FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LDC/2021/0018**
HMCTS	**:**	**CVP**
Property	**:**	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Great East Court, Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Landlord)	**:**	**RMB 102 Limited**
Representative	**:**	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Respondents (Tenants):		**The Long Leaseholders identified in the Schedule to the Application**
Representative	**:**	**Dr Frank Gommer**
Type of Application	**:**	**1) To dispense with the consultation Requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA of the Landlord and Tenant Act 1985** **2) To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge J R Morris** **Mr N Miller BSc**
Date of Application	**:**	**14th April 2022**
Date of Directions	**:**	**16th May 2022 and 20th June 2022**
Date of Hearing	**:**	**13th September 2022**
Date of Decision	**:**	**24th October 2022**

DECISION

Decision

1. The Tribunal determines that with regard to the Further Works it is not reasonable to dispense with the consultation requirements in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat but that it is reasonable to dispense with the consultation requirements in relation to the cost of the replacement of the pipework and valves.

2. The Tribunal determines that with regard to the Additional Works it is reasonable to dispense with the consultation requirements.

3. The Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Tenants.

4. The Tribunal makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for written submissions prior to a determination of such costs.

5. The Tribunal does not make an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Reasons

Application

6. On 14th April 2022 the Applicants applied for a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 that the requirement to comply with all the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) ("the Consultation Requirements") should be dispensed with (the Dispensation Application).

7. On 30th June 2021 an Application, case number CAM/12UB/LDC/2021/0026, was made under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements under section 20 of the 1985 Act for qualifying works. The qualifying works were the replacement of the boiler flues. In April 2021 the boiler flues were found to be leaking and therefore defective with a health and safety risk of carbon monoxide being emitted. In addition, servicing and maintenance work could not be carried out on the boilers as any readings regarding their operation would be unreliable due to the defective flues.

8. The tribunal hearing that application determined for reasons set out in its Decision dated 4th March 2021 that retrospective dispensation should be given for those qualifying works.

9. The present application is quite separate and the only relevance to the decision concerning the flues is that, on completion of their replacement in June 2021, the contractors, Pure Heating and Plumbing ("'PHP"), were then able to carry out an accurate test of the boilers and related installation with a view to service and maintenance.

10. In doing so the Applicant states that it found that "Further Works" were required, they being further to the replacement of the flues. In an email exchange between the PHP and the Landlord's Agent, in July 2021 the following work was identified as being required:
    - Replacement of gas pipe work –
      Quotation 7180 dated 12th July 2021 and Invoice 17728 dated 11th August 2021 for **£7,608.30**
    - Replacement of boiler heat exchangers -
      Quotation 7193 dated 14th July 2021 and Invoice 18056 dated 17th September 2021 for **£13,511.95**
    - Replacement of Gas Isolation Valve - **£871.44**
    - Replacement Pressure Switch - **£358.08**

11. In addition to the above PHP identified the following "Additional Works" as being required, they being additional to the Further Works relating to the boilers:
    - A new pump and filtration system -
      Quotation 7858 dated 12th December 2021 for **£26,622.96**
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation **£12,910.76**
    - Flushing of system - **£2,340.00**

12. In order to carry out the installation of the new pump and filtration system the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room & filtration system -
      Quotation 7857 dated 12th December 2021 of **£13,351.30**
    - Additional Cost of hire of Temporary plant room due to delivery date for pump - **£3,024.00**
    - Decommissioning costs temporary plant room -
      Quotation 7859 dated 9th September 2021 of **£2,210.40**

13. These are hereafter referred to collectively as "the Qualifying Works". Their total cost was **£82,809.19.** However, following the evidence and submissions at the hearing the Tribunal found it appropriate to distinguish between what were two sets of work and so identify each by reference to the terms "Further Works" and "Additional Works".

14. The Applicant said that the work was necessary and urgent. Due to the time of year (December), the number of failures within apartments and the demand for heating and hot water meant that the temporary plant hire was an absolute necessity. The work could not be completed without the temporary plant hire as there were major pipework modifications required within the plant room which could not be done without the temporary plant hire. Some of the work took days to complete and

therefore, this would have caused a greater issue with residents and the obligations relating to heating and hot water as it was during the winter months.

Description

15. The Tribunal did not consider it necessary to inspect the Property. The following description is based upon the Statements of Case, photographs, the Lease and the Internet.

16. What is referred to in this Decision and Reasons as the "Property" in the Lease is the Block which comprises two buildings, 117 – 131 (Odds) The Cherry Building, containing 8 purpose-built Apartments, and 133-171 (Odds) Addenbrookes Road, containing 20 purpose-built Apartments, which have joint communal facilities including a central heating system.

The Law

17. The Law relating to these proceedings is set out in Annexe 2 and should be read in conjunction with this Decision and Reasons.

The Leases

18. Each Apartment is subject to a long residential lease. Each lease is similar in terms as to the relevant covenants.

19. A copy of the lease relating to Plot 305 dated 30th September 2013 and made between (1) Countryside Cambridge One Limited and Countryside Cambridge Two Limited, (2) Countryside Properties (UK) Limited and (3) Kurt Stadler and Friedelind Stadler (the "Lease") was provided. The terms of the Leases are understood to be common to all Apartments.

20. On 8th August 2014, Countryside Properties (UK) Limited ("the Developer") assigned the freehold title to the Property to E&J Ground Rents N06 LLP who then assigned the Property to the Applicant, RMB 102 Ltd, on 26th July 2019. E&J Ground Rents N06 LLP and RMB 102 Ltd form part of the same holding group. RMB 102 Ltd is therefore the Landlord and the long leaseholders of each of the apartments is a Tenant.

21. As at 2018 APT Property Management ("APT") was the managing agent for the Property. On 1st February 2019 the Applicant appointed Flaxfields Ltd ("Flaxfields") as its managing agent for the Property to carry out all of the Respondent's obligations and duties under the Leases, ensure that all statutory requirements had been complied with and collect the service charges that have fallen due. On 1st September 2021 Flaxfields' appointment ceased, and Premier Estates ("Premier") were appointed in Flaxfields' place. On 29th June 2022 an RTM company has taken over the management of the Property and Urang Ltd have been appointed managing Agents.

22. Relevant provisions of the Leases are set out in Annex 2 of this Decision and Reasons.

Written Statements and Hearing

23. Both parties provided written statements which were confirmed and developed at the hearing. The cases summarised below include both the written and oral cases presented to the Tribunal. The hearing was attended by Ms Rebecca Ackerley Counsel for the Applicant, Mr Paul Tolley of Premier, the Applicant's current Managing Agents and Dr Frank Gommer, the Respondents' Representative.

    Other persons in attendance included Ms Cheryl Earle and Mr Steve Boon of E & J Estates Ltd and Ms Hannah McLeod of JB Leitch the Applicant's Solicitors.

Preliminary Issue

24. The Applicant submitted a late witness statement from Mr Tolley. The Respondent's Representative objected to the late production saying that he had only received the witness statement the day before the hearing and had not had an opportunity to either read or consider it and therefore it should be excluded. Counsel for the Applicant accepted that the witness statement had been provided late in the day but the Tribunal had not made a Direction for the Applicant to reply to the Respondents' Statement of Case.

25. With regard to the content of the witness statement Mr Tolley said that he wished to make certain points clear which he felt the Respondents had misrepresented by being selective in their supporting documents, in particular certain emails had been omitted. He said the exhibits he had provided to his witness statement in Reply to their Statement of Case included the whole email exchange particularly between Mr Cole and PHP. Mr Tolley said that he could see no objection to admitting the documents as they were known to the Respondents either because they were the recipients or because they had been included in the bundles of the two previous cases.

Decision re Preliminary Issue

26. The Tribunal had not considered a direction to reply to the Respondent's Statement of case was necessary for a section 20ZA Application. It also considered that the Applicant through Mr Tolley's oral evidence could draw attention to any points in the Respondents' Statement of Case which he felt were misleading and refer to documents if, as he said, they were in the knowledge of the Respondents.

27. Therefore, the Tribunal refused permission to admit Mr Tolley's witness statement in reply.

Applicant's case

28. The Applicant provided a Statement of Case in the form of a Witness Statement by Mr Tolley. With regard to the replacement gas pipework and the boilers he referred to the Witness Statement of Mr Jonathan Coles, director of the Applicant's previous Management Agent, Flaxfields.

29. Mr Tolley stated that his predecessor Mr Coles for Flaxfields was told by PHP in July 2021 that the Further Works would be required. Mr Tolley referred the

Tribunal to Witness Statement of Mr Coles, which was prepared for case number CAM/12UB/LDC/2021/0026 regarding an application under section 20ZA of the Landlord and Tenant Act 1985 in respect of the Works to replace flues. Mr Coles's statement dealt with the identification by PHP and the notification to the Leaseholders of the Further Works and was supported by correspondence attached to his statement.

Mr Coles's Witness Statement re Further Works

30. The relevant part of Mr Coles's Statement said that following completion of the installation of the flues PHP advised that Further Works to the gas pipework in the plantroom was required and two of the four boilers needed replacing. Quotes were obtained totalling £20,780.88 (£7,608.30 for the replacement of the gas pipework and £13,172.57 for replacement of the heat exchangers) and a copy of which was provided.

31. Following application CAM/12UB/LDC/2021/0026 to the Tribunal for dispensation regarding the works to the flues in which reference was made to these Further Works which were qualifying works under section 20 of the 1985 Act, the following objections were received from the Respondents which are followed by the Applicant's responses. These mostly refer to the Further Works of replacing the boilers but some refer to the flues as well.
    a. Frank Gommer on behalf of a formally recognised tenants association at the Premises;
    b. Linda Skeggs and Glen Skeggs of 135 The Cherry Building,
    c. Julie Vaughan of 151 The Cherry Building,
    d. Michael Opel of 127 The Cherry Building,
    e. Roberto Lattuada and Silvana Filipponi of 137 The Cherry Building,

32. The objections of Dr Frank Gommer on behalf of the Cherry Building Residents' Association:
    1. The Application does not concern qualifying works;
    2. The plant room including the flue is still in the defects' liability period of the Developer;
    3. The leakage of the flue has been known to the landlord since 2018; and
    4. The Landlord's managing agents have made no attempt to explain the issue and potential costs after the state of the flue became so severe that no further operation could be permitted.

33. The Applicant's Response:
    1. Qualifying works. under the Landlord and Tenant Act 1985 are defined as "works on a building or any other premises". This includes any repair, replacement and maintenance works. As the Works to the flues and boilers are replacement works on the Property, they therefore fall under the definition of qualifying works.
    2. The Developer confirmed those other parts of the system other than the flue are not under warranty and therefore it was understood that the flue itself is also not under warranty.
    3. Prior to Flaxfields management of the Property the issue of the flues leaking was raised with PHP who were in the process of fixing the leak. After the

completion of the works, the flues were still leaking, and probably the leaks had never fully been repaired.

4. The Managing Agents have tried to update leaseholders throughout the process. Due to the number of leaseholders at the property, there may have been delays in responses, but this was never due to a lack of attempting to contact. Three updates had been provided to all leaseholders throughout this process, as well as individual concerns being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

34. The objections of Linda and Glen Skeggs:
    1. The Respondents believe Flaxfields have failed to comply with the terms of the lease.
    2. The Respondents state the issues relating to the heating and hot water have made it difficult to manage the Flat.
    3. The Respondents believe that the plant room hasn't been maintained properly since they've purchased the flat and that this would not be a matter of urgency if the boilers were regularly maintained.
    4. The Respondents are unhappy as Flaxfields have billed over the £250 permitted by the lease without consultation.

