear that the detailed analysis set out in the April 2019 HM report was communicated to leaseholders. No reference to that report, or the recommendations made in it, appear in the minutes of the meeting held with leaseholders on 19 June 2019. The minutes just record that leaseholders were informed that invitations to tender were to be sent out to contractors, and that the works were expected to run until the end of September. When the tenders were analysed in September 2019, showing estimated costs far in excess of HM's initial expectations, there was, once again, no attempt to communicate this to leaseholders. All that they were told in the Autumn 2019 newsletter was that tenders had been received, and that instead of replacing the tanks on a like for like basis, a two-tank solution was to be pursued. Nor does there appear to have been any attempt to inform them about the delay in completion of phase 2 of the works due to the need to secure retrospective planning approval.

56. The Applicants complete disregard of their statutory consultation obligations regarding these works is obvious, and we have considerably sympathy with the criticisms levelled against them in this respect by the objecting leaseholders. Mr Srinivasan was quite right to concede that the consultation requirements should have been followed, but were not. As a consequence of this failure, leaseholders were deprived of the opportunity to make observations on the proposed works, to nominate alternative possible contractors, and to make observations on the landlord's choice of contractor.

57. These were serious breaches. However, as was made clear by Lord Neuberger in *Daejan* [45] a tribunal should not refuse dispensation solely because a landlord has breached the consultation requirements,

even where the breach is a serious one. Nor should a tribunal refuse dispensation because, as was suggested by some of the objecting leaseholders, the works carried out were not urgently required, or because there was sufficient time for consultation to have taken place. The issue on which the tribunal has to focus is the extent to which leaseholders have been prejudiced by the breaches of the requirements. On that issue, we agree with Ms Bretherton's submission that the objecting leaseholders have not established a case of relevant prejudice.

58. We agree with Mr and Mrs Burke that once the April 2019 HM report was available the joint board should have notified leaseholders of the proposed works, and started the formal statutory consultation process. It would also have been good practice for leaseholders to have been advised about the nine options proposed by HM, and the advantages and disadvantages of each option. The choice of which option to proceed with is something that could have usefully been discussed at a meeting with leaseholders, but was not.

59. However, as Lord Neuberger said in *Daejan* [46] the statutory consultation requirements "leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them". Therefore, whilst the requirements oblige the landlord to consult with leaseholders, and, amongst other matters, to have regard to observations received from them, they do not grant leaseholders a right of 'veto' over the works themselves as seemed to be suggested by Mrs Weiner.

60. It is suggested that leaseholders have been prejudiced because the works undertaken were inappropriate. We do not agree. In our assessment, there was a clear rational behind the decisions taken by the joint board regarding these works, who acted in accordance with the advice given to them by HM.

61. The objecting leaseholders have not suggested that the nine options identified in HM's report were inappropriate suggestions. Their position, as advanced by Mr Burke, is that the board chose the wrong option, and should have chosen a like for like replacement rather than option 2.2. However, Mr Burke's opinion that this would have been the most economical solution contrasts with that of HM which, in its April 2019 report, identified a like for like replacement as the most expensive option, a conclusion accepted by Mr Marshall in his report.

62. Mr Burke assessed that the likely costs of a like for like replacement would have amounted to £710,000 **[616]**. He arrived at that figure by taking figures budgeted for in the May 2018 HM report **[77]**, adding in a 10% "installation reserve", uplifting this by 4% as per the Building Cost Information Service price index over to 2020, and adding in consultants fees and contingencies at 10% each.

63. We do not consider Mr Burke's calculation to carry significant evidential weight for the following reasons. Firstly, his report does not constitute

expert evidence, and he is clearly not an independent witness. Secondly, his calculation is based on budgeted figures contained in the first HM report which were expressly stated to be indicative only, and which it suggested should be verified by a cost consultant prior to any works being carried out. Finally, the 4% uplift he applied may not reflect the true increase in the costs of labour and materials since Brexit. The Office of National Statistics published data for repair and maintenance output prices reproduced in Mr Marshall's report **[1727]** suggests a significantly higher increase than 4%. We prefer the expert evidence given by Mr Marshall who accepted HM's conclusion that a like for like replacement would have been the most expensive option to pursue.

