FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/19UG/LIS/2021/0014
Property:	Flats 1, 3, 5, 9 and 10 Gablehurst, Poole Road, Upton, Poole BH16 5JA
Applicant:	Synergy Housing Limited
Representative:	Mr J Fieldsend of counsel for Birketts LLP
Respondents:	Ms Fry (Flat 1) Ms E Todd (Flat 3) Mr S Bennett (Flat 5) Ms L Przbyla (Flat 9) Mr K J & Mrs A J Dixon (Flat 10)
Representative:	Mr S Bennett
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Landlords application for the determination of reasonableness of service charges for the year 2020/2021 and 2021/2022. Section 20ZA of the Landlord and Tenant Act 1985 Landlord's application for the dispensation of all or any of the consultation requirements contained in Section 20 Landlord and Tenant Act 1985
Tribunal Members:	Judge A Cresswell (Chairman) Mr J Reichel BSc MRICS
Date and venue of Hearing:	6 July 2021 by Video
Date of Decision:	20 July 2021

DECISION

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Summary Decision

1. **The Tribunal has determined that the Applicant landlord has demonstrated that the charges in question, as refined at the hearing, were reasonably incurred and that they are reasonable in amount and are payable by the Respondents.**
2. **The Tribunal has determined that the Applicant landlord has demonstrated that it is reasonable to dispense with the consultation requirements, and for that reason makes a determination dispensing with all of the consultation requirements. The dispensation is conditional upon the Applicant not seeking to recover its costs of these proceedings from the Respondents by way of service charge or administration charge in this or any other year and its paying to them up to £500 for their costs subject to their supplying the Applicant with relevant supporting invoice(s) within 21 days of the supply of those invoices.**
3. **The Tribunal allows the Respondents' application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Applicant from recovering its cost in relation to the application by way of service charge or administration charge.**

The Application

4. This case arises out of the Applicant landlord's application, made on 25 February 2021, for the determination of liability to pay service charges for the years 2020/2021 and 2021/2022 and for the dispensation of all or any of the consultation requirements provided for by Section 20 of the Landlord and Tenant Act 1985.

Inspection and Description of Property

5. The Tribunal did not inspect the property but saw it on Google Maps.
6. The property appears to be a three-storey block of 12 purpose-built flats of brick elevations. The Tribunal was told that it was constructed in the 1970s.

Directions

7. Directions were issued on 30 March 2021.
8. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.

Hearing

9. This determination is made in the light of the documentation submitted in response to the directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by Emma Towler, Strategic Lead for Home Ownership and Service Charges Aster Group, Tom Broome, Senior Housing Officer (Somerset, Dorset, Devon and Cornwall), Aster Group, Adam Grant, Contracts Surveyor (Special Projects), Aster Group, Stewart Matthews, Operations Manager, Pipefix and by Stevan Bennett.
10. At the end of the hearing, the parties' representatives told the Tribunal that they had had an opportunity to say all that they wished and had nothing further to add.
11. The Tribunal has regard in how it has dealt with this case to its overriding objective: The Tribunal Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

. (a) exercises any power under these Rules; or

. (b) interprets any rule or practice direction.

(4) Parties must:

. (a) help the Tribunal to further the overriding objective; and

. (b) co-operate with the Tribunal generally.

The Law

12. Relevant law is set out in Sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 and can be found in the Annex below.

13. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

14. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.

15. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable

service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 *Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.*

16. "*If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the* ***Yorkbrook*** *case* **(Yorkbrook Investments Ltd v Batten** (1986) 19 HLR 25) *make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.":* **Schilling v Canary Riverside Development PTE Limited** LRX/26/2005 at paragraph 15.

17. In **Enterprise Home Developments LLP v Adam** (2020) UKUT 151 (LC):

27. In Yorkbrook Investments Ltd v Batten (1986) 18 HLR 25 Wood J, giving the decision of the Court of Appeal, addressed the issue of the burden of proof on the reasonableness of service charges. At page 34 he said this:

"Having examined the statutory provisions we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions."

28. Much has changed since the Court of Appeal's decision in Yorkbrook v Batten but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a prima facie case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions.

18. "*Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available:* **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.

19. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

20. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law… It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out…: the burden of proof is a last, not a first, resort.*"

(Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

21. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost.*

<u>Section 20 Landlord and Tenant Act 1985 Limitation of service charges: consultation requirements</u>

22. The provisions of Section 20 apply where a landlord enters into a contract to carry out qualifying works.

23. They provide that if the consultation requirements have not been complied with or dispensed with by a Tribunal, the amount of the relevant costs incurred on carrying out the works or under the agreement which may be recovered through the service charge is limited to the "appropriate amount". The application of the provisions is regulated by the Service Charges (Consultation Requirements) England) Regulations 2003 – SI 2003/1987*)*.

24. "The appropriate amount" is –
in respect of qualifying works, £250 per tenant.

25. Service Charges (Consultation Requirements) (England) Regulations 2003
<u>Schedule 4 Part 2 (Qualifying Works – no public notice)</u>

o Notice of intention to undertake works to be given to each tenant and any recognised tenants' association, describing (or specifying a place and hours at which a description may be inspected free of charge (which arrangements must be reasonable)), in general terms, the proposed works; explain why the works are necessary; identify the people from whom the landlord proposes to get an estimate.

o invite written observations and give address to which they may be sent, state period for delivery (which is 30 days from date of notice) and date when that period ends

o invite nomination of a person from whom the landlord should try to obtain an estimate

o Landlord must have regard to any observations made and must try to obtain an estimate from nominated persons (or some of them). The landlord must have regard to the observations he receives. This does not mean he is obliged to follow or act on the comments, but, if challenged later at the Tribunal on the reasonableness of the costs, he will need to show that he has taken them into account or explain why he did not.

o Landlord must then prepare at least two proposals for provision of the works, at least one from a person wholly unconnected with him and including any estimate received from a nominated person

o each proposal must state for each party to the proposed agreement the party's name and address and any connection with the landlord ("connection" is defined in regulation 5(6)) and must give estimate of total cost or rate of charges.

o written notice of the proposals to be given to each tenant and recognised tenants' association, setting out the details of the proposed works (or giving details of arrangements for inspection) and the likely costs; include a statement setting out the estimated cost of the proposed work specified in at least two of the estimates, and state where the estimates are available for inspection; and include a summary of the tenants' observations received by the landlord in response to the first notice, and the landlord's response to them; and invite observations from the tenants (within 30 days).

o landlord must have regard to any observations made. The landlord must have regard to the observations he receives. This does not mean he is obliged to follow or act on the comments, but, if challenged later at the Tribunal on the reasonableness of the costs, he will need to show that he has taken them into account or explain why he did not.

o After entering into the contract, the landlord must within 21 days give notice to each tenant and recognised tenants' association giving his reasons for making that contract and summarising any observations that were made, or providing arrangements for inspection of same, and his response to them. This requirement

does not apply if he has entered into contract with a nominated person or one who submitted the lowest estimate.