35. The Applicant's Response:
    1. It is refuted that the Applicant breached the terms of any leases. The issues were only identified in April 2021 after PHP's site inspection. Alternative advice was obtained quotes were compared in order to act reasonably and in the interests of the leaseholders, the Works started swiftly on 29 June 2021. It was unfortunate that the Further Works were identified but these could not be foreseen.
    2. The inconvenience is appreciated although these issues have been out of the Applicant's control.
    3. No evidence has been given of any suggested failure for failing to maintain the plant room.
    4. The full consultation process was not completed, hence the reason for making the S20ZA application. Correspondence was sent to keep leaseholders informed as much as possible in respect of the Works. The reason the Dispensation Application was made was because Flaxfields were aware of the obligation to consult when billing over the permitted £250 limit.

36. The objections of Julie Vaughan
    1. This situation regarding the hot water supply has been occurring for too long a period of time causing severe disruption to her Tenant.
    2. Flaxfields have been poor at replying to correspondence and they have provided misleading emails stating gas inspections have been carried out when they have not.

37. The Applicant's Response:
    1. The disruption was appreciated but the amount of time to rectify the problems was out of the Applicant's control. The Works were instructed as soon as reasonably practicable and unfortunately, the Further Works were found to be necessary.

2. PHP had been booked for the gas inspections to take place but when PHP attended, they informed Flaxfields that they could not be carried out due to the leaking flues.

38. Objections of Michael Opel and Applicant's Response
    1. Already dealt with under Dr Gommer's objections
    2. He said he was unaware of the issues when he bought the Flat on 30 June 2021. However, the Managing Agent did inform him that there were two section 20 works in process.

39. The Objection of Roberto Lattuada and Silvana Filipponi:
    1. The numerous problems with the heating system have led them to feel let down by the managing agents.
    2. There has been a lack of communication with regards to the works with too many delays and interruptions of services.

40. The Applicant's Response
    1. It is not fair to associate the problems with the heating and hot water system with the quality of service provided by the managing agents. Flaxfields on behalf of the Applicant responded to all the problems that have arisen to the best of its ability. When made aware of the problems, quotes for the Works were obtained and PHP were instructed. It was unfortunate that the Further Works were then deemed necessary.

41. Mr Coles said that Flaxfields' had tried to update leaseholders throughout the process and there has been no lack of communication. Due to the number of leaseholders at the Property, there may have been delays in responses, but this was never out of not attempting contact. Updates have been provided to all leaseholders throughout this process, as well as individual concerns also being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

Correspondence with PHP and the Respondents re the Further Works

42. Email correspondence between Mr Coles and PHP and the Leaseholders regarding the Further Works was provided. Mr Tolley said that it was important to look at the whole email exchange between Mr Coles and PHP as it showed that they were discussing the best way forward to remedy the problems with the heating system at as low a cost as would be reasonable. The Correspondence comprising emails between PHP and Flaxfields was provided which was said to show the need for the works to be carried out as follows:

    7th July 2021

    PHP confirms that the new flues had been installed but that there were problems with all four of the boilers which was set out in considerable detail. PHP identify the likely cause as the heat exchangers.

13th July 2021

Mr Coles sought confirmation that the replacement of the boilers is on top of the £8,000 for the recommended replacement of the gas pipes.

15th July 2021

PHP confirm that the heat exchangers have failed due to them coming to the end of their life and that the gas pipe work will also be needed.

14th July 2021

Mr Coles wrote to the Leaseholders as follows:
"I am writing to all owners with a comprehensive review of how things stand currently and what actions are being taken to address all the apparent issues.

The recent flue works were very frustrating for you all, we totally understand this and appreciate your patience during the works. The flue works have been fully carried out to the specification quoted as we are satisfied with the end result.

We are aware that since the flue works were completed that it has resulted in some minor repair works needed to circa 6 out of 30 HIU's which have subsequently been addressed or are booked in with engineers.

Flaxfields Ltd have recently been advised by Pure Plumbing & Heating that 2 of the four boilers need replacing and that some further works to the gas pipework in the plantroom is required.

Their comments on the boilers are as follows:

Boiler 1
Safety time exceeded. The boiler is igniting but not recognizing the flame. Probe could be faulty from the excessive heat in the burner or water damage from the heat exchanger leak.

Boiler 2
The boiler is currently the best performing staying on the majority of the time but does reach temperature faster than expected which is no doubt connected with the partially blocked heat exchanger.

Boiler 3
Reaching high temperature very quickly. Boiler only stays on for 1 minute before it gets to 80 degrees and the flame goes off. The boiler temperature does continue to climb and often reached near 100 degrees. Boiler sometimes recognises excessive temperature and cuts out but does reset itself after the temperature reduces. Then the process repeats.

Boiler 4
Same as boiler 1.

Recently Pure monitored the operation and although not right the boilers are slowly heating the district system. Peak time approaching and the system temperature was maintaining between 58 and 62 degrees. Additional heat is needed for the system to deliver effectively, which means, ideally, 2 new boilers.

From early conversations with Pure Heating & Plumbing it does sound like this may be an expensive issue to address so we are obtaining quotes as we speak whilst trying to keep the system going.

We can only apologise for the issues you are experiencing and assure you that we are doing all we can to minimize any ongoing disruption to services. Flaxfields Limited have acted on every recommendation made by Pure and continue to rely on their advice as accredited professionals. We will report back on costs as soon as known."

17th July 2021

PHP provides an account of the lifespan of the boilers as follows:

"Commercial boilers generally have a life span of 10-15 years, however, during this time repairs and individual parts and components will require replacement, the more operational time the boiler goes through the more chance there is of these repairs and replacements being needed. For example, a domestic boiler may last between 10 ~ 15 years, depending on the manufacturer, however, after 5 - 10 years individual components Within that boiler will need replacing. As with commercial boilers that are running 24/7 parts will need replacing but more frequently. The more boilers you have on your system the less stress and wear and tear is caused on each boiler.

There is no way of telling how long a boiler will last. Most manufactures will on average provide a 5 warranty. There are a few factors that cause a boiler to deteriorate and in turn, reducing its operational life span. Leaks and water conditions being a couple.

The system at the Cherry building has been treated and the closed system has been maintained correctly as part of the service agreement. Unfortunately, a part, the heat exchanger has failed on boilers 1 and 4 and leaked which has caused the damage and the system to deteriorate rapidly.

Installing the new boilers ensuring the PPM is carried out, continued monitoring and all remedial works when required on equipment going forward, are authorised and carried out promptly will help to ensure that the system operates and lasts to its potential.

The issues with the HIU do not have anything to do with the Installation of the flues. The reasons HIU filters are blocked is due to the damaged heat exchangers and the condition of the system.

Switching off the flow and return valve to the HIU will help protect the HIU but in doing this the unit will not operate as it needs continuous flow from the system to produce heating and hot water."

23rd July 2021

PHP suggested two options:

"Option 1
Replace the leaking heat exchangers and probes in the current boilers and install a temporary side stream filtration unit for a period of 4 weeks and have a full system flush and close of light oxide and sludge removing chemical. This will pass through the system clearing any blockages and sludge that may have built up.
Quote 7193 has been revised and resubmitted at the cost of £10,977.15 Plus VAT
However, PHP recommended

Option 2:
Replace the 4 no existing boilers and replace them with 4 No new Ideal Evo MaxZ Boilers and an Ideal Evo Max plate heat exchanger.
Installation of the plate heat exchange will mean the heating system will be separated for the boiler system, reducing future potential risk to the boilers.
The cost for this would be £43,321.87 Plus VAT
Please note:
The works on the gas pipe will still need to be carried out at the cost of £6,340.25 Plus VAT with either option."

Mr Tolley's Witness Statement re Additional Works

43. Mr Tolley was only able to address the Additional Works. As noted from Mr Coles's witness statement, the Further Works were carried out before Premier were appointed as managing agents. Mr Tolly set out the Qualifying Works as follows:
    - Gas pipework needed to be replaced – Quotation 7180 dated 12th July 2021 for £7,608.30
    - Boiler heat exchangers or replacement of boilers were needed - Quotation 7193 dated 14th July 2021 for £13,511.95
    - Gas Isolation Valve needed to be replaced - £871.44
    - Replacement Pressure Switch - £358.08

44. The replacement of the gas pipework was completed on 11th August 2022 and the work to replace the heat exchangers was completed on 17th September 2021. In the course of carrying out the works it was found that the gas isolation valve needed to be replaced and the replacement pressure switch was broken and was renewed.

45. Mr Tolley said that in December 2021, he was told the following Additional Works were needed:
    - A new pump and filtration system would need to be installed - Quotation 7858 dated 12th December 2021 for £26,622.96
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation £12,910.76
    - The system would need to be flushed out at a cost of - £2,340.00

46. Mr Tolley said that these works were completed in April 2022.

47. In order to carry out the Additional Works of installation of the new pump and filtration system, the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room - Quotation 7857 dated 9th September 2021 for £13,351.30
    - Due to the time taken for the pump to be delivered an additional cost of hire was incurred of £3,024.00
    - Decommissioning temporary plant room - Quotation 7859 dated 9th September 2021 for £2,210.40.

48. A copy of the details and as to how the work was to be undertaken as set out by PHP was provided. It is a very detailed document and is not repeated here but stated that the work would be carried out in three stages and in outline:
    Stage 1
    - Setting up and commissioning a temporary plant room.

    Stage 2
    - The installation of a X-pot 6 side stream filtration unit and inline strainer & Microfil unit to replace the existing pressurisation unit.
    - Installation of a Grundfos Primary District Pump to replace the existing Wilo pump.
    - The flushing of each riser to ensure the system is clear of debris

    Step 3
    - Decommissioning the temporary plant room

49. With regard to the necessity and choice of filtration system PHP said in its quotation:

    "Pure to revisit site (the temporary plant room now providing heat to the building) and carry out the removal of the prefabricated steel district supplied pipe work inclusive of the existing Wilo pump set and Spirotec air/dirt separator. Carry out necessary pipework modification using carbon steel mapress pipework, this will include a new X-pot 6 side stream filtration unit and inline strainer (document attached). We previously quoted to supply and install a Magnetic filter and dirt & air separator; we feel this solution provides better system protection and a more cost-effective option.

    The previous price was £10,953.57 plus VAT. The new X Pot solution also incorporates built-in a side stream filter, dosing pot, and magnet filter, there will be savings made with this unit. Prior to connecting onto the existing header, Herts Environmental will carry out a flush of the existing boilers cascade header and main primary header to remove any magnetite using medium-strength cleaning chemicals with the existing boilers isolated. Upon completion of header flushing works the boilers will then be flushed to dear any debris in each individual heat exchanger using a low strength chemical in preparation of reinstatement. We will strip down the existing headers prior to flushing to ensure these are not too heavily blocked with magnetite sludge. This is the most cost-effective option without replacing the headers or boilers.

    Supply and install new Grundfos twin head pump set (model to be confirmed and cost), cost will include link up to the existing BMS panel.

We recommend the existing pressurization unit is replaced with a Microfil unit; the existing setup is an open vented tank which is subsequently open to the elements. This when filling can create oxidization (corrosive) and can cause the integrity of the system to corrode, rust, and leads to magnetite and cavitation.

Labour and Materials - £22,185.80 plus VAT"

50. With regard to the Pump Mr Tolley said that Dr Gommer as representative for the Respondents was asked for his input on the type of pump that was to be used. As a result of the discussions with Dr Gommer, the pump that has been installed is a pump which regulates with the demand, if the system is not used the flow drops to around 20% and if everybody used the system it would reach 100% of the demand. using the most energy.

51. The need for the system to be flushed out was said to be shown from the photographs taken by Harts Environmental who carried out that part of the work. These depicted a large quantity of sludge having been taken out of the system. Copies of the photographs were provided.