64. HM also identified that unlike option 2.2, a disadvantage with like for like replacement is that it would not result in improved resilience or reduced maintenance costs. In section 8 of his report **[1726]**, Mr Marshall accepts HM's assessment, and concludes that a like for like replacement would have been "clearly sub-optimal" when compared to other options. He also concludes, in section 9, that option 2.2 was clearly either the best option, or a leading option.

65. We find, based on HM's assessment, and Mr Marshall's evidence, that a like for like replacement would not have achieved some of the key objectives considered desirable by HM, namely a reduction of maintenance requirements and the improved resilience in the system. We agree with Mr Marshall that the implementation of a ring main system had distinct advantages over maintaining the existing pipework distribution system. One advantage being that a ring main system allows for the isolation of a defective tank without the loss of the whole water supply. In addition, we accept that the reduction in the number of water tanks is likely to result in lower maintenance costs, as identified by HM, and accepted by Mr Marshall. With fewer tanks, there is likely to be less scope for mechanical failures to occur. Further, we agree that the pipework distribution type chosen, including the pipework installed between the car park and the South Block is likely to increase the resilience of the system, minimise noise, vibration and potential for disruption to residents and reduce future maintenance down time and associated costs by having a robust pipework system utilising stainless steel tubing that is readily accessible for inspection and repair.

66. We therefore reject the submission that leaseholders were prejudiced because the works undertaken were inappropriate, or inappropriate in extent. In our judgment:

    (a) the decision to replace the individual tanks to each block, rather than to just to repair the existing tanks, was a reasonable conclusion for the board to reach given: (i) HM's conclusion that all of the tanks had exceeded their design lifespan, a conclusion shared by Mr Marshall at para. 3.14 of his report **[1723]** referencing, in particular, the failure of two tanks (one catastrophically); and (ii) that this was the recommendation made by HM, a conclusion with which Mr Marshall agrees at para. 3.23 of his report **[1725]**.

(b) the nine options suggested by HM, which included like for like replacement, were all appropriate options for the joint board to consider;

(c) there were economies of scale in replacing all the tanks at the same time, as identified by Mr Marshall at para. 3.21 of his report **[1725]**, and whilst introducing ultraviolet light water treatment can be regarded as an improvement to the former system, given its role in protecting against legionnaires disease, this was not an inappropriate decision for the board to take;

(d) the solution chosen by the board, option 2.2, was a rational choice for it to make, and it was one that was cheaper, and which had distinct advantages over a like for like replacement, as described above. There is no evidence to support the assertion made by some of the objecting leaseholders that the new system will be more expensive to replace than the former one. We agree with Mr Marshall's assessment at para. 3.26 of his report that option 2.2 was chosen on the basis of a cost/benefit analysis, and not on cost alone.

67. Nor do we agree with the suggestion that leaseholders have been prejudiced by being asked to pay more by way of contribution towards the costs of the works carried out than would have been the case if consultation had occurred. Whilst it is correct that the actual costs incurred were substantially in excess of the initial estimate given by HM, that estimate was an only an indicative one, and did not include the substantial cost that was subsequently incurred in respect of the pipework installation. There then followed what appears to us to be a rigorous tendering exercise, one which has not been criticised by leaseholders, and which involved recognised firms within the field of mechanical engineering. This resulted in three contractors tendering for the works, whose tenders were analysed very thoroughly by HM in its tender analysis report **[315]**, and the lowest tender subsequently accepted.

68. At para. 23 of his witness statement **[34]** Mr Baker said that on 26 September 2019, Mr Bryan of HM attended a meeting with five directors from the joint board at which he was asked to explain the increase in costs. Mr Baker's evidence is that at that meeting he expressed his "serious concern as to why the estimated cost had increased so much" and that ways must be found to "mitigate the cost". He stated that Mr Bryan was "rigorously challenged" at that meeting. We bear in mind that Mr Baker did not attend the hearing, and so could not be cross-examined on his evidence. As such, we give his statement limited evidential weight. However, his evidence in this respect has not been countered by the objecting respondents, and Mr Ellis's letter of 1 October 2019 to Ms Fardous **[329]** suggests that the board did indeed put pressure on HM to explain the increase in the anticipated costs. Mr Marshall's opinion, at para. 3.27 of his report **[1725]**, was that these checks were as rigorous as would normally be expected for a project of this nature and, in our view the evidence supports that conclusion. We

also agree with Ms Bretherton's submission that, in effect, the tendering process followed fulfilled a similar function to the board instructing a costs consultant to verify the indicative costs suggested by HM.