It is essential that residential landlords follow the consultation procedure correctly. If they do not, the maximum contribution they may be able to recover from each tenant is £250.

26. Under **Section 20ZA of the Landlord and Tenant Act 1985** (as amended), the Tribunal has jurisdiction to make a determination dispensing with all or any of the consultation requirements, where an application has been made by the landlord, "if satisfied that it is reasonable to dispense with the requirements."

Daejan Investments Limited v Benson and others [2013] UKSC 14:

The correct question is whether, if dispensation was granted, the respondents would suffer any relevant prejudice, and, if so, what relevant prejudice, as a result of the failure to comply with the Requirements.

The purpose of the Requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate.

In considering dispensation requests, the LVT should focus on whether 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.

The Requirements are a means to the end of the protection of tenants in relation to service charges. There is no justification for treating consultation and transparency as appropriate ends in themselves. The right to be consulted is not a free-standing right. As regards compliance with the Requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes.

The LVT has power to grant dispensation on appropriate terms, and can impose conditions on the grant of dispensation, including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application.

Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted. ***While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it and should be sympathetic to the tenants' case.***

Insofar as the tenants will suffer relevant prejudice, the LVT should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the Requirements have been satisfied.

This conclusion does not enable a landlord to buy its way out of having failed to comply with the Requirements, because a landlord faces significant disadvantages for non-compliance. This conclusion achieves a fair balance between ensuring that tenants do not receive a windfall, and that landlords are not cavalier about observing the Requirements strictly.

27. The consultation requirements are not the way Parliament has chosen to protect residential leaseholders. As Dyson MR said in ***Francis v Phillips*** [2014] EWCA Civ 1395:

    "The real protection . . .is that all service charges must be reasonable and reasonably incurred under section 19.".

28. In **OM Property Management Limited v Hughes** (2014) UKUT 0009 (LC):

    ……there is no provision in the 1985 Act for leaseholders to be relieved of their liability to pay service charges on the grounds of incompetent or inefficient administration which has not caused demonstrable prejudice.

It is clearly appropriate, as the appellant recognises, that the dispensation be on condition that the leaseholders' reasonable expenses incurred in connection with the section 20ZA application to the LVT should be reimbursed.
.........and I will make that payment a condition of dispensation.

29. In **23 Dollis Avenue (1998) Ltd v (1) Nikan Vejdani (2) Nahideh Echraghi** (2016) UKUT (Lands):
A failure to comply with the Service Charges (Consultation Requirements) (England) Regulations 2003 could be relevant to the reasonableness of a service charge to be paid under the Landlord and Tenant Act 1985 s.19(2), but it was simply one factor to be considered. In the instant case, the non-compliance consisted in the fact that the estimate on which the service charge demand was based included work which went beyond that initially proposed; the amount demanded would be reduced by excluding that extra work.

30. In **Aster Communities v Chapman & Others** [2021] EWCA Civ 660 ("*Aster*") the Court of Appeal considered the circumstances in which the First-tier Tribunal ("*the FTT*") may grant a landlord dispensation from the service charge consultation requirements prescribed by s. 20 of the Landlord and Tenant Act 1985 ("*the 1985 Act*").
Sections 20 and 20ZA of the 1985 Act provide that the service charge contribution of lessees towards "*qualifying works*" will be limited to the "*appropriate amount*" (currently prescribed by regulations as £250) unless the "*consultation requirements*" are: (a) "*complied with*" by the landlord; or (b) "*dispensed with*" by the FTT. The consultation requirements are set out in part 2 of schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 ("*the Consultation Requirements*").
The leading case on dispensation is the Supreme Court's decision in *Daejan Investments Ltd v Benson* [2013] UKSC 14, [2013] 1 WLR 854 ("*Daejan*").
In *Daejan* Lord Neuberger made clear that in determining an application for dispensation the FTT's focus must be on what prejudice, if any, the lessees have suffered as a result of the landlord's failure to comply with the consultation requirements. To oppose an application for dispensation the lessees must prove that they have suffered some "*relevant*" prejudice. The "*prejudice*" is the inappropriate works; such prejudice is "*relevant*" if it flows from the failure to comply with the

consultation requirements. For the prejudice to flow from the failure to consult the lessees must prove that they would have acted differently had the landlord carried out a consultation.
Further, in *Daejan* the Supreme Court held that the FTT could require a landlord to comply with certain terms as a condition to the grant of dispensation provided "*any such terms are appropriate in their nature and their effect*."

In Aster the appellant landlord carried out a s. 20 consultation in relation to a package of major works concerning several blocks of flats ("*the s.20 Consultation*"). It was held in earlier FTT proceedings, brought by the landlord pursuant to s. 27A of the 1985 Act to establish the reasonableness of on-account service charge demands, that the landlord had failed to include the replacement of balcony asphalt in the s.20 Consultation and that the full replacement of all balcony asphalt which the landlord had carried out was, on the available evidence, unnecessary. The landlord, Aster Communities, then applied to the FTT for dispensation.

The FTT held that if the landlord had complied with the Consultation Requirements then one of the lessees, a Miss Motovilova, would have acted differently: she would have obtained a surveyor's report and therefore relevant prejudice was established. In the circumstances the FTT granted the landlord dispensation but on certain terms. On appeal the landlord challenged two of these terms:

1. A requirement that the landlord pay the reasonable costs of an expert report advising the lessees on the necessity of replacing the balcony asphalt.
2. A requirement that the landlord pay the lessees reasonable costs of the application.

The landlord's appeal to the Upper Tribunal (Lands Chamber) was dismissed but His Honour Judge Bridge granted permission to appeal to the Court of Appeal. In the Court of Appeal the appellant landlord, Aster Communities, raised three principal issues.

First, the appellant landlord argued that the FTT was wrong to conclude that Miss Motovilova would have acted differently if the notice of intention in the

Consultation had referred to the replacement of the balcony asphalt. On the facts of the case the Court of Appeal dismissed this argument.

Secondly, the appellant landlord argued that the issue of "*relevant prejudice*" must be separately assessed for each lessee. The appellant landlord contended that each lessee must show that they as individuals would have acted differently had the Consultation Requirements been complied with. The Court of Appeal rejected this argument and adopted the analogy (a hypothetical block of 20 identical flats) put forward by Counsel for the respondent lessees:

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

As Newey LJ explained at [44]:

"*The consultation for which the 2003 Regulations provide is a group process… 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.*"

Finally, the appellant landlord argued that, in any event, it was impermissible for the FTT to impose conditions (i) and (ii). The Court of Appeal dismissed this contention. Newey LJ found condition (i) which required the landlord to pay for an expert report was "*a condition which the FTT was entitled to impose in the specific circumstances of this case*" (paragraph [50]). The Court of Appeal noted that condition (ii) which required the landlord to pay the lessees' costs of the application

was along the lines of a condition imposed by the Court in Deajan and on that basis should be upheld.