52. It was noted that the Respondents disputed the Work Order value. Premier Estates provided Pure Heating & Plumbing with the Work Order to proceed with the pump replacement at the budgeted cost and later amended the figure once an official quote from Pure for the new pump had been received

53. Mr Tolley said there was a delay in obtaining the pump which meant the hire of the temporary plant room had to be extended.

Correspondence with the Respondents re the Additional Works

54. Mr Tolly outlined the extent to which the Leaseholders were notified of the Additional Works. He said that on Friday 10th December 2021 all Leaseholders were sent a letter as follows:

"We recognise that the current communal heating/hot water system is struggling to provide all apartments with sufficient hot water and heating. In an attempt to restore the supply for residents we are regularly instructing Pure Heating & Plumbing to attend to investigate.

We have instructed Pure Heating and Plumbing to complete a series of works to the communal heating system that should result in greater reliability, less faults and reduced call outs, subject to regular maintenance in line with manufacturer's guidelines. However, to complete the required work, we need to implement a temporary plant room which will ensure the hot water/heating supply is not lost for the duration. The temporary plant room will be installed by the end of Monday 13th December 2021 at the latest and works will commence for an estimated duration of 8 weeks, taking into effect the Christmas period.

As part of the works, the temporary plant room will be stored outside of the existing plant room and will provide consistent supply of hot water/heating to all apartments with heat more than the existing system currently."

55. He said this letter did not have any costs as these costs could change (similar to the pump costs), hence no information was shared to all residents, but was available upon request.

56. On Tuesday 30th November 2021 Nicola Murray of Premier Estates sent an email (copy provided) with service charge estimates for the Residents Association to review and the estimated costs (for some of the work) were listed as follows:
- Replacement failed pressure switch on boiler 2 £358
- Boiler Heat Exchange replacement £13,512
- Replacement WILO pumps £10,500
- Permanent filtration system £13,800
- Boiler 4 switch and gas lever repair £872

57. Mr Tolley said that Dr Gommer and the Respondents already knew about the estimated costs for a lot of the work as it was included within the service charge estimate. He said that there were some unexpected costs which were included in the mid-term service charge levy which was set out in an email (no copy was provided).

58. In response to the Respondents' claim that they were not able to enter the plant room to make adjustments to the heating Mr Tolly acknowledged that Premier Estates had requested that residents do not access the plant room. He said that this request was appropriate due to the equipment there and that contractors are available to attend any faults and residents have been advised to contact the Out of Hours team whereby a callout will be made to Pure Heating & Plumbing.

59. Mr Tolley also said that a letter was sent to Leaseholders on 23rd March 2022 on completion of the Qualifying Works which set out what was done and the cost as stated in the section headed Application above.

Respondents' Case

60. The Respondents stated that they were not notified of the works and estimated costs of the Qualifying Works, as required by the Tribunal's directions dated 16th May 2022. As a result, the Respondents remain largely in the dark about significant aspects of the Applicant's case, including as to the true scope of the qualifying works, their full cost, whether they were in fact needed and what, if any, alternative course of action was considered and quotes obtained.

61. In the circumstances, the Respondents are unfairly prejudiced in these proceedings by the lack of documents and information provided by the Applicant that would have enabled the Respondents to provide a more comprehensive response to the present application.

62. Dr Gommer outlined the law as follows:

Section 20ZA(1) of the Landlord and Tenant Act 1985 provides as follows:

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make

the determination if satisfied that it is reasonable to dispense with the requirements.

The correct approach to considering an application for dispensation has been set out in *Daeian investments Ltd v Benson* [2013] UKSC 14, as summarised in Woodfall on Landlord and Tenant, at 1199.8 as follows:

(1) the consultation requirements are not an end in themselves, but a means to the end of the protection of tenants in relation to service charges: their purpose is to ensure that tenants are protected from paying for inappropriate works, or from paying more than would be appropriate;
(2) in considering dispensation requests, the tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
(3) it is neither convenient nor sensible to distinguish between a serious failing and a minor oversight, save in relation to the prejudice it causes;
(4) the financial consequences to the landlord of not granting dispensation are not a relevant factor, and neither is the nature of the landlord;
(5) while the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants: once they have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
(6) the tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application;
(7) insofar as the tenants will suffer relevant prejudice, the tribunal 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;
(8) that conclusion does not enable a landlord to buy its way out of having failed to comply with the consultation requirements, because it will still face significant disadvantages for non-compliance, namely
    (i) it must pay its own costs of making and pursuing an application to the tribunal for a dispensation,
    (ii) it must pay the tenants' reasonable costs of investigating and challenging that application, and
    (iii) it must accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.

Respondents suffered prejudice

63. Dr Gommer said that it was indisputable that in the present case the Respondents suffered relevant prejudice.

64. First, as a result of the lack of information about the qualifying works and the Applicant's refusal to engage with the Respondents, the true scope of the works and costs were not known to the Respondents. Dr Gommer referred to correspondence as follows:

- on 13th July 2021, Flaxfields the previous managing agent to PHP expressly told them not to provide any information about the works to the Respondents.
- on 12th August 2021 and 3rd September 2021, the Respondents asked the Applicant to provide them with information on costs and further details about the works but received no answer.
- on 10th December 2021, the Applicant sent a letter to the Respondents purporting to provide information about, and costs of the qualifying works. However, that letter did not contain any information about costs.

65. The Applicant takes an aggressively unhelpful stance for example it has failed to provide information as part of the right-to-manage process (with the acquisition date on 29 June 2022) The Applicant has expressly instructed its managing agents not to assist the Respondents.

66. The reason that the Respondents were actively seeking information about the works and costs was to ensure that the Qualifying Works were in fact necessary and appropriate, and that the costs of those works (so far as they were necessary) were reasonable in amount. Had the Respondents received the information they sought, and which was required to be provided by the consultation requirements, they would have engaged an independent surveyor and specialist engineer to advise on the necessity of the works and alternative cheaper courses of action. The Respondents would also have obtained information about alternative suppliers to ensure that the Applicant obtained competitive quotes.

67. Secondly, the Applicant's failure to follow the consultation process, together with its opaque processes, has meant that the Respondents may now be less able to pursue an application to determine payability and reasonableness of service charges. If the consultation process had been followed, the Respondents would have obtained (or at least would have had the opportunity to obtain) contemporaneous quotes based on the actual state disrepair. That opportunity to obtain contemporaneous documents and information is now lost. Even if the Respondents now decide to obtain indicative quotes, they would necessarily be somewhat speculative and based on an assumed state of disrepair.

68. Thirdly, as a result of the Applicant's failure to follow the statutory consultation process, the Respondents are now faced with exorbitant service charge demands in respect of works which failed to remedy the original disrepair. The plant room is still not functioning as designed. All four boilers fail regularly leaving residents without hot water. The system is only 7 years old. It was submitted that had the Applicant followed the consultation process, the Respondents (who in fact live in the subject property and are extremely familiar with the problems there) would have provided detailed comments on the works specifications, would have nominated alternative providers and would have submitted comments on the estimates of costs (it appears that the Applicant had not sought any alternative quotes).

69. The only time resident input was requested was in regards with the proposed replacement of the pumps. In turn, the property managers have been provided with the statement of an expert witness from the developer suggesting significantly more

work in respect to the pump specifications are required. Therefore, residents suggested that an expert opinion is to be obtained to select the correct pumps size. This seems not to have happened and, in fact, the pumps installed appear to be even larger than the previously used oversized ones.

70. Fourthly, documents provided in the course of the earlier dispensation application suggest that the Applicant had received the recommendation to replace the boilers in the plant room rather than attempting a repair. The Applicant had decided not to follow expert advice. It seems certain that many of the problems now being experienced, together with the further costs of rectifying them, are a direct result of that decision. Had the Applicant followed the consultation process, the Respondents would have requested their own expert to analyse the two options in July 2021.

71. Fifthly, the Applicant's deliberate decision to push on with the works regardless, in an apparent hope that a dispensation could be obtained at a later date, resulted in the present application and the Respondent's need to spend time and money opposing it. It was clear from the outset that the Respondents were keen to engage with the Applicant in relation to the works and their costs. The works were not urgent and there was ample time for the Applicant to consult the Respondents.

72. Unlike the previous occasion involving a flue potentially leaking harmful gases into communal areas, there were no problems with the plant room requiring urgent works. The severe delays with carrying out the works shows their non-urgent nature.

Expert Report Costs

73. Dr Gommer said that when he was asked about the replacement pump, he had said that expert advice should be obtained as to whether the pump should be replaced at all and if so, what pump was required. He added that an expert in heating systems of this kind was required because PHP were in their own words, “only plumbers”,

74. He submitted that if the Tribunal was minded to grant the application for dispensation, a condition should be included that the Applicant pays the Respondent's costs of obtaining an expert report - *Aster Communities v Chapman* [2021] EWCA Civ 660.

75. The Applicant’s failure to provide any information highlights the need for such an expert report, especially as it is not clear if the works suggested were actually required.

76. The quotation for the largest individual costs of over £26,622.96 for installation of a filtration system mentioned an initially cheaper version for £10,953.57 and even acknowledges that there is an existing set-up doing this job, covered under the service contract with PHP and only 7 years old.

77. The need to hire a filtration system for £2,016.00 and a temporary plant room should have been examined by an expert to establish if the work (if required) could have been done without these extra costs with the boilers being worked on individually, which seems easily feasible as each boiler can be isolated separately from the system.

78. In addition, the decision to replace a large amount of only 7-year-old gas pipe because of a micro-leakage supposedly within accepted tolerances seems excessive and onsite welding would have incurred a fraction of the costs.

79. Also, the works were identified in July 2021 a time when very little heating demand is required from the system, therefore it should not have been left until December for the work to be carried out.

80. The Respondents then referred to a number of matters which were not relevant to the issue of whether or not dispensation should be granted i.e breakdowns during the works being carried out; flushing works being carried out by Huttie; a loan being made by the Landlord.

81. The Respondents submitted that the Tribunal refuse the Application for dispensation and that the charge for the Qualifying Works is limited to £250 each.

82. Should the Tribunal nevertheless be minded to grant the application, it should be on condition that the Applicant pays the Respondents' costs of engaging an expert to prepare a report on the qualifying works, such report to be used in a future application to determine payability and reasonableness of costs.

83. The Tribunal should also order the Applicant to pay the Respondent's costs

Discussion

84. The parties confirmed their written statements in the hearing.

85. In response to Counsel's questions Dr Gommer said that he had difficulty in preparing the case because information was not handed over in June 2022 when the RTM Company took over management. PHP were not prepared to provide any information about the system therefore he said the RTM Company had little choice but to continue employing them for maintenance. However, advice was being sought from expert engineers and an alternative maintenance contract was being considered.

86. Dr Gommer said that an expert report was needed to assess what was wrong with the system and to obtain a quotation to remedy the defects.

87. Counsel said that when it was known in April 2021 that the flues needed to be replaced and in July that the heat exchangers needed to be replaced the Respondents did not appear to be concerned about employing an expert to report on defects. Their main concern was passing the cost of the works on to the Developer.

88. Dr Gommer responded that the responsibility for the defects lay with the Developer. If the proper procedure had been followed regarding section 20 the Respondents would have questioned why a system that should have been effective for 15 to 20 years was failing after only 8 years. He submitted that the managing agents were too anxious to get the jobs done rather than investigate why they needed to be carried out.

89. Dr Gommer went on to question the work that was carried out. He said the leak around the gas valve could have been welded rather than a replacement of the valve. The breakdowns have continued despite the work that was carried out. He said that there had been over 70 breakdowns since the new heat exchangers were installed. All four boilers had on occasion failed. What was required was expert report on the system and new boilers as was recommended to Mr Coles by PHP in July 2021.