69. None of the objecting leaseholders have provided us with the name of a contractor that they would have approached if statutory consultation had taken place. Nor have any of them produced any evidence, such as an estimate from an alternative contractor, to suggest that overall costs of the works would have been substantially less if a different contractor had been appointed to carry out the works in question. All that we have is Mr Burke's calculation in which he suggests that the costs of a like for like replacement would have been cheaper than the solution adopted by the board. For the reasons stated above, we do not agree with his assessment. In our determination, the objecting leaseholders have not shown that they have been asked to pay more towards the costs of these works than would have been the case if consultation had occurred.

70. We accept that if consultation had taken place, some, quite probably all of the objecting leaseholders would have made observations as to the proposed works, including suggesting a like for like replacement instead of option 2.2. It is also possible that some may have nominated alternative contractors to tender for the works they considered to be appropriate, although none of them have specifically said that they would have done so. However, on the evidence before us, we are satisfied that even if full consultation had taken place the joint board would, irrespective of any observations received or alternative nominations made, still have proceeded with option 2.2, engaged in the tendering process it followed, and proceeded to engage Virtus to carry out the works. As such, we reject the suggestion that the overall costs of the works would have been substantially less, and the scope of the works significantly different.

71. We have, as is required, considered the objecting leaseholders' position sympathetically, but we conclude that they have not established a case of relevant prejudice. They have not, in our view, shown that the extent, quality and cost of the works carried out were affected by the failure to comply with the statutory requirements. We agree with Ms Bretherton's submission that the reality is that the leaseholders are in no worse a position than they would have been if consultation had occurred. We therefore grant the Applicant dispensation from all of the consultation requirements imposed by s.20 of the Act.

72. We have given careful thought as to whether the grant of dispensation should be made subject to conditions. The objecting leaseholders argue that the Applicants' costs should be capped on the basis that they greatly exceeded the costs of like for like replacement. We concluded above that cost of the works carried out was not affected by the failure to comply with the statutory consultation requirements, and, as such, it would not be appropriate to impose a condition reducing the recoverable cost of the works from leaseholders.

73. We have considerable sympathy with the requests that dispensation be made conditional on: (a) the Applicants paying the objecting leaseholders legal costs incurred in considering and responding to this application for dispensation; and (b) that the tribunal make an order under Section 20C of the Act preventing the Applicants from recovering the legal costs it has incurred in this application from leaseholders through the service charge account.

74. Turning to the application for a s.20C order first, it is not immediately obvious to us that the lease entitles the Applicant to recover legal costs incurred in this type of application from leaseholders via the service charge. There is provision in paragraph 10 of the Fourth Schedule obliging leaseholders to contribute towards the costs of management of the Block, but it is questionable that this covers legal costs incurred in pursuing a dispensation application. If there is no such entitlement, then the making of a s.20C order serves no purpose.

75. The fundamental problem with both applications, however, is that all of the leaseholders, including the objecting leaseholders, are members of one of the Applicant companies. Mr Srinivasan confirmed at the hearing that those companies have no income other than the service charge income they receive from leaseholders. In circumstances where the leaseholders self-manage the building, it would not, in our determination, be appropriate to make either order sought. As submitted by Ms Bretherton, to do so would run the real risk of one or more of the Applicant companies becoming insolvent, which would be to the obvious detriment of the leaseholders affected.

76. If the leaseholders were not self-managing, the Applicants' complete disregard of the statutory consultation requirements would, in our view have justified making the grant of dispensation conditional upon the Applicants contributing towards the legal costs incurred by the objecting leaseholders in responding to the application. However, it would not be appropriate to do so in circumstances where a significant shortfall in the Applicants' service charge income would very likely have to addressed by a call on funds from shareholders if insolvency is to be avoided.

77. For these reasons we impose no conditions on the grant of dispensation. We also decline to make a s.20C order as we do not consider it would be just and equitable to do so.

**Amran Vance**

**28 October 2022**

## Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).