Costs of Management

31. The following cases provide guidance:

London Borough of Southwark v Paul and Others [2013] UKUT 0375 (LC):

34. Mr Rainey submitted that an administration fee could be added to a charge which included indirect costs such as the overheads in the present appeals. He relied upon Palley v London Borough of Camden [2010] UKUT 469 (LC) in which His Honour Judge Mole QC considered a similar issue. In Palley the "Service Charge" was defined in the relevant lease as:

"All those costs and expenses incurred or to be incurred by the Landlord in connection with the management and maintenance of the estate and the carrying out of the Landlord obligations and duties and providing all such services as are required to be provided by the Landlord under the terms of the Lease..."

*After reference to the authorities referred to above, including **Pottle, Wembley National Stadium, LB Brent v Hamilton, and Norwich City Council v Marshall**, His Honour Judge Mole concluded that the plain and natural meaning of the leases in Palley was that the landlord was entitled by way of service charge to all those direct and indirect costs and overheads, including management costs, that were incurred by the landlord in carrying out his obligations under the lease together with an additional management charge for the estate and the building in which the flat was situated, calculated as 10% of all other items included in the relevant service charge.*

*37. The decisions of the President in **Brent** and then **Norwich City Council v Marshall**, and the decision of the Chancellor in **Wembley National Stadium** provide a clear line of authority for the proposition that the overhead costs incurred in the maintenance and management of the building and estate falls within the provision "all costs and expenses of or incidental to ..." (see paragraph 7 of the Third Schedule to the lease). The respondents contend that these authorities are all determined on their own facts and do not support the principle that indirect*

costs, charged as overheads, should be recoverable. We do not accept that contention. While the cases are clearly on their own facts with respect to whether a charge is reasonable, the issue as to whether indirect costs properly form part of the service charge is an issue of principle which we consider to be now well established.

*39. We also find, following **Palley**, that the administration charge can be raised on indirect costs (overheads) as well as direct costs.*

London Borough of Brent v Hamilton LRX/51/2005:

"11. If repairs are to be carried out ... someone will have to be paid for doing the work and someone will have to arrange for the work to be done, supervise it, check that it has been done, and arrange for payment to be made. Since the Council can only act in these respects through employees or agents it will have to incur expenditure on all these tasks. If it does incur such expenditure, the lessees will be liable to pay a reasonable part of it.

13. The provisions are clear. Under clause 4(A)(i) and (ii) it is the total expenditure incurred in fulfilling the clause 6 obligations that is recoverable. That certain of the work done in fulfilment of those obligations – for example, arranging for work to be done or approving payment for it – may be classified as management does not take it outside the scope of clause 4(A)(i) and (ii). It is a question of fact what management tasks were performed in the financial year in question in fulfilling the council's obligations under clause 6. It is also a question of fact what expenditure was incurred on them and (for the purpose of applying the statutory provisions) whether such expenditure was reasonable. The cost of employing agents to carry out any of the functions under clause 6, both for managerial and other tasks, would be covered by clause 4(A)(i) and (ii) provided that it was reasonable."

Wembley National Stadium Ltd v Wembley London Ltd [2008] 1 P & CR 3:

"44. The principal dispute in this context was whether the costs of management might be included and if so to what heads of expenditure they might extend. For WNSL it was contended that provisions relating to service charges are

restrictively interpreted, see Mummery LJ in ***Gilje v Charlgrove Securities Ltd*** *[2002] 1 EGLR 41, [32]. No doubt, too, it is appropriate for the interpretation to be more restrictive in the case of residential tenancies as opposed to a commercial transaction between two substantial parties. At all events I can find nothing in the wording of this lease in general and the definitions of "Expenditure" in particular to confine the relevant services to the actual service to the exclusion of any management cost incurred in its provision. Why, for example, should the wages of the employee who actually applied the tarmac to the surface of the car park be included but the salary of he who arranged for the employee to do it and for the tarmac to be available for such application be excluded. In my judgment the wording of the definition embraces both.*

46. In relation to the heads of expenditure to which the cost of management might extend Mrs Viazzani set out a list in para 17(b) of her witness statement. The list included office accommodation, training, medical insurance and pensions. It is said that these items of expenditure are all ingredients in the cost of providing the lessor's services. It is contended on behalf of WNSL that such costs could not be shown to have been 'properly incurred by the Lessor in complying with its obligations.' This does not appear to me to be a sufficient response to the contention of WLL. If such expenditure can be shown to have been so incurred I see nothing in the definition to exclude it. The further from actual compliance with the Lessor's obligations the incurring of the cost or expense lies the less likely it will be that such expenditure was incurred 'in' such compliance. But I see no reason in principle to exclude indirect costs of management and corresponding 'overhead' expenses."

The Applicant

32. The Respondent argued that the terms of the Lease allowed the Applicant to add the costs of managing major works to the service charge demand.

33. Ms Towler told the Tribunal that it had undertaken an analysis of the work it used on the management of works, analysing time spent by various staff and the administration of service charges using salaries and on costs and had established that a charge of 15% of the costs of a project equated to 70% of the Applicant's cost of managing that project.

34. In the event, during the course of the proceedings, the Applicant reduced its requested management costs to a figure of 12% and withdrew its request for the costs of the management of the Wessex Water works.

The Respondents

35. The Respondents did not believe that the Applicant's cost of managing major works should be recoverable, but accepted that the caselaw suggested otherwise. Mr Bennett had been opposed to any payment for management of the Wessex Water works, but was persuaded by the evidence of Mr Grant that the Applicant had indeed managed the Pipefix contract.

The Tribunal

36. It was not disputed by the Respondents, in the event, that the Lease permits the recovery of the Applicant's cost of managing major works in line with the cases detailed above and the Tribunal agrees that this is permitted.
37. Ms Towler had explained how the figure of 15% had been arrived at, and this was a figure which the Tribunal had seen in other such cases.
38. Accordingly, the Tribunal finds the charges for the Applicant's cost of managing major works in the years 2020 to 2022 to be reasonable and payable in the proportion of 12% of the Pipefix costs for each of the two years, being £4,653.40 and £2,038.76 respectively.

The Leases

39. There are two forms of lease under which the 5 long-leased flats are demised, which are later referred to as "Type 1" and "Type 2".
40. Flats 1, 9 and 10 are held under Type 1, and flats 3 and 5 are held under Type 2.
41. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

42. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

43. Both Type 1 and Type 2 leases contain the following provisions:

a) Clause 1 – the grant of the lease is on terms that include the payment of a service charge: “... YIELDING AND PAYING therefor ... THIRDLY an amount or amounts in respect of service and other charges in accordance with the provisions of the Third Schedule hereto”

b) Clause 2.1 – the tenant covenants to pay all monies payable under the lease.

c) Paragraph 1 of the Third Schedule - “The service charge to be paid by the Lessee [...] be the aggregate costs expenses and outgoings incurred by the Council in respect of or for the purpose of painting repairing maintaining servicing lighting cleansing and managing the flat or the building including without prejudice to the generality of the foregoing costs expenses or outgoings incurred in –

1.1 keeping the flat and the building (including drains gutters and external pipes and cables) in good and substantial repair ...
1.3 the provision or maintenance of services."