90. Dr Gommer said that the new pumps had still not been commissioned and he had been told they were not appropriate. He said he had been asked about the new replacement pump and referred to an email in which he had said that expert advice should be obtained.

91. With regard to the filtration system Dr Gommer said that there was a cheaper alternative filtration system to which PHP referred which should have been considered- He said again that an expert should have been instructed to advise on the best system. If an expert had been employed all these points could have been highlighted and alternative quotations obtained for each of the respective parts.

92. Dr Gommer said that the only reason given for not following the procedure was that the work was urgent. He disputed the urgency of the works saying that the breakdowns which the Additional Works were intended to deal with continued. The work could just have well been done in March or July of 2022.

93. Mr Tolly in reply said that initially the Leaseholders required gas certificates and were pressing for remedial work to be carried out so that these could be issued. He had then received numerous complaints prior to the Additional Works about breakdowns and the lack of hot water and later heating. PHP had advised him that the Additional Works of a new pump and filtration system were needed to prevent further problems with the boilers. Nicola Murray had told the Residents Association of the estimated costs in an email date 30th November 2021 and a letter was sent to all Leaseholders on 10th December 2021. Being at the beginning of winter it was considered necessary to ensure the heating system was in full working order and therefore the work was considered to be urgent and that a section 20 procedure would take too long. Following the works being carried out he said there had been a significant reduction in complaints.

94. The Tribunal referred to the correspondence between Flaxfields and PHP in July in which PHP recommended that the boilers be replaced, a point repeated at the end of the Invoice number 18056 dated 17th September 2021. The Tribunal noted that the Leaseholders were never told that there were two options and were never consulted about which option they would prefer, notwithstanding that it was cheaper to have the heat exchangers alone replaced.

95. Counsel for the Applicant submitted that this was a choice the Respondent was entitled to make. Having made the decision to replace the heat exchangers then that is what the Tribunal should consider and not whether other works such as the replacement of the boilers would or would not have been a better alternative.

96. Counsel said no issue was raised with regard to the pipe work. The replacement of the gas valve was on the advice of PHP. The Applicant was advised the valve was

leaking and should be replaced. The Applicant was right to rely on the expertise of the contractor and was not in a position to suggest another form of repair such as welding. Counsel said that the pressure valve was damaged and needed to be replaced. There was no evidence to suggest the valve had been damaged by the contractor.

97. Counsel said that PHP had made it clear that a new filtration system was required to improve the operation of the system.

98. With regard to relevant prejudice Counsel said that although the Respondents refer to requiring expert evidence, they have not provided any. She questioned whether they would have asked for an expert's report if a consultation had taken place.

99. Had a consultation taken place, based upon the previous cases, the Respondents would have contended that the Developer should pay and not them.

100. The contractors provided all the information about the system and so obtained a quotation for a pump recommended by the manufacturer which they understood to be the correct size and proceeded on that basis.

101. There had been communication with both the Residents' Association and the Leaseholders. Counsel submitted that the Respondents could not say that they had no idea what was being undertaken. In addition, the estimated costs were provided in an email date 30th November 2021. These emails suggested partial compliance.

102. Irrespective of the issue of consultation, an estimate was obtained in December and due to the need for heating over the winter and taking into account the number of complaints received and the time that a section 20 procedure would have taken it was reasonable to press ahead with the work as a matter of urgency and to seek retrospective dispensation.

103. The comments that were made to Mr Coles and which were set out in his witness statement about the Further Works related to wanting the works done rather than what type of works were to be carried out.

104. Dr Gommer said that with more cooperation by the Applicant and it's managing agents with the Respondents the proceedings could have been avoided. The Applicant and its managing agents had held back information and what information was provided lacked formality. There were three occasions when the Applicant should have consulted.

105. Dr Gommer said that because there had been no expert's report it was still not clear why the boilers break down, why a new filtration system was required. The system is still not providing hot water and heating. Dr Gommer submitted that the root of the problem was that the boilers needed replacing.

Decision

106. The Tribunal considered all the evidence adduced and submissions made in the written and oral representations. In determining whether the Respondent had suffered prejudice by the section 20 procedure not being followed the Tribunal in

respect of the Qualifying Works the Tribunal treated the Further Works and the Additional Works separately. The justification for this was that the works were separated by several months. The Further Works were carried out in July whereas the Additional Works were carried out in December. The Further Works were carried out while Flaxfields were the agents and the Additional Works while Premier were the agents.

107. Firstly, the Tribunal considered the urgency of the Qualifying Works.

108. The Applicant had submitted that the Qualifying Works as a whole were urgent because if they had not been carried out when they were actually undertaken the Leaseholders including the Respondents would not have had hot water and heating because the boilers were failing and breaking down and the works carried out were a) the Further Works of repairing the boilers (Replacement of boiler heat exchangers and related pipework and valves) and b) the Additional Works were to make the system more reliable (installation of a new filtration system and pump).

109. The Tribunal accepted that the Further Works were urgent. The Tribunal found that the Leaseholders would be prejudiced if the Further Works were not carried out expeditiously.

110. The Additional Works were preventative in that it appeared the system could have operated with the existing filtration system but there was a risk that debris and sludge would build up in the system, causing it to fail. Therefore, it needed to be carried out expeditiously but there was not the same urgency as with the boilers.

111. Secondly, the Tribunal considered whether any of the procedure had been complied with.

112. With regard to the Qualifying Works generally the Tribunal accepted that for an industrial size heating and hot water system there were a limited number of contractors who would be prepared tender and carry out repair, replacement or maintenance work. Two contractors had carried out maintenance work being PHP and Huttie. Either appeared capable of undertaking the Further and Additional Works. However, only PHP was engaged. No explanation was given as to why Huttie was not asked to tender or to offer an opinion as to what action could be taken with regard to either the Further or Additional Works.

113. With regard to the Further Works, PHP had installed the new flues and on testing they found the boilers were in a parlous state. The emails from PHP to Flaxfields of the 7th July 2021 setting out the problem with the boilers, of 17th July 2021 explaining why the boilers need to be replaced and of the 23rd July 2021 setting out the options available were clear. The Tribunal could not see why Flaxfields and PHP did not share this information with the Leaseholders. Mr Coles's letter to the Leaseholders was sparse in comparison. PHP's email of 23rd July gave some idea of costs but this was not shared with the Leaseholders despite Mr Coles saying it would be as soon as it was known. Mr Coles's letter also referred to replacing the boilers whereas in fact a decision was made unilaterally by the Applicant or its managing agent, without consultation with the Leaseholders, to replace the heat exchangers. This was against the advice of PHP which Mr Coles said the Applicant would rely on.

114. The advice to renew the boilers was repeated in the invoice for the new heat exchangers confirming that in their opinion this work would be required sooner rather than later.

115. The Tribunal is satisfied that failure by the Applicant's managing agent at the time to consult with the Leaseholders by providing them with the information that the Applicant and it's managing agent had, caused the Leaseholders prejudice.

116. The Tribunal does not agree that the Tribunal can only look at the qualifying works which a landlord decided to have carried out. In this case the Applicant Landlord was given a choice to repair or to renew the boilers. The choice came with advice, which was, in this instance, to renew rather than replace. If the Respondents, as Leaseholders had been told of the alternatives in the course of consultation the Tribunal is confident that they would have made observations to which the Applicant Landlord through its managing agent would have been obliged under the section 20 consultation procedure to have responded. The choice was between what PHP considered from the emails (and the invoice) to be a cheaper short-term remedy of repair, by replacing the heat exchangers, which had no guarantee and a much more expensive long-term remedy of replacing the boilers which would have carried with it a guarantee of usually 5 years.

117. In the course of consultation, the Leaseholders might, notwithstanding PHP's advice, have expressed a preference for the cheaper option or they may have considered the more expensive option to be better with its 5 year guarantee. Either way the Applicant Landlord would have had to respond to the observations to justify its choice. A justification that the Leaseholders were entitled to receive as the people paying and receiving the service. The Tribunal is confident the Residents' Association would have made observations as would some of the Leaseholders, as evidenced from the evidence adduced and Mr Coles's witness statement.

118. As stated above the Tribunal accepts that there was a degree of urgency to ensure continued hot water at any time of the year and to ensure heating by November when the weather would almost certainly be getting cold. Nevertheless, merely because the need for work to be done urgently does not allow of a full section 20 consultation procedure to be carried out does not mean an attempt should not be made at a truncated version. The information, including the costings, provided by PHP in the emails in July 2021 could and should have been appropriately edited and provided to the Leaseholders, together with the opinion of the Landlord and, say, a 14 day response time for observations. The Landlord through its managing agents could say what had been decided based on or in spite of the observations. This process could have been completed by the end of August and PHP could have carried out the work of repair or replacement of the boilers. This suggested timescale does not seem unreasonable and is one that the Tribunal would have specified as a condition had this Application been made before the work was carried out. PHP as the chosen contractor was available as evidenced by the work carried out in installing the filtration system at around that time.

119. Mr Coles in his communications with PHP showed real concern and asked the right questions as a managing agent and his letter of 17th July 2021 went some way to explaining the situation to the Leaseholders. However, in that letter he said he

would be guided by PHP, as the experts who recommended replacing the boilers, and would let the Leaseholders know of costings when they were available but he did neither. He went against PHP's advice and did not keep the Leaseholders informed. If Mr Coles had provided, at least the Residents' Association with a copy of PHP's quotations of 12th and 14th July 2021 they would have made a form of Notice of Intention under the section 20 procedure.

120. The Tribunal accepts that the pipework and replacement valves were required whether the heat exchangers or the boilers were replaced. No evidence was adduced to show that these works were unnecessary or that the Respondents would have challenged these works had there been a full or partial consultation causing them to be prejudiced. With regard to the leak and whether it could be welded the Tribunal found that the Applicant was entitled to take the advice of the contractor.

121. Therefore, the Tribunal determines that it is not reasonable to dispense with the consultation requirements in relation to the Further Works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to the Further works in respect of the cost of the replacement of the pipework and valves.

122. This does not preclude the Respondents from applying for a section 27A determination with regard to the costs that have been incurred for the work for which dispensation has not been granted.

123. With regard to the Additional Works Mr Tolley said in his witness statement that an email was sent to the Residents' Association on Tuesday 30th November 2021 from Premier Estates which listed the cost of the Further Works, which had already been carried out, and the estimated cost of replacing the pump and the filtration system, although the estimate given in the email was half the actual cost. The Tribunal found this of little help to the Leaseholders with regard to the proposed Additional Works.

124. Mr Tolley said in his witness statement that on Friday 10th December 2021 all Leaseholders were sent a letter informing them of the problems with the heating and that work would commence on 13th December 2021. He said this letter did not have any costs as these might change. Therefore, no details were shared with the Leaseholders and although he said in his statement that the information was available on request, he did not say so in his letter. Therefore, the Leaseholders did not know that they could ask for a copy of the very clear quotation of PHP which set out the stages of the work, what was to be done at each stage and the estimated cost.

125. As with Mr Coles's letter of 17th July 2021, if Mr Tolley had provided, at least the Residents' Association, with a copy of PHP's quotation of 9th December 2021 it would have made a form of Notice of Intention under the section 20 procedure.

126. *Daeian Investments Ltd v Benson* [2013] UKSC 14 is concerned with the consultation requirements of section 20 which have the purpose set out in that

judgement. However, the Tribunal is of the opinion that consultation is not the only purpose of the section. It is also to ensure that Leaseholders have notice of major works. The Notices to be issued under the procedure should describe the works and why they are necessary, when they are to take place and what the estimated cost of the works is and what the leaseholders contribution is likely to be.

127. The managing agents in this case appear to take the view that as little information as possible about Qualifying Works is to be provided to the Leaseholders until the work is done. The Tribunal were of the opinion that this approach was likely to lead to disputes between a landlord and tenant.

128. The letter dated 23rd March 2022 setting out the works and their costs, which corresponded to PHP's quotation dated 9th December 2021 is of little help to these proceedings. These proceedings are about dispensing with the requirements of the secton 20 procedure and that letter was sent after the works were completed.

129. The Tribunal went on to consider whether, notwithstanding the lack of compliance with the section 20 procedure, the Leaseholders were prejudiced. Both parties agreed that the heating and hot water system did not operate effectively or consistently. The advice of PHP was that the pump and filtration system needed to be replaced which is what the Applicant proposed to do. The onus is on the Respondents to prove that if they had been consulted about this proposal, they would have been able to show, that contrary to PHP's advice, the Additional Works would not have been necessary. Alternatively, if they had been necessary, they would have been able to show that another more cost-effective pump and filtration system than that recommended by PHP should have been used.

130. The Tribunal examined the advice and description of the Additional Works and found that irrespective of whether the heat exchangers were replaced or the whole boiler was replaced some action was required with regard to the pump and filtration system. The pictures of the sludge that had built up following the flushing of the system provided evidence, be it as it may, retrospectively, that some action was needed to improve the efficacy of the system and to protect the boilers from breakdown.

131. Notwithstanding that PHP were "only plumbers" they had knowledge and experience of the particular system and their advice was to replace both. The Respondents did not provide sufficient evidence to show that this position would have altered had the Leaseholders been consulted. In the absence of evidence to the contrary the Tribunal finds that it was necessary to replace the pump and filtration system.

132. With regard to an alternative pump or filtration system, it was agreed that Dr Gommer had been asked on behalf of the Residents' Association by the Applicant as to whether he had any suggestions as to the pump that should be purchased. He said that he did not have an opinion and that an expert should be instructed to advise. The Applicants chose to rely upon the advice of the contractor, PHP, as to which pump and filtration system should be used.

133. With the Further Works there was a choice between a repair which was not guaranteed and a replacement which was and where the contractor had advised the latter. With the Additional Works, given that they were necessary, there did not appear to be a choice, only advice by the contractor which was explained, at least to the managing agent, in its quotation. PHP was subsequently instructed to install a suitable pump and filter. The Respondents said that if the Leaseholders had been consulted, they would have made the observation that an expert should be instructed, by which they presumably meant an independent expert, as the Applicant was relying on the knowledge and expertise of the contractor. The Tribunal is of the opinion that in this case there was no obligation upon the Landlord to instruct an independent expert and if the Leaseholders consider an alternative system should be used it is for them to instruct their own expert to advise them. If the Application for dispensation from the section 20 procedure in respect of the Additional Works had been made before they were carried out the Tribunal would have made the same decision. The only condition would have been to share the advice and explanation given by PHP to the Applicant's managing agents with the Leaseholders so they would know what was to be done, when and, of particular importance how much.

134. The quotation by PHP acknowledged that the Additional Work was carried out during a high demand season. Nevertheless, as the system provided both hot water and heating a plant room would have been required no matter what time of year the work was done. The Respondents questioned whether the plant room was necessary for the Additional Work to be carried out. PHP said it was and in the absence of evidence to the contrary the Applicant was entitled to accept that advice.

135. If the Respondents consider the cost or standard of work related to the installation of the pump and/or filtration system were unreasonable then their action lies in an application under section 27A of the 1985 Act.

136. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of the Additional Works.

137. The Respondents raised the point that if they had been consulted on the Qualifying Works, they would have raised the issue that the system was only 7 years old and the Developer should bear some responsibility. This is not a matter that is within the Tribunal's jurisdiction.

Costs

138. There was a mention in the Bundle of an application under section 20C of the Landlord and Tenant Act 1985 which prompted the Applicant's solicitor to inform the Tribunal that an offer had been made by letter prior to the hearing (copy provided) which said that the Applicant would not seek costs if the Respondent did not pursue the matter further.

139. The Respondents replied that the Applicant's offer regarding costs amounted to telling the Respondents that if they did not question the Application then they would not be charged any costs.

140. Following the decision in the case of *Daeian Investments Ltd v Benson* [2013] UKSC 14 the Tribunal is of the opinion that generally the proper manner of dealing with costs incurred in respect of an application under secton 20ZA is by a condition in the Tribunal's decision.

141. Whereas the Tribunal finds that there was a need to act expeditiously, the Qualifying Works were not so urgent as to instruct contractors to carry out the Further Works without consulting, not matter how briefly, on the issue of repairing the boilers by replacing the heat exchangers or replacing the boilers completely, in accordance with the contractor's advice, notwithstanding that the latter would cost more, and which prejudiced the Leaseholders. In addition, as stated above, the Tribunal is critical of the failure by the manging agents to share with the Leaseholders key information with regard to both the Further and Additional Works. This information if shared and the consultation if undertaken would probably have avoided these proceedings.

142. Taking this into account, the Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Leaseholders.

143. The Tribunal also makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for submissions prior to a determination of such costs.

Rule 13 Costs

144. The Respondents' Representative claimed costs under Rule 13 submitting that the Applicant had acted unreasonably in bringing, defending or conducting proceedings.

145. The Tribunal considered all the submissions of the parties in the course fo these proceedings.

146. The Tribunal starts from a position that its jurisdiction is one in which costs are generally not awarded. The only exception being where a party has acted unreasonably. The Civil Procedure Rules do not apply to tribunals including the provision relating to costs and "*there is no equivalent general rule that the unsuccessful party will be ordered to pay the costs of the successful party*" as per paragraph 28 of *Ridehalgh v Horsefield* [1994] Ch 2015.

147. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application "*should not be regarded as routine, should not be abused to discourage access to*

the tribunal, and should not be allowed to become major disputes in their own right".

148. The Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
    (i) Whether the Applicant had acted unreasonably, applying an objective standard;
    (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
    (iii) If so, what should the terms of the order be?

149. The Tribunal also took into account the meaning of "unreasonable" in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:

    "Unreasonable" means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

150. The Tribunal considered whether the Applicant *has acted unreasonably in bringing, defending or conducting proceedings*.

151. The Tribunal found that the managing agents should have carried out some consultation with regard to the Further Works and should have shared information in relation to the Qualifying Works and the Tribunal's decision reflects those findings. However, these findings did not show that the Respondent had acted unreasonably in bringing or conducting proceedings under secton 20ZA for dispensation of the consultant requirements under section 20 of the Landlord and Tenant Act 1985.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

2. 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.

3. 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.

4. 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.

APPENDIX 2 – The LEASE

1. The relevant terms of the Leases were identified as follows (references to the Property are to the individual Apartment to which the Lease relates):

2. Clause 1 Definitions

'The Block'
An area within which the Building is situated

Note: The Property is the Apartment within the Building. Therefore, the term Block in the Lease includes the Building. As noted above there are two Buildings and the heating is shared by both buildings.

'Building Communal Areas'
Those parts of the Building of which the Property forms part (excluding the Property) laid out as…ducts risers communal boilers/Heat Installations and Energy Centre (if any) and all other parts of the Building intended to be or are capable of being enjoyed or used by some or all of the owners tenants and occupiers of premises in the Building".

'Conduits'
Pipes downpipes sewers (excluding Estate Sewers) drains pumping stations soakaways channels gullies gutters watercourses conduits ducts flues Wires cables and other service conducting media or apparatus for the supply or transmission of water sewerage electricity gas (if any) telephone (if any) and other communications media now or to be constructed in any part of the Estate and serving the Property but shall not Include any conduits belonging to any local or other Statutory Authorities

'Heat installations'
The network of pipes wires and other ancillary plant and equipment serving the Building (together with any other buildings) that transfer Heat from the Energy Centre to the Heat interface Unit together with all connected meters and monitoring equipment

'Heat'
Heat in the form of hot water generated from the Energy Centre and also cold water to be supplied to the Tenant through the Heat Interface Unit

'Energy Centre'
The energy centre serving the Building (together with any other buildings) from which the Energy Service Company supplies Heat

'Energy Service Company'
The Landlord or any organisation appointed by the Landlord from time to time to move and/or procure the provision of Heat to the Building (together with any other buildings)

'Heat Interface Unit'
A unit composing a heat exchanger pump and associated valves and controls used to transfer Heat from Heat Installations to the Tenants Internal heating and hot and cold-water system

'Proportion'
The Part A Proportion the Part B Proportion and the Part C Proportion which are each defined as being a fair and proper proportion (assessed by the Landlord acting reasonably) of the Service Charge attributable to the respective Part A, B and C Services

'Services'
The services carried out by or on behalf of the Landlord from time to time as set out or referred to in Parts I, II and III of the Fifth Schedule

'Service Charge'
The total cost of providing the Services

3. Clause 4 The Tenant hereby covenants with the Landlord as follows: -

4.3 To pay to the Landlord in respect of every Service Charge Year, the Proportion of the Service Charge by two equal instalments in advance on the Half Yearly Dates (those being 19th September and 1st March).

4.4 To pay to the Landlord on demand, the Proportion of the appropriate Service Charge Adjustment pursuant to the Fourth Schedule.

4.5 To pay to the Landlord on demand, the Proportion as the case may be of any Additional Contribution that may be levied by the Landlord. Additional Contribution is defined within the Lease as "any amount which the Landlord shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under Paragraph 2.2 of the Fourth Schedule

Schedule 5 -Services

Part 1 Building Communal Area Services (Part A)

1. To keep the Building Communal Areas [which includes the Energy Centre, Heat Installations and the Heat Interface Unit] in good repair and condition

7. To keep the Energy Centre and the plant and machinery housed within the Energy Centre and the Heat Installations serving the Premises [also known as the Property] in good repair order and condition including the renewal and replacement of all worn or damaged parts

Part 2 Building Services (Part B)

21. To carry out all repairs to any other part of the Building for which the Landlord may be liable and to provide and supply such other services of the benefit of the Tenant … as the Landlord shall consider necessary to maintain the Building as a good class development

Part 3 Block Communal Area Services (Part C)

3. To keep all Conduits… in good repair and condition.

13. To carry out all repairs to any other part of the Block Communal Areas for which the Landlord may be liable and to provide and supply such other services for the benefit of the Tenant and the tenants of other properties in the Block and to carry out such other repairs and improvement works additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Landlord shall consider necessary to maintain the Block Communal Areas as a good class development or otherwise desirable in the general interest of the Tenant and the tenants of other properties in the Block.

APPENDIX 3 – THE LAW

The Law

1. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.

2. The consultation provisions appropriate to the present case are set out in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The Procedure of the Regulations and are summarised as being in 4 stages as follows:

   A Notice of Intention to carry out qualifying works must be served on all the tenants. The Notice must describe the works and give an opportunity for tenants to view the schedule of works to be carried out and invite observations to be made and the nomination of contractors with a time limit for responding of no less than 30 days. (Referred to in the 2003 Regulations as the "relevant period" and defined in Regulation 2.)

   Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants.

   A Notice of the Landlord's Proposals must be served on all tenants to whom an opportunity is given to view the estimates for the works to be carried out. At least two estimates must be set out in the Proposal and an invitation must be made to the tenants to make observations with a time limit of no less than 30 days. (Also referred to as the "relevant period" and defined in Regulation 2.) This is for tenants to check that the works to be carried out are permitted under the Lease, conform to the schedule of works, are appropriately guaranteed, are likely to be best value (not necessarily the cheapest) and so on.

   A Notice of Works must be given if the contractor to be employed is not a nominated contractor or is not the lowest estimate submitted. The Landlord must within 21 days of entering into the contract give notice in writing to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the Landlord's response to them.