2.2 So soon after the end of the Council's financial year as may be

practicable the Council shall supply to the Lessee an invoice in

respect of the service charge (including value added tax) payable by

the Lessee for the then immediately preceding Council's financial year

and the invoice shall contain a fair summary of the Council's said

costs expenses and outgoings incurred during the Council's financial

year to which it relates

d) Clause 2 of the Third Schedule – the service charge is payable in arrear in respect of service charge expenditure incurred in each period of a year ending 31 March on supply of an invoice.

44. The Type 1 lease but not the Type 2 lease provides as follows:

a) Clause 2.1 of the Third Schedule – for shared facilities and services for which a service charge is payable, then the amount of the charge is calculated as being the total cost of the works or service divided by the number of flats who benefit from the shared facility or service.

b) Clause 8.2 - " 'the building' shall mean that part of the property not included in the flats being the main structural parts of the building ... including the roof foundations and external parts thereof (but not the glass of the windows and the windows of the flats nor the interior faces of such external walls as bound the flats) and the entrances passages halls landings and staircases and other parts of the building forming part of the property which are used in common by the owners or occupiers of any two or more of the flats and all cisterns tanks sewers drains pipes

wires ducts and conduits not used solely for the purposes of one flat and any joists or beams supporting the floor of the flat"

" 'the flat' shall mean the property hereby demised ... including for the purpose of obligation as well as grant the ceilings and floors window glass and windows and interior faces of such exterior walls as bound the said flat (but not the joists and beams) and all cisterns tanks sewers drains pipes wires ducts and conduits used solely for the purposes of the said flat but no others and not including the main structural parts of the building roof foundations common services and common parts"

70. The Type 2 lease but not the Type 1 lease provides as follows:

a) Clause 1 - "... hereby demises unto the Lessee the [...] floor flat known as Flat [...] Gablehurst 2 Poole Road Upton Poole in the County of Dorset (hereinafter called 'the flat') being part of a building belonging to the Council (hereinafter called 'the building') and containing other flats ..."

Apportionment

45. Mr Bennett agreed on behalf of the Respondents that each tenancy was due to pay 1/12th of service charge costs and the Tribunal, having regard also to the leases, accordingly, so orders.

Section 20ZA Application

The Applicant

46. The Applicant said that dispensation is sought for the following qualifying works: Installation of a new external water supply by Wessex Water from the main located on Blandford Road running to the Building boundary, to be connected to 4 new locations around the outside of the Building, from where it will break out of the ground and run up on the exterior of the Building to the kitchens in the individual flats and be connected to the existing internal installation.

47. On 29 January 2020 one of the residents in the block complained about rust coming out of her tap.

48. On 13 February 2020, the Applicant received a further complaint from the resident about the quality of the water supply, namely that the water coming out of the kitchen and bathroom taps was rusty in colour. It was further reported that the water contained rust flakes and small brown deposits and that left a brown residue in the sink.

49. On 3 March 2020, the resident again complained.

50. In March 2020, Adam Grant, a Contract Surveyor employed by the Applicant, observed a very minor leak of the rising main (not mentioned by Mr Matthews – see later).

51. In March and April 2020, the Applicant was informed via email correspondence from a Senior Environmental Health Officer at Dorset Council, Mr March, that a resident in the Building had complained to the Council about the quality of the drinking water supply.

52. At the end of March 2020, the Applicant explained to the Environmental Health Officer that there was an option to install a permanent electric filter in the kitchen of the resident's property. This proposal was put to the complainant on 20 April 2020, along with an offer to supply Britta filters whilst the works are completed, but the resident rejected this electric water filter in an email dated 11 June 2020 as it would remove all minerals from the water, rather than simply removing the rust. The Applicant began providing her with Britta filters in May 2020.

53. By letter of 20 April 2020, the Applicant wrote to the resident to tell her that

The problem of the rust is due to the age and condition of the iron pipework which supplies the mains water to the whole block and the only option to have rust free water is to have the whole block (all 12 flats and communal areas) re-plumbed. As this is a very large job and one that requires a significant investment not only from Aster but from the leaseholders in the block there is a processes that Aster have to follow which will require a full consultation which will take time to fully complete prior to any work being undertaken.

The work to replace all the iron pipework has been approved and the property is due to be surveyed prior to the work being issued out for pricing by external contractors and the leaseholders are due to be notified of the proposed work where consultation will now take place (this is currently on hold due to the coronavirus outbreak)

54. On 17 July 2020, the Applicant received a complaint from another leaseholder about contaminated water.

55. In July 2020, the Applicant was notified by Dorset Council's Environmental Health Department that they were minded to serve an enforcement notice in connection with the water quality at the Building. The Council's Mr Conway said: *Samples of the water have been independently analysed and the analyst has stated that the supply is unpotable.*

56. Delay in progressing resolution of the issue with the water supply was caused by the national lockdown that was imposed in response to the Covid-19 pandemic. When that lockdown eased in the summer of 2020, it was possible to progress, and progress was made with arranging remedial action, as is more fully explained in the witness statements accompanying this Statement of Case.

57. On 3 August 2020, a company called Water Matters was instructed to undertake investigatory surveys to identify possible causes and proposals to resolve the issues.

58. On the same day, the Applicant received a further letter from the resident, advising that using a Britta filter was not working, that her son was unable to drink bottled water due to high levels of sodium and that she had previously provided a letter from the infant's GP about this.

59. On 4 August 2020, Mr March provided the Applicant with the results of water testing carried out by the local water undertaker, Wessex Water, on 7 March 2020 and processed on 6 April 2020 (notwithstanding an indication from Mr March that he was only considering asking for a test on 26 March 2020). The results were that the water met the drinking water standards. He said: *The analyst confirmed that if a consumer reasonably rejects water because of unacceptable appearance, taste or odour, then this itself constitutes a failure of the drinking water standards and a risk to public health on that basis i.e. a person cannot be expected to drink water of unacceptable appearance, taste or odour even when that may in principle meet the standards defined.*

60. On 5 August 2020 a letter was sent to leaseholders to advise them that Water Matters, the Applicant's contractor at the time, would be on site on 11 August 2020 to survey the site and assess the repair works needed. This would include an assessment of the pipes within the leasehold flats. It also advised that it would be arranging for a supply of bottled water to be delivered to the block the following day.

61. On 7 August 2020 a letter was received from the residents of Gablehurst expressing their disgruntlement with the water supply at the block.

62. On 7 August 2020 a letter was sent to the leaseholders notifying them of the planned works and the intention to seek dispensation from the requirements under Section 20 of the Landlord and Tenant Act 1985 due to the urgency of the works. As part of this communication the Applicant explained how it had appointed a consultant to investigate and identify the exact nature of the works required. It asked the leaseholders to provide it with any feedback by 24 August 2020. No feedback was provided.

63. On 13 August 2020 a letter was sent to leaseholders to notify them that the water supply was safe to drink and had passed the necessary tests, however the Applicant understood their concerns so it was continuing to supply bottled water and these arrangements would be reviewed monthly. The letter updated the leaseholders that its contractor had been on site and carried out preliminary investigations and had arranged for a surveyor to be on site on 18 August between 8am and 4pm to access individual properties.