3. Section 20ZA allows a Landlord to seek dispensation from these requirements, as follows –

   (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the

tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
if it is an agreement of a description prescribed by the regulations, or in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,
c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) and (7)... not relevant to this application.

4. Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Rule 13 (1) states that:
The Tribunal may make an order in respect of costs only-

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-

(ii) a residential property case

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LDC/2021/0018**
HMCTS	**:**	**CVP**
Property	**:**	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Great East Court, Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Landlord)	**:**	**RMB 102 Limited**
Representative	**:**	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Respondents (Tenants):		**The Long Leaseholders identified in the Schedule to the Application**
Representative	**:**	**Dr Frank Gommer**
Type of Application	**:**	**1) To dispense with the consultation Requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA of the Landlord and Tenant Act 1985** **2) To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge J R Morris** **Mr N Miller BSc**
Date of Application	**:**	**14th April 2022**
Date of Directions	**:**	**16th May 2022 and 20th June 2022**
Date of Hearing	**:**	**13th September 2022**
Date of Decision	**:**	**24th October 2022**

DECISION

Decision

1. The Tribunal determines that with regard to the Further Works it is not reasonable to dispense with the consultation requirements in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat but that it is reasonable to dispense with the consultation requirements in relation to the cost of the replacement of the pipework and valves.

2. The Tribunal determines that with regard to the Additional Works it is reasonable to dispense with the consultation requirements.

3. The Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Tenants.

4. The Tribunal makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for written submissions prior to a determination of such costs.

5. The Tribunal does not make an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Reasons

Application

6. On 14th April 2022 the Applicants applied for a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 that the requirement to comply with all the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) ("the Consultation Requirements") should be dispensed with (the Dispensation Application).

7. On 30th June 2021 an Application, case number CAM/12UB/LDC/2021/0026, was made under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements under section 20 of the 1985 Act for qualifying works. The qualifying works were the replacement of the boiler flues. In April 2021 the boiler flues were found to be leaking and therefore defective with a health and safety risk of carbon monoxide being emitted. In addition, servicing and maintenance work could not be carried out on the boilers as any readings regarding their operation would be unreliable due to the defective flues.

8. The tribunal hearing that application determined for reasons set out in its Decision dated 4th March 2021 that retrospective dispensation should be given for those qualifying works.

9. The present application is quite separate and the only relevance to the decision concerning the flues is that, on completion of their replacement in June 2021, the contractors, Pure Heating and Plumbing ("'PHP"), were then able to carry out an accurate test of the boilers and related installation with a view to service and maintenance.

10. In doing so the Applicant states that it found that "Further Works" were required, they being further to the replacement of the flues. In an email exchange between the PHP and the Landlord's Agent, in July 2021 the following work was identified as being required:
    - Replacement of gas pipe work –
      Quotation 7180 dated 12th July 2021 and Invoice 17728 dated 11th August 2021 for **£7,608.30**
    - Replacement of boiler heat exchangers -
      Quotation 7193 dated 14th July 2021 and Invoice 18056 dated 17th September 2021 for **£13,511.95**
    - Replacement of Gas Isolation Valve - **£871.44**
    - Replacement Pressure Switch - **£358.08**

11. In addition to the above PHP identified the following "Additional Works" as being required, they being additional to the Further Works relating to the boilers:
    - A new pump and filtration system -
      Quotation 7858 dated 12th December 2021 for **£26,622.96**
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation **£12,910.76**
    - Flushing of system - **£2,340.00**

12. In order to carry out the installation of the new pump and filtration system the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room & filtration system -
      Quotation 7857 dated 12th December 2021 of **£13,351.30**
    - Additional Cost of hire of Temporary plant room due to delivery date for pump - **£3,024.00**
    - Decommissioning costs temporary plant room -
      Quotation 7859 dated 9th September 2021 of **£2,210.40**

13. These are hereafter referred to collectively as "the Qualifying Works". Their total cost was **£82,809.19.** However, following the evidence and submissions at the hearing the Tribunal found it appropriate to distinguish between what were two sets of work and so identify each by reference to the terms "Further Works" and "Additional Works".

14. The Applicant said that the work was necessary and urgent. Due to the time of year (December), the number of failures within apartments and the demand for heating and hot water meant that the temporary plant hire was an absolute necessity. The work could not be completed without the temporary plant hire as there were major pipework modifications required within the plant room which could not be done without the temporary plant hire. Some of the work took days to complete and

therefore, this would have caused a greater issue with residents and the obligations relating to heating and hot water as it was during the winter months.

Description

15. The Tribunal did not consider it necessary to inspect the Property. The following description is based upon the Statements of Case, photographs, the Lease and the Internet.

16. What is referred to in this Decision and Reasons as the "Property" in the Lease is the Block which comprises two buildings, 117 – 131 (Odds) The Cherry Building, containing 8 purpose-built Apartments, and 133-171 (Odds) Addenbrookes Road, containing 20 purpose-built Apartments, which have joint communal facilities including a central heating system.

The Law

17. The Law relating to these proceedings is set out in Annexe 2 and should be read in conjunction with this Decision and Reasons.

The Leases

18. Each Apartment is subject to a long residential lease. Each lease is similar in terms as to the relevant covenants.

19. A copy of the lease relating to Plot 305 dated 30th September 2013 and made between (1) Countryside Cambridge One Limited and Countryside Cambridge Two Limited, (2) Countryside Properties (UK) Limited and (3) Kurt Stadler and Friedelind Stadler (the "Lease") was provided. The terms of the Leases are understood to be common to all Apartments.

20. On 8th August 2014, Countryside Properties (UK) Limited ("the Developer") assigned the freehold title to the Property to E&J Ground Rents N06 LLP who then assigned the Property to the Applicant, RMB 102 Ltd, on 26th July 2019. E&J Ground Rents N06 LLP and RMB 102 Ltd form part of the same holding group. RMB 102 Ltd is therefore the Landlord and the long leaseholders of each of the apartments is a Tenant.

21. As at 2018 APT Property Management ("APT") was the managing agent for the Property. On 1st February 2019 the Applicant appointed Flaxfields Ltd ("Flaxfields") as its managing agent for the Property to carry out all of the Respondent's obligations and duties under the Leases, ensure that all statutory requirements had been complied with and collect the service charges that have fallen due. On 1st September 2021 Flaxfields' appointment ceased, and Premier Estates ("Premier") were appointed in Flaxfields' place. On 29th June 2022 an RTM company has taken over the management of the Property and Urang Ltd have been appointed managing Agents.

22. Relevant provisions of the Leases are set out in Annex 2 of this Decision and Reasons.

Written Statements and Hearing

23. Both parties provided written statements which were confirmed and developed at the hearing. The cases summarised below include both the written and oral cases presented to the Tribunal. The hearing was attended by Ms Rebecca Ackerley Counsel for the Applicant, Mr Paul Tolley of Premier, the Applicant's current Managing Agents and Dr Frank Gommer, the Respondents' Representative.

    Other persons in attendance included Ms Cheryl Earle and Mr Steve Boon of E & J Estates Ltd and Ms Hannah McLeod of JB Leitch the Applicant's Solicitors.

Preliminary Issue

24. The Applicant submitted a late witness statement from Mr Tolley. The Respondent's Representative objected to the late production saying that he had only received the witness statement the day before the hearing and had not had an opportunity to either read or consider it and therefore it should be excluded. Counsel for the Applicant accepted that the witness statement had been provided late in the day but the Tribunal had not made a Direction for the Applicant to reply to the Respondents' Statement of Case.

25. With regard to the content of the witness statement Mr Tolley said that he wished to make certain points clear which he felt the Respondents had misrepresented by being selective in their supporting documents, in particular certain emails had been omitted. He said the exhibits he had provided to his witness statement in Reply to their Statement of Case included the whole email exchange particularly between Mr Cole and PHP. Mr Tolley said that he could see no objection to admitting the documents as they were known to the Respondents either because they were the recipients or because they had been included in the bundles of the two previous cases.

Decision re Preliminary Issue

26. The Tribunal had not considered a direction to reply to the Respondent's Statement of case was necessary for a section 20ZA Application. It also considered that the Applicant through Mr Tolley's oral evidence could draw attention to any points in the Respondents' Statement of Case which he felt were misleading and refer to documents if, as he said, they were in the knowledge of the Respondents.

27. Therefore, the Tribunal refused permission to admit Mr Tolley's witness statement in reply.

Applicant's case

28. The Applicant provided a Statement of Case in the form of a Witness Statement by Mr Tolley. With regard to the replacement gas pipework and the boilers he referred to the Witness Statement of Mr Jonathan Coles, director of the Applicant's previous Management Agent, Flaxfields.

29. Mr Tolley stated that his predecessor Mr Coles for Flaxfields was told by PHP in July 2021 that the Further Works would be required. Mr Tolley referred the

Tribunal to Witness Statement of Mr Coles, which was prepared for case number CAM/12UB/LDC/2021/0026 regarding an application under section 20ZA of the Landlord and Tenant Act 1985 in respect of the Works to replace flues. Mr Coles's statement dealt with the identification by PHP and the notification to the Leaseholders of the Further Works and was supported by correspondence attached to his statement.

Mr Coles's Witness Statement re Further Works

30. The relevant part of Mr Coles's Statement said that following completion of the installation of the flues PHP advised that Further Works to the gas pipework in the plantroom was required and two of the four boilers needed replacing. Quotes were obtained totalling £20,780.88 (£7,608.30 for the replacement of the gas pipework and £13,172.57 for replacement of the heat exchangers) and a copy of which was provided.

31. Following application CAM/12UB/LDC/2021/0026 to the Tribunal for dispensation regarding the works to the flues in which reference was made to these Further Works which were qualifying works under section 20 of the 1985 Act, the following objections were received from the Respondents which are followed by the Applicant's responses. These mostly refer to the Further Works of replacing the boilers but some refer to the flues as well.
    a. Frank Gommer on behalf of a formally recognised tenants association at the Premises;
    b. Linda Skeggs and Glen Skeggs of 135 The Cherry Building,
    c. Julie Vaughan of 151 The Cherry Building,
    d. Michael Opel of 127 The Cherry Building,
    e. Roberto Lattuada and Silvana Filipponi of 137 The Cherry Building,

32. The objections of Dr Frank Gommer on behalf of the Cherry Building Residents' Association:
    1. The Application does not concern qualifying works;
    2. The plant room including the flue is still in the defects' liability period of the Developer;
    3. The leakage of the flue has been known to the landlord since 2018; and
    4. The Landlord's managing agents have made no attempt to explain the issue and potential costs after the state of the flue became so severe that no further operation could be permitted.

33. The Applicant's Response:
    1. Qualifying works. under the Landlord and Tenant Act 1985 are defined as "works on a building or any other premises". This includes any repair, replacement and maintenance works. As the Works to the flues and boilers are replacement works on the Property, they therefore fall under the definition of qualifying works.
    2. The Developer confirmed those other parts of the system other than the flue are not under warranty and therefore it was understood that the flue itself is also not under warranty.
    3. Prior to Flaxfields management of the Property the issue of the flues leaking was raised with PHP who were in the process of fixing the leak. After the

completion of the works, the flues were still leaking, and probably the leaks had never fully been repaired.

4. The Managing Agents have tried to update leaseholders throughout the process. Due to the number of leaseholders at the property, there may have been delays in responses, but this was never due to a lack of attempting to contact. Three updates had been provided to all leaseholders throughout this process, as well as individual concerns being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

34. The objections of Linda and Glen Skeggs:
    1. The Respondents believe Flaxfields have failed to comply with the terms of the lease.
    2. The Respondents state the issues relating to the heating and hot water have made it difficult to manage the Flat.
    3. The Respondents believe that the plant room hasn't been maintained properly since they've purchased the flat and that this would not be a matter of urgency if the boilers were regularly maintained.
    4. The Respondents are unhappy as Flaxfields have billed over the £250 permitted by the lease without consultation.