64. Investigations carried out for the Applicant by Stewart Matthews, Operations Manager for Pipefix Limited, in August 2020, revealed that the galvanised pipework used to deliver the water supply to the block and individual flats had decayed and it was releasing rust particles into the water supply.

65. Mr Matthews said in his witness statement that he looked at the water coming out of taps inside individual flats, mapped and looked at the existing underground pipework, what type of pipework was used, and looked at the internal plumbing of individual flats to see if the problem was with the main pipe or internally within the individual flats.

66. Copper pipework installed by the residents in their flats, for example when installing new bathrooms or kitchens, has been connected to the existing galvanised pipework and the difference in the metal types creates an electrolytic reaction, which in turn causes the galvanised pipework to rust from the inside out.

67. The Applicant's investigations also revealed that the issues were widespread due to the extensive use of galvanised pipework in the Building.

68. A letter was sent to leaseholders on 27 August 2020 to explain that the Applicant had engaged a second consultant to provide their professional opinion. This would allow it to consider all options. The letter also advised that it was working with Wessex

Water regarding the management and maintenance of the main pipework which sits outside of its responsibility and to confirm it will continue the weekly bottled water supply.

69. A letter from the Officer dated 5 October 2020, said that it was the opinion of the Environmental Health Department that the water at the Building was unfit for human consumption. The Department in that letter directed the Applicant to replace the water supply pipes at the Building without "further unnecessary delay".

70. A letter was sent to leaseholders on 28 October 2020 providing an update on the works. Leaseholders were updated that the contractor was on site on 6 October and in order to carry out the works as efficiently as possible and with least disruption the Applicant will be completing the works in two phases. In phase one, the contractor will work with Wessex Water to complete the new external supply connection to the building. In phase two the contractor will take the feed from the new supply and run it through the building using new approved pipework in each flat, leaving everybody with a new water connection.

71. A specification for the Qualifying Works was prepared by an independent contractor in November 2020 (independent of the Applicant but sharing some common control with Pipefix Limited) and in connection with that specification a procurement exercise was carried out.

72. Four companies were invited to provide quotes for the works. Two of those companies submitted estimates: Pipefix Limited and Water Matters (UK) Limited.

73. The tendered sum from Pipefix Ltd is £158,290.22 (exclusive of VAT), which includes a contingency of £10,000. The quote received from Water Matters (UK) Limited was £231,000 (exclusive of VAT).

74. The cost for Wessex Water to provide a new water supply is £6,835.20 (inclusive of VAT).

75. In November 2020, and at the suggestion of Wessex Water, Pipefix Ltd carried out works in the grounds of the Building to dig the trench and prepare the piping to be connected to the new mains connection to be established by Wessex Water.

76. On 12 November 2020, the Applicant sent a letter to the leaseholders to notify them that on Monday 16 November 2020 its contractors will begin laying some pipework outside in the communal garden. Once completed, Wessex Water will be able to dig up the road to create a new connection. Leaseholders were informed that the

Applicant expected Wessex Water to start works around 7 December 2020 and for these works to last approximately 4 weeks.

77. On 4 January 2021, the Applicant awarded the contract for the works to Pipefix Ltd.
78. On 5 January 2021, the Applicant sent a letter to the leaseholders to advise them that it was now in a position where it can begin to plan a date for the works and before it finalises the specification of works it wanted to talk with them about its plans. A residents' meeting was arranged for 14 January 2021 to be conducted virtually on Zoom. The letter also advised how it would discuss at the meeting the options available to the leaseholders about the works to take place within their flat and whether they would like it or their own contractor to carry out the works.
79. A residents' meeting was conducted on 14 January 2021 at 6pm.
80. On 15 January 2021, the Applicant sent a letter to the leaseholders to notify them that works will commence on 1 February 2021 and will take in the region of 16 weeks to commence, however this was subject to COVID-19 restrictions permitting. With the letter it advised that it would like to meet with residents again before the works commence and a second meeting was arranged for 4 February 2021 which would be conducted virtually by Zoom. At the meeting it hoped to be joined by a representative of the contractor, Pipefix.
81. Following completion of works carried out by Wessex Water to connect the main on Blandford Road to the boundary of the Building's site, Pipefix began works on site on 22 February 2021. The estimated completion date was 31 May 2021.
82. The Respondent points to the test as set out in the judgment of Lord Neuberger PSC in Daejan Investments Ltd v Benson [2013] UKSC 14.
83. The focus of a dispensation application is "relevant prejudice".
84. The purpose of the requirement to consult is to ensure that tenants are protected from (1) paying for inappropriate works and (2) paying more than would be appropriate. "Relevant prejudice" is prejudice to either of those protections caused by the absence of a compliant consultation exercise.
85. Accordingly, the question to be asked is, to what extent, if at all, have the Respondents' protections against paying for inappropriate works and paying more than would be appropriate, been prejudiced by the Applicant's failure to carry out a compliant statutory consultation exercise?
86. The factual burden of showing "relevant prejudice" lies with the Respondents.

87. Where no “relevant prejudice” can be shown, the tenant is in the same position they would have been had there been a compliant consultation exercise. In those circumstances it is appropriate to grant unconditional dispensation.

88. The Respondents refer to the recent decision of the Court of Appeal in Aster Communities v Chapman [2021] EWCA Civ 660. That decision does not alter or place any gloss on the Supreme Court’s test as set out in Daejan v Benson. Aster v Chapman is an example of the application of the Daejan v Benson test: the application of the test is fact sensitive (Lord Neuberger in Daejan v Benson at [14]) and the decision in Aster v Chapman on the imposition of conditions turned on “the specific circumstances of [the] case” (Newey LJ at [50]).

89. Here, the Respondents have not discharged the factual burden of showing “relevant prejudice”.

90. The evidence is that the galvanised pipes were in a condition of decay; they were out of repair. That decay manifested itself in the discoloration of the water supply and contamination of that supply with rust debris. There is no evidence that the Works, which were carried out to address that issue, were inappropriate.

91. As regards the costs:

    a) For that part of the Works carried out by Wessex Water, there is no alternative contractor and the Applicant had no option other than to pay the sum charged by the utility supplier for the works it carried out.

    b) For the remaining Works, a procurement exercise was carried out. The contract was placed with the company (Pipefix Ltd) who gave the lowest estimate. The Respondents have not offered in evidence comparable estimates to show that the costs charged by Pipefix were more than is appropriate or that the works carried out by Pipefix could have been carried out for a lesser amount.

92. In the circumstances, there is no evidence of “relevant prejudice”; there is no evidence that the Respondents would have been in a different position had there been a compliant consultation exercise.

93. In those circumstances, the Tribunal is invited to determine to dispense with the consultation requirement on terms imposing a single condition: that the Applicant’s costs of these applications are not taken into account in determining the amount of

any service charge payable by the Respondents. In other words, the condition is an order under s.20C LTA 1985 in connection with the costs of these applications. No other condition is warranted in the circumstances of this case (an approach which was varied at the hearing – see below).

The Respondents

94. The Respondents gave a history of the issue and said that had they been properly consulted (with a Section 20 consultation) and accurately informed of the scope of works and the anticipated substantial cost involved, the outcome in respect of work carried out and expected costs would have been very different.

95. The issue, they said, stems from a complaint made by a single tenant in the block of 12 flats about the water supply from their tap. The Applicant's case rests on their insistence of the urgency for a resolution to prevent the issue of an improvement notice.

96. The complainant was offered a number of solutions such as a filtration system, water filter and bottled water. However, the water was tested and found to be potable and presented no immediate threat to health and wellbeing. They believe that had these measures been implemented this would have satisfied the Environmental Health Authority in the interim and allowed time for a proper consultation regarding any permanent works that may be required. The complainant rejected these measures on the grounds her baby could not drink bottled water. She claims to have medical evidence for this but it has not been submitted.

97. Aster have also included a letter purporting to be from the Gablehurst Residents Association complaining about water quality; as far as they are aware no such group exists. Furthermore, the letter is neither signed or dated and could have been written by anybody and, therefore, should be struck out of their evidence. If the Applicant had taken this letter as genuine then why weren't water samples taken from all properties? Had they done so then it would have been obvious that the problem was not systemic.

98. The Applicant has stated that dispensation is required due to the urgency of the work. However, it has taken over a year from the first complaint to the commencement of the work to remedy the alleged problem. The Applicant claims that this was delayed by Covid, although where health is a concern then work has carried on throughout. This highlights they weren't that concerned there was any immediate or long-term

danger. This lack of urgency indicates that there was plenty of time for consultation to have occurred.

99. The Applicant placed emphasis on their regular communications with the leaseholders. However, it was not until the leaseholders Zoom meeting of 14 December 2020 that they were informed of the enormity of the scope of the works to be carried out and the costs involved.

100. This was when they were informed of the costs that Aster would be claiming from them. No mention at this time was made of a 15% management fee or costs passed on by Wessex Water. Their Notification of Works and pending dispensation application to residents letter dated 7 August 2020 refers to the remedy of water issues and possible costs but nothing specific; it is quite vague. They say in respect of plumbing work to be carried out at Gablehurst that they were obtaining "a consultant's report and specification of what needs to done" and "will share" this with them. They were asked to comment by 24 August 2020, but the Applicant failed to provide a "a consultant's report" so they were unable to comment. - *'As we are unable to undertake a formal Section 20 consultation, we would like to take this opportunity to invite you to feedback any concerns you may have in relation to the proposed works. We will take these into consideration as part of our planning for any works. Please send your comments and feedback to us before Monday 24 August 2020'.*

101. At this point, they could have taken measures to investigate further and obtain an independent survey.

102. And yet a letter dated 20 April 2020 confirms that the Applicant was aware of significant costs, this information was not communicated to the leaseholders. *They say: The problem of the rust is due to the age and condition of the iron pipework which supplies the mains water to the whole block and the only option to have rust -free water is to have the whole block (all 12 flats and communal areas) re-plumbed. As this is a very large job and one that* ***requires a significant investment not only from Aster but from the leaseholders*** *in the block there is a process that Aster have to follow which will require a full consultation which will take time to fully complete prior to any work being undertaken. Aster have confirmed the work to replace all the iron pipework has been approved and the property is due to be surveyed prior to the work being issued out for pricing by external contractors and the leaseholders are due to be notified of the proposed work where consultation will now take place (this is currently on hold due to the coronavirus outbreak).*

103. This communication highlights that the Applicant was aware there may be significant costs involved but also that they had decided the cause in advance of any detailed survey and approved works.

104. Despite numerous requests, to date, they still have not had sight of this survey. Had they done so they would, as a group, have appointed an independent surveyor to corroborate this evidence, but they were not afforded this opportunity. By the time they had been fully informed it was too late, and any evidence of damaged pipes had been removed so it was not possible to investigate further.

105. Leaseholders posed this question to the Applicant:

Your letter of 7 August states that you were expecting a report by 21 August and we were asked to comment by 24 August. Are we correct in understanding that we were not sent any report for comment and the first overview was given at the Zoom meeting in January 2021? We have no record of receiving said report?

106. The Applicant's response:

We had hoped to be able to share a report with you by the end of August, however due to the complexities of the works required and the need to consult with external agencies this was not possible. Instead, we used Zoom meetings to provide all customers with an update and work that will take place to resolve the issues.

107. An undated letter from Joanna Capel at Aster (On the Applicant's website the date is shown as somewhere between 5 and 13 August 2020):

The 1st sentence states "*we would like to reassure you that the mains water supply is safe to drink and has passed the necessary tests*". If this is the case where was the urgency to get the work done without consulting with the leaseholders.

108. A letter dated 27 August 2020 (as per website) to residents:

The Applicant again confirms they "*would like to reiterate that the water has passed tests and is safe to drink*".

109. A letter dated 28 October 2020 (as per website) to residents was their first notification giving some detail on the works. No mention of costs or who the contractor was.

110. A letter dated 12 November 2020 (as per website) to residents. This is the last letter that was added to the website. It advised work was starting on 16 November. No mention of costs involved or who contractor is.

111. The Respondents contend that an independent survey may have shown the water contamination was coming from an external source. Aster were fixated on the pipes

within the building and looking nowhere else. Sometimes further investigation is required.

112. The Respondents refer the Tribunal to a recent case where they say the Applicant took a similar approach; (**Aster Communities v Chapman & Ors** (2020) UKUT):

113. They believe that throughout this process they have been misinformed, misled and "kept in the dark" until it was too late to react. The work schedule and costs were presented to them as a fait accompli. The Applicant has reacted to the complaint of one individual in a block of 12 flats. By carpet bombing the situation rather than pinpointing the issue with that one particular flat, the Applicant has disadvantaged all of the other 11 residents.

114. The Applicant's action has resulted in the leaseholders being faced with huge costs which have not been justified to them and were totally unexpected.

115. The Applicant's statement that the work had to be completed within a specific time to avoid prosecution does not hold up if you take into account that no issues occurred with flats 1 to 11 after August 2020. An alternative supply was offered to the complainant which would have given the Applicant time for a full consultation and time for the Respondents to carry out their own investigation. It is unfortunate that the complainant refused to take up the Applicant's offer of a solution albeit temporary.

116. They request that the Dispensation be denied.

The Tribunal

117. The Tribunal adopted the approach advised in **Francis v Phillips** above and took a common- sense approach, examining all of the relevant factors.

118. The Tribunal concluded, on balance, that the nature of the works undertaken by the Applicant was a reasonable response to the issues confronting it.