35. The Applicant's Response:
    1. It is refuted that the Applicant breached the terms of any leases. The issues were only identified in April 2021 after PHP's site inspection. Alternative advice was obtained quotes were compared in order to act reasonably and in the interests of the leaseholders, the Works started swiftly on 29 June 2021. It was unfortunate that the Further Works were identified but these could not be foreseen.
    2. The inconvenience is appreciated although these issues have been out of the Applicant's control.
    3. No evidence has been given of any suggested failure for failing to maintain the plant room.
    4. The full consultation process was not completed, hence the reason for making the S20ZA application. Correspondence was sent to keep leaseholders informed as much as possible in respect of the Works. The reason the Dispensation Application was made was because Flaxfields were aware of the obligation to consult when billing over the permitted £250 limit.

36. The objections of Julie Vaughan
    1. This situation regarding the hot water supply has been occurring for too long a period of time causing severe disruption to her Tenant.
    2. Flaxfields have been poor at replying to correspondence and they have provided misleading emails stating gas inspections have been carried out when they have not.

37. The Applicant's Response:
    1. The disruption was appreciated but the amount of time to rectify the problems was out of the Applicant's control. The Works were instructed as soon as reasonably practicable and unfortunately, the Further Works were found to be necessary.

2. PHP had been booked for the gas inspections to take place but when PHP attended, they informed Flaxfields that they could not be carried out due to the leaking flues.

38. Objections of Michael Opel and Applicant's Response
    1. Already dealt with under Dr Gommer's objections
    2. He said he was unaware of the issues when he bought the Flat on 30 June 2021. However, the Managing Agent did inform him that there were two section 20 works in process.

39. The Objection of Roberto Lattuada and Silvana Filipponi:
    1. The numerous problems with the heating system have led them to feel let down by the managing agents.
    2. There has been a lack of communication with regards to the works with too many delays and interruptions of services.

40. The Applicant's Response
    1. It is not fair to associate the problems with the heating and hot water system with the quality of service provided by the managing agents. Flaxfields on behalf of the Applicant responded to all the problems that have arisen to the best of its ability. When made aware of the problems, quotes for the Works were obtained and PHP were instructed. It was unfortunate that the Further Works were then deemed necessary.

41. Mr Coles said that Flaxfields' had tried to update leaseholders throughout the process and there has been no lack of communication. Due to the number of leaseholders at the Property, there may have been delays in responses, but this was never out of not attempting contact. Updates have been provided to all leaseholders throughout this process, as well as individual concerns also being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

Correspondence with PHP and the Respondents re the Further Works

42. Email correspondence between Mr Coles and PHP and the Leaseholders regarding the Further Works was provided. Mr Tolley said that it was important to look at the whole email exchange between Mr Coles and PHP as it showed that they were discussing the best way forward to remedy the problems with the heating system at as low a cost as would be reasonable. The Correspondence comprising emails between PHP and Flaxfields was provided which was said to show the need for the works to be carried out as follows:

    7th July 2021

    PHP confirms that the new flues had been installed but that there were problems with all four of the boilers which was set out in considerable detail. PHP identify the likely cause as the heat exchangers.

13th July 2021

Mr Coles sought confirmation that the replacement of the boilers is on top of the £8,000 for the recommended replacement of the gas pipes.

15th July 2021

PHP confirm that the heat exchangers have failed due to them coming to the end of their life and that the gas pipe work will also be needed.

14th July 2021

Mr Coles wrote to the Leaseholders as follows:
"I am writing to all owners with a comprehensive review of how things stand currently and what actions are being taken to address all the apparent issues.

The recent flue works were very frustrating for you all, we totally understand this and appreciate your patience during the works. The flue works have been fully carried out to the specification quoted as we are satisfied with the end result.

We are aware that since the flue works were completed that it has resulted in some minor repair works needed to circa 6 out of 30 HIU's which have subsequently been addressed or are booked in with engineers.

Flaxfields Ltd have recently been advised by Pure Plumbing & Heating that 2 of the four boilers need replacing and that some further works to the gas pipework in the plantroom is required.

Their comments on the boilers are as follows:

Boiler 1
Safety time exceeded. The boiler is igniting but not recognizing the flame. Probe could be faulty from the excessive heat in the burner or water damage from the heat exchanger leak.

Boiler 2
The boiler is currently the best performing staying on the majority of the time but does reach temperature faster than expected which is no doubt connected with the partially blocked heat exchanger.

Boiler 3
Reaching high temperature very quickly. Boiler only stays on for 1 minute before it gets to 80 degrees and the flame goes off. The boiler temperature does continue to climb and often reached near 100 degrees. Boiler sometimes recognises excessive temperature and cuts out but does reset itself after the temperature reduces. Then the process repeats.

Boiler 4
Same as boiler 1.

Recently Pure monitored the operation and although not right the boilers are slowly heating the district system. Peak time approaching and the system temperature was maintaining between 58 and 62 degrees. Additional heat is needed for the system to deliver effectively, which means, ideally, 2 new boilers.

From early conversations with Pure Heating & Plumbing it does sound like this may be an expensive issue to address so we are obtaining quotes as we speak whilst trying to keep the system going.

We can only apologise for the issues you are experiencing and assure you that we are doing all we can to minimize any ongoing disruption to services. Flaxfields Limited have acted on every recommendation made by Pure and continue to rely on their advice as accredited professionals. We will report back on costs as soon as known."

17th July 2021

PHP provides an account of the lifespan of the boilers as follows:

"Commercial boilers generally have a life span of 10-15 years, however, during this time repairs and individual parts and components will require replacement, the more operational time the boiler goes through the more chance there is of these repairs and replacements being needed. For example, a domestic boiler may last between 10 ~ 15 years, depending on the manufacturer, however, after 5 - 10 years individual components Within that boiler will need replacing. As with commercial boilers that are running 24/7 parts will need replacing but more frequently. The more boilers you have on your system the less stress and wear and tear is caused on each boiler.

There is no way of telling how long a boiler will last. Most manufactures will on average provide a 5 warranty. There are a few factors that cause a boiler to deteriorate and in turn, reducing its operational life span. Leaks and water conditions being a couple.

The system at the Cherry building has been treated and the closed system has been maintained correctly as part of the service agreement. Unfortunately, a part, the heat exchanger has failed on boilers 1 and 4 and leaked which has caused the damage and the system to deteriorate rapidly.

Installing the new boilers ensuring the PPM is carried out, continued monitoring and all remedial works when required on equipment going forward, are authorised and carried out promptly will help to ensure that the system operates and lasts to its potential.

The issues with the HIU do not have anything to do with the Installation of the flues. The reasons HIU filters are blocked is due to the damaged heat exchangers and the condition of the system.

Switching off the flow and return valve to the HIU will help protect the HIU but in doing this the unit will not operate as it needs continuous flow from the system to produce heating and hot water."

23rd July 2021

PHP suggested two options:

"Option 1
Replace the leaking heat exchangers and probes in the current boilers and install a temporary side stream filtration unit for a period of 4 weeks and have a full system flush and close of light oxide and sludge removing chemical. This will pass through the system clearing any blockages and sludge that may have built up.
Quote 7193 has been revised and resubmitted at the cost of £10,977.15 Plus VAT
However, PHP recommended

Option 2:
Replace the 4 no existing boilers and replace them with 4 No new Ideal Evo MaxZ Boilers and an Ideal Evo Max plate heat exchanger.
Installation of the plate heat exchange will mean the heating system will be separated for the boiler system, reducing future potential risk to the boilers.
The cost for this would be £43,321.87 Plus VAT
Please note:
The works on the gas pipe will still need to be carried out at the cost of £6,340.25 Plus VAT with either option."

Mr Tolley's Witness Statement re Additional Works

43. Mr Tolley was only able to address the Additional Works. As noted from Mr Coles's witness statement, the Further Works were carried out before Premier were appointed as managing agents. Mr Tolly set out the Qualifying Works as follows:
    - Gas pipework needed to be replaced – Quotation 7180 dated 12th July 2021 for £7,608.30
    - Boiler heat exchangers or replacement of boilers were needed - Quotation 7193 dated 14th July 2021 for £13,511.95
    - Gas Isolation Valve needed to be replaced - £871.44
    - Replacement Pressure Switch - £358.08

44. The replacement of the gas pipework was completed on 11th August 2022 and the work to replace the heat exchangers was completed on 17th September 2021. In the course of carrying out the works it was found that the gas isolation valve needed to be replaced and the replacement pressure switch was broken and was renewed.

45. Mr Tolley said that in December 2021, he was told the following Additional Works were needed:
    - A new pump and filtration system would need to be installed - Quotation 7858 dated 12th December 2021 for £26,622.96
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation £12,910.76
    - The system would need to be flushed out at a cost of - £2,340.00

46. Mr Tolley said that these works were completed in April 2022.

47. In order to carry out the Additional Works of installation of the new pump and filtration system, the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room - Quotation 7857 dated 9th September 2021 for £13,351.30
    - Due to the time taken for the pump to be delivered an additional cost of hire was incurred of £3,024.00
    - Decommissioning temporary plant room - Quotation 7859 dated 9th September 2021 for £2,210.40.

48. A copy of the details and as to how the work was to be undertaken as set out by PHP was provided. It is a very detailed document and is not repeated here but stated that the work would be carried out in three stages and in outline:
    Stage 1
    - Setting up and commissioning a temporary plant room.

    Stage 2
    - The installation of a X-pot 6 side stream filtration unit and inline strainer & Microfil unit to replace the existing pressurisation unit.
    - Installation of a Grundfos Primary District Pump to replace the existing Wilo pump.
    - The flushing of each riser to ensure the system is clear of debris

    Step 3
    - Decommissioning the temporary plant room

49. With regard to the necessity and choice of filtration system PHP said in its quotation:

    "Pure to revisit site (the temporary plant room now providing heat to the building) and carry out the removal of the prefabricated steel district supplied pipe work inclusive of the existing Wilo pump set and Spirotec air/dirt separator. Carry out necessary pipework modification using carbon steel mapress pipework, this will include a new X-pot 6 side stream filtration unit and inline strainer (document attached). We previously quoted to supply and install a Magnetic filter and dirt & air separator; we feel this solution provides better system protection and a more cost-effective option.

    The previous price was £10,953.57 plus VAT. The new X Pot solution also incorporates built-in a side stream filter, dosing pot, and magnet filter, there will be savings made with this unit. Prior to connecting onto the existing header, Herts Environmental will carry out a flush of the existing boilers cascade header and main primary header to remove any magnetite using medium-strength cleaning chemicals with the existing boilers isolated. Upon completion of header flushing works the boilers will then be flushed to dear any debris in each individual heat exchanger using a low strength chemical in preparation of reinstatement. We will strip down the existing headers prior to flushing to ensure these are not too heavily blocked with magnetite sludge. This is the most cost-effective option without replacing the headers or boilers.

    Supply and install new Grundfos twin head pump set (model to be confirmed and cost), cost will include link up to the existing BMS panel.

We recommend the existing pressurization unit is replaced with a Microfil unit; the existing setup is an open vented tank which is subsequently open to the elements. This when filling can create oxidization (corrosive) and can cause the integrity of the system to corrode, rust, and leads to magnetite and cavitation.