119. There were differing accounts as to how widespread was the issue of rust and coloured water. On the one hand, 11 of 12 tenants reported in April 2021 that after suffering mineral deposits in their water following Wessex Water conducting operations in the area in August 2020, no further such issues had been encountered since. Nor, Mr Matthews accepted, had the water within the other 11 flats been specifically examined. On the other hand, there was evidence from the 12th tenant including photographs showing a continuing experience of rust sediment in her water and associated colouring. Further, Mr Matthews was aware from his discussions with

Wessex Water of complaints from some tenants of low water pressure, a factor associated with the reduction in the interior of pipes. He also pointed to the need to repair a leak to the galvanised pipework whilst on site; and reported that the pipes were in a rusty state throughout when removed during the works. Further, there was a complaint in July 2020 from another tenant related to water contamination.

120. The Applicant had engaged 3 external consultants: Pipefix, Water Matters and Water Maxim. All of these contractors pointed to an essential failure of the galvanized water pipes and all recommended their total replacement. On top of this, Mr Grant had noted failings with the rising main. Further, the galvanized pipes were noted as being at or close to the end of their useful life; Mr Matthews indicated that there could be 5 years life left in the pipes or only months and the risk of a catastrophic failure with catastrophic results. There was also considerable pressure upon the Applicant by the Environmental Health Department of Dorset County Council for the whole of the pipes to be replaced as soon as possible and the Tribunal has noted that this too was the view of the Water Quality Advisor at Wessex Water, who wrote to Mr March at Dorset County Council as follows: *Our regulations inspector who attended, advises the bits are likely to be coming from the galvanised iron pipework serving the property. I'd recommend this is replaced.* This too points to a whole pipe issue. The Applicant had also received a communication of 24 July 2020 from Richard Conway, Service Manager Housing Standards at Dorset County Council, which included the following: *Samples of the water have been independently analysed and the analyst has stated that the supply is unpotable.* Whilst that appears to be an incorrect assertion, the Applicant would have had to take that assertion on face value.

121. The preponderance of view from all of the professionals associated with the issue was, therefore, that there was a whole pipe issue, which required urgent attention from both a public health and pragmatic base (the risk of a catastrophic failure). It is difficult to see how the Applicant could ignore this.

122. The Applicant failed to comply with any of the Section 20 statutory consultation procedures. Mr Fieldsend pointed out, however, that the Respondents had had an opportunity from 5 August 2020 to raise issues about unnecessary works, but had never said that there were no problems with the water supply or queried why works were being proposed.

123. He pointed out that the report envisaged on 7 August from the consultant had never materialised as such, so that a copy could not be provided to the Respondents. As well

as seeking comments on the report, the communication from the Applicant had invited comments generally.

124. Mr Fieldsend indicated that greater detail had been given in the Applicant's communication of 28 October 2020 and had identified the 2 phases of work planned. That general description was met by silence on the part of the Respondents as to whether the works were necessary. All of these factors, argued Mr Fieldsend, were relevant to identifying any relevant prejudice to the Respondents attendant upon the Applicant's failure to consult formally and feeds into the analysis of what might have happened had there been a compliant consultation process. He also points out that the Applicant's letter in February 2021 responded to questions raised by the Respondents at the January Zoom meeting.

125. It appears that the works completed have resolved the issues identified by the tenant who initiated the complaint and certainly, so far as Mr Bennett is concerned, there are no current concerns about the quality of the water.

126. The Applicant chose the cheaper of two bids. Whilst Mr Bennett reported that the in -flat works were completed at half the price quoted by Pipefix for the work undertaken by plumbers chosen by some of the Respondents, he readily accepted that there can be a difference between those minor works and the industrial nature of the main works and that there was no comparator he could use to exemplify that a lower price could have been achieved for the works.

127. The Tribunal is required to apply the guidance of the Supreme Court in **Daejan Properties Limited v Benson** (2013) UKSC and finds that the tenants were not, on the basis of the evidence presented to it by the parties, prejudiced by the failure by the landlord to consult.

128. It is apparent that the landlord knew of the legal requirement to consult, and admitted during the proceedings that it so knew. Ms Towler indicated that it was not the practice of the Applicant to commence Section 20 consultation until the works specification was available, so as to ensure certainty of communication as to what was planned. By that stage, the Applicant was under considerable pressure from the Local Authority Environmental Health Department and, thereafter, acted with some speed to ensure the commencement of the works. The Tribunal notes that enforcement action can be taken where there is a failure to provide water which is wholesome and Mr March of Dorset County Council had detailed how the water could be considered to be unfit for human consumption on the grounds of its taste, smell or appearance

and here there was evidence of discolouration and actual rust particles within the drinking water of the flat of the tenant who originally complained.

129. The Tribunal understands and has sympathy with the Respondents, who were not consulted in the way that they would have been had the Applicant followed the Section 20 statutory consultation procedure and were then presented with the realisation that there would be hefty bills to pay for the works. The Tribunal would encourage the Applicant to introduce a proper system of sinking fund for the long leaseholders so that such surprises are not encountered again and to follow the advice in the Code when doing so.

130. The guidance of the Supreme Court requires the Tribunal to measure the prejudice rather than simply disallow all costs above £250 per flat. The tenants here were not prejudiced on the basis suggested by Mr Bennett on a consideration of his submissions seen in the light of the available evidence. The Tribunal concluded, upon the evidence available to it, that there was no reasonable likelihood that the Respondents would have engaged their own consultant had formal consultation been followed. The work was, as stated above, a reasonable response to the circumstances facing the Applicant and there remains no evidence that another contractor could have completed the works at a lower price. Nor was there before the Tribunal evidence that there was any alternative solution which would have been cheaper.

131. The Tribunal determined that the dispensation requested by the Respondent landlord be provided. The Tribunal, accordingly, allows full dispensation to the landlord from the consultation requirements of Section 20, but subject to two conditions.

132. The dispensation is conditional upon the Applicant not seeking to recover its costs of these proceedings from the Respondents by way of service charge or administration charge in this or any other year and its repaying to them up to £500 for their costs subject to their supplying the Applicant with relevant invoice(s) within 21 days of the supply of those invoices.

The Costs of the Works

The Applicant

133. The Applicant says that four companies were invited to provide quotes for the works. Two of those companies submitted estimates: Pipefix Limited and Water Matters (UK) Limited.

134. The tendered sum from Pipefix Ltd is £158,290.22, which includes a contingency of £10,000. The final account was in the sum of £55,768.01 plus VAT. The quote received from Water Matters (UK) Limited was £231,000.

135. The cost for Wessex Water to provide a new water supply is £6,835.20 inclusive of VAT.

136. For the service charge year ending 31 March 2021, the costs incurred in connection with the works is as follows:

    a) £38,778.37 (exclusive of VAT) with Pipefix.

    b) £5,696 (exclusive of VAT) with Wessex Water

    For the service charge year ending 31 March 2022, the costs incurred in connection with the works is £16,989.64 (exclusive of VAT) with Pipefix.

    For the purposes of calculating the service charge the relevant costs are: the prelims, external works, internal works (not including individual flats). As at the end of March 2021 these incurred heads of cost total: £38,778.37. These costs will be included in the leaseholders' service charge for the year ending 31 March 2021.

137. In November 2020, and at the suggestion of Wessex Water, Pipefix Ltd carried out works in the grounds of the Building to dig the trench and prepare the piping to be connected to the new mains connection to be established by Wessex Water.

138. On 4 January 2021, the Applicant awarded the contract for the works to Pipefix Ltd.

139. Following completion of works carried out by Wessex Water to connect the main on Blandford Road to the boundary of the Building's site, Pipefix began works on site on 22 February 2021. The works have been completed.

140. It is the Applicant's intention to recover through the Respondents' service charge a contribution to the following costs ("Relevant Costs"):

    a) The costs incurred with Wessex Water.

    b) Those of the costs incurred with Pipefix Ltd that relate to pipework from which all flats benefit.

c) The Applicant's management fee for arranging and supervising the works and liaising with residents in connection with the works.

141. The Relevant Costs are costs that can be included in the calculation of the service charge payable under both the Type 1 and Type 2 lease.

142. Each flat in the Building benefits equally from the works and the associated management service.

143. In accordance with the Type 1 lease, the Applicant intends to claim a contribution from each of the leaseholders holding under those leases in the amount of 1/12th of the Relevant Costs (the costs being shared equally across all flats).

144. In relation to the Type 2 lease, and in the absence of a prescribed method of apportionment under that form of lease, the apportionment of the costs is a matter for the Tribunal. The Applicant invites the Tribunal to determine an apportionment of 1/12th on the grounds that all flats benefit equally.

145. The Tribunal is invited to determine that: a service charge is payable by each of the Respondents in connection with the Qualifying Works; and that the amount of the service charge so payable by each of the Respondents is 1/12th of Relevant Costs.

146. As indicated earlier, the Applicant agreed to limit its application in respect of Management to 12% only of the Pipefix works.

The Respondents

147. The Respondents question the efficacy of the tender process; if this was a government contract would this stand up to scrutiny?

148. The Applicant advised that 4 companies had been approached to tender for the work. They stated that 2 companies, "*Canford Drains and Dorset Water Services declined to tender*". However, these are small companies with minimal staff. Canford Drains informed it that the work was beyond their capacity, a fact that the Applicant should have checked before approaching them.

149. With only two companies quoting, the Applicant failed to approach a third company for a more independent assessment and quote.

150. Pipefix was awarded the contract as their quote was lower than Water Matters. Interestingly, Water Maxim/Pipefix are linked and wrote the Schedule of Works (dated November 2020) for the tender.

151. They feel that scrutiny of the tender process will show that the Applicant was aware that it was unlikely for the small companies approached to be competitive in the tender process. As Pipefix were involved in the drawing up of the tender and therefore had inside knowledge, it is almost a foregone conclusion that they would be awarded the contract.

152. In July 2020 they understand that Wessex Water received complaints of low water pressure from properties in the Upton area. Wessex Water carried out works to remedy this and flushing operations were required in a number of properties after the work had been completed. When reconnected, property owners were advised to flush their systems to remove remaining particles. This related to Gablehurst residents and once they had carried out this request, the water was free of particles. Residents subsequently received a credit on their water bills.

153. This is confirmed in a letter from Wessex Water.

154. After flushing of the system by Wessex Water no further issues occurred within flats 1-11 at Gablehurst.

155. A witness statement has been signed by all Gablehurst residents, bar flat 12, to the effect that there was no problem with water quality following Wessex Water repairs.

156. As this was the case why did the work to replace the entire system continue?

157. Note: Flat 12 is at the top of the building with a roof tank. To their knowledge this was not checked to see if it contained any debris.

158. The Schedule of Works included individual costs for each property and work which they were told to complete without deviation.

159. The independent plumber received numerous emails from the Applicant putting obstacles in his way, (see also **Aster Exhibit TB26** this work was deemed unnecessary by Wessex Water), indicating that Aster did not really want us to use private contractors on site but wanted Pipefix to do the work themselves. This would have been lucrative for the contractor.

160. Stevan Bennett of Flat 5 was told directly by Stewart Matthews of Pipefix that they did not actually have to carry out any work within the properties, but in his opinion it might be putting off the inevitable in some properties. He also stated that there was no evidence of asbestos and they would not be charging the £10k contingency. Mr Bennett had this conversation prior to an email about asbestos from the Applicant.

161. Having instructed an independent plumber to carry out a like-for-like survey, the costs were calculated at 50% less than quoted by Pipefix on behalf of Aster. The

plumber is not VAT registered but even taking this into consideration, if costs for internal works were inflated by 50%, without the opportunity of an independent survey, how do they know the same is not true for the external works?

The Tribunal

162. The Tribunal notes the confirmation of Mr Matthews that the £10,000 contingency fund was not used and that the contract price came down considerably from a figure net of VAT of £158,290.22 (which included allowance for internal works to the long lease flats) to a figure net of VAT of £55,768.01 (excluding the internal works to the long lease flats).
163. The Tribunal has already recorded above that it finds the sums expended to be reasonable in sum and its reasons for so finding.
164. It should also be recorded that the Tribunal found no evidence of any collusion by Pipefix and Water Matrix so as to affect either the price charged or the ability of Pipefix to gain the contract for the works. Mr Bennett made clear that he had no such evidence, only concerns.
165. The Tribunal finds that, subject to demands being made of the Respondents which comply with the terms of the lease, it is proper to demand of each tenancy the sum of £4,835.22 for the year to 31 March 2021 (Wessex Water at £5696 plus Pipefix at £38,778.37 = £53,369,24 inclusive of VAT. Add to that 12% of Pipefix at £4,653.40, a total of £58,022.64. Divided by 12.)
166. The Tribunal finds that, subject to demands being made of the Respondents which comply with the terms of the lease, it will be proper to demand of each tenancy the sum of £1,902.84 for the year to 31 March 2022 (Pipefix at £16,989.64 = £20,387.57 inclusive of VAT. Add to that 12% of Pipefix at £2,446.51, a total of £22,834.08. Divided by 12.)

<u>Section 20c and Paragraph 5A Application</u>

167. The Respondents have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Applicant's costs incurred in these proceedings.
168. They do not believe that they are liable for the Applicant's legal costs, however they ask the Tribunal to consider ensuring these are not passed on to them as respondents. We are happy to complete a Section 20c 5a schedule 11 form if it is required.

169. The Tribunal finds in favour of the Respondents on this issue because the Applicant indicated that it would not seek to recover its costs from the Respondents and because that is a condition of the dispensation granted above. The Tribunal would have made such an order in any event, given that the Respondents are entirely innocent of any blame for the position they find themselves in, whereas the Tribunal believes that the communication by the Applicant could have been better and earlier. It was not until the hearing of this application that there was any real clarity as to the sums involved. The stark realisation of the extent of and cost of the works came very late in the day to people, some of whom have been placed in a financial predicament.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

Section 20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the

agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined accordance with, the regulations is limited to the amount so prescribed or determined.

18 Meaning of "service charge" and "relevant costs"
(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose—
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 Limitation of service charges: reasonableness
(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a postdispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.