Labour and Materials - £22,185.80 plus VAT"

50. With regard to the Pump Mr Tolley said that Dr Gommer as representative for the Respondents was asked for his input on the type of pump that was to be used. As a result of the discussions with Dr Gommer, the pump that has been installed is a pump which regulates with the demand, if the system is not used the flow drops to around 20% and if everybody used the system it would reach 100% of the demand. using the most energy.

51. The need for the system to be flushed out was said to be shown from the photographs taken by Harts Environmental who carried out that part of the work. These depicted a large quantity of sludge having been taken out of the system. Copies of the photographs were provided.

52. It was noted that the Respondents disputed the Work Order value. Premier Estates provided Pure Heating & Plumbing with the Work Order to proceed with the pump replacement at the budgeted cost and later amended the figure once an official quote from Pure for the new pump had been received

53. Mr Tolley said there was a delay in obtaining the pump which meant the hire of the temporary plant room had to be extended.

Correspondence with the Respondents re the Additional Works

54. Mr Tolly outlined the extent to which the Leaseholders were notified of the Additional Works. He said that on Friday 10th December 2021 all Leaseholders were sent a letter as follows:

"We recognise that the current communal heating/hot water system is struggling to provide all apartments with sufficient hot water and heating. In an attempt to restore the supply for residents we are regularly instructing Pure Heating & Plumbing to attend to investigate.

We have instructed Pure Heating and Plumbing to complete a series of works to the communal heating system that should result in greater reliability, less faults and reduced call outs, subject to regular maintenance in line with manufacturer's guidelines. However, to complete the required work, we need to implement a temporary plant room which will ensure the hot water/heating supply is not lost for the duration. The temporary plant room will be installed by the end of Monday 13th December 2021 at the latest and works will commence for an estimated duration of 8 weeks, taking into effect the Christmas period.

As part of the works, the temporary plant room will be stored outside of the existing plant room and will provide consistent supply of hot water/heating to all apartments with heat more than the existing system currently."

55. He said this letter did not have any costs as these costs could change (similar to the pump costs), hence no information was shared to all residents, but was available upon request.

56. On Tuesday 30th November 2021 Nicola Murray of Premier Estates sent an email (copy provided) with service charge estimates for the Residents Association to review and the estimated costs (for some of the work) were listed as follows:
- Replacement failed pressure switch on boiler 2 £358
- Boiler Heat Exchange replacement £13,512
- Replacement WILO pumps £10,500
- Permanent filtration system £13,800
- Boiler 4 switch and gas lever repair £872

57. Mr Tolley said that Dr Gommer and the Respondents already knew about the estimated costs for a lot of the work as it was included within the service charge estimate. He said that there were some unexpected costs which were included in the mid-term service charge levy which was set out in an email (no copy was provided).

58. In response to the Respondents' claim that they were not able to enter the plant room to make adjustments to the heating Mr Tolly acknowledged that Premier Estates had requested that residents do not access the plant room. He said that this request was appropriate due to the equipment there and that contractors are available to attend any faults and residents have been advised to contact the Out of Hours team whereby a callout will be made to Pure Heating & Plumbing.

59. Mr Tolley also said that a letter was sent to Leaseholders on 23rd March 2022 on completion of the Qualifying Works which set out what was done and the cost as stated in the section headed Application above.

Respondents' Case

60. The Respondents stated that they were not notified of the works and estimated costs of the Qualifying Works, as required by the Tribunal's directions dated 16th May 2022. As a result, the Respondents remain largely in the dark about significant aspects of the Applicant's case, including as to the true scope of the qualifying works, their full cost, whether they were in fact needed and what, if any, alternative course of action was considered and quotes obtained.

61. In the circumstances, the Respondents are unfairly prejudiced in these proceedings by the lack of documents and information provided by the Applicant that would have enabled the Respondents to provide a more comprehensive response to the present application.

62. Dr Gommer outlined the law as follows:

Section 20ZA(1) of the Landlord and Tenant Act 1985 provides as follows:

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make

the determination if satisfied that it is reasonable to dispense with the requirements.

The correct approach to considering an application for dispensation has been set out in *Daeian investments Ltd v Benson* [2013] UKSC 14, as summarised in Woodfall on Landlord and Tenant, at 1199.8 as follows:

(1) the consultation requirements are not an end in themselves, but a means to the end of the protection of tenants in relation to service charges: their purpose is to ensure that tenants are protected from paying for inappropriate works, or from paying more than would be appropriate;
(2) in considering dispensation requests, the tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
(3) it is neither convenient nor sensible to distinguish between a serious failing and a minor oversight, save in relation to the prejudice it causes;
(4) the financial consequences to the landlord of not granting dispensation are not a relevant factor, and neither is the nature of the landlord;
(5) while the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants: once they have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
(6) the tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application;
(7) insofar as the tenants will suffer relevant prejudice, the tribunal 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;
(8) that conclusion does not enable a landlord to buy its way out of having failed to comply with the consultation requirements, because it will still face significant disadvantages for non-compliance, namely
    (i) it must pay its own costs of making and pursuing an application to the tribunal for a dispensation,
    (ii) it must pay the tenants' reasonable costs of investigating and challenging that application, and
    (iii) it must accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.

Respondents suffered prejudice

63. Dr Gommer said that it was indisputable that in the present case the Respondents suffered relevant prejudice.

64. First, as a result of the lack of information about the qualifying works and the Applicant's refusal to engage with the Respondents, the true scope of the works and costs were not known to the Respondents. Dr Gommer referred to correspondence as follows:

- on 13th July 2021, Flaxfields the previous managing agent to PHP expressly told them not to provide any information about the works to the Respondents.
- on 12th August 2021 and 3rd September 2021, the Respondents asked the Applicant to provide them with information on costs and further details about the works but received no answer.
- on 10th December 2021, the Applicant sent a letter to the Respondents purporting to provide information about, and costs of the qualifying works. However, that letter did not contain any information about costs.

65. The Applicant takes an aggressively unhelpful stance for example it has failed to provide information as part of the right-to-manage process (with the acquisition date on 29 June 2022) The Applicant has expressly instructed its managing agents not to assist the Respondents.

66. The reason that the Respondents were actively seeking information about the works and costs was to ensure that the Qualifying Works were in fact necessary and appropriate, and that the costs of those works (so far as they were necessary) were reasonable in amount. Had the Respondents received the information they sought, and which was required to be provided by the consultation requirements, they would have engaged an independent surveyor and specialist engineer to advise on the necessity of the works and alternative cheaper courses of action. The Respondents would also have obtained information about alternative suppliers to ensure that the Applicant obtained competitive quotes.

67. Secondly, the Applicant's failure to follow the consultation process, together with its opaque processes, has meant that the Respondents may now be less able to pursue an application to determine payability and reasonableness of service charges. If the consultation process had been followed, the Respondents would have obtained (or at least would have had the opportunity to obtain) contemporaneous quotes based on the actual state disrepair. That opportunity to obtain contemporaneous documents and information is now lost. Even if the Respondents now decide to obtain indicative quotes, they would necessarily be somewhat speculative and based on an assumed state of disrepair.

68. Thirdly, as a result of the Applicant's failure to follow the statutory consultation process, the Respondents are now faced with exorbitant service charge demands in respect of works which failed to remedy the original disrepair. The plant room is still not functioning as designed. All four boilers fail regularly leaving residents without hot water. The system is only 7 years old. It was submitted that had the Applicant followed the consultation process, the Respondents (who in fact live in the subject property and are extremely familiar with the problems there) would have provided detailed comments on the works specifications, would have nominated alternative providers and would have submitted comments on the estimates of costs (it appears that the Applicant had not sought any alternative quotes).

69. The only time resident input was requested was in regards with the proposed replacement of the pumps. In turn, the property managers have been provided with the statement of an expert witness from the developer suggesting significantly more

work in respect to the pump specifications are required. Therefore, residents suggested that an expert opinion is to be obtained to select the correct pumps size. This seems not to have happened and, in fact, the pumps installed appear to be even larger than the previously used oversized ones.

70. Fourthly, documents provided in the course of the earlier dispensation application suggest that the Applicant had received the recommendation to replace the boilers in the plant room rather than attempting a repair. The Applicant had decided not to follow expert advice. It seems certain that many of the problems now being experienced, together with the further costs of rectifying them, are a direct result of that decision. Had the Applicant followed the consultation process, the Respondents would have requested their own expert to analyse the two options in July 2021.

71. Fifthly, the Applicant's deliberate decision to push on with the works regardless, in an apparent hope that a dispensation could be obtained at a later date, resulted in the present application and the Respondent's need to spend time and money opposing it. It was clear from the outset that the Respondents were keen to engage with the Applicant in relation to the works and their costs. The works were not urgent and there was ample time for the Applicant to consult the Respondents.

72. Unlike the previous occasion involving a flue potentially leaking harmful gases into communal areas, there were no problems with the plant room requiring urgent works. The severe delays with carrying out the works shows their non-urgent nature.

Expert Report Costs

73. Dr Gommer said that when he was asked about the replacement pump, he had said that expert advice should be obtained as to whether the pump should be replaced at all and if so, what pump was required. He added that an expert in heating systems of this kind was required because PHP were in their own words, “only plumbers”,

74. He submitted that if the Tribunal was minded to grant the application for dispensation, a condition should be included that the Applicant pays the Respondent's costs of obtaining an expert report - *Aster Communities v Chapman* [2021] EWCA Civ 660.

75. The Applicant’s failure to provide any information highlights the need for such an expert report, especially as it is not clear if the works suggested were actually required.

76. The quotation for the largest individual costs of over £26,622.96 for installation of a filtration system mentioned an initially cheaper version for £10,953.57 and even acknowledges that there is an existing set-up doing this job, covered under the service contract with PHP and only 7 years old.

77. The need to hire a filtration system for £2,016.00 and a temporary plant room should have been examined by an expert to establish if the work (if required) could have been done without these extra costs with the boilers being worked on individually, which seems easily feasible as each boiler can be isolated separately from the system.

78. In addition, the decision to replace a large amount of only 7-year-old gas pipe because of a micro-leakage supposedly within accepted tolerances seems excessive and onsite welding would have incurred a fraction of the costs.

79. Also, the works were identified in July 2021 a time when very little heating demand is required from the system, therefore it should not have been left until December for the work to be carried out.

80. The Respondents then referred to a number of matters which were not relevant to the issue of whether or not dispensation should be granted i.e breakdowns during the works being carried out; flushing works being carried out by Huttie; a loan being made by the Landlord.

81. The Respondents submitted that the Tribunal refuse the Application for dispensation and that the charge for the Qualifying Works is limited to £250 each.

82. Should the Tribunal nevertheless be minded to grant the application, it should be on condition that the Applicant pays the Respondents' costs of engaging an expert to prepare a report on the qualifying works, such report to be used in a future application to determine payability and reasonableness of costs.

83. The Tribunal should also order the Applicant to pay the Respondent's costs

Discussion

84. The parties confirmed their written statements in the hearing.

85. In response to Counsel's questions Dr Gommer said that he had difficulty in preparing the case because information was not handed over in June 2022 when the RTM Company took over management. PHP were not prepared to provide any information about the system therefore he said the RTM Company had little choice but to continue employing them for maintenance. However, advice was being sought from expert engineers and an alternative maintenance contract was being considered.

86. Dr Gommer said that an expert report was needed to assess what was wrong with the system and to obtain a quotation to remedy the defects.

87. Counsel said that when it was known in April 2021 that the flues needed to be replaced and in July that the heat exchangers needed to be replaced the Respondents did not appear to be concerned about employing an expert to report on defects. Their main concern was passing the cost of the works on to the Developer.

88. Dr Gommer responded that the responsibility for the defects lay with the Developer. If the proper procedure had been followed regarding section 20 the Respondents would have questioned why a system that should have been effective for 15 to 20 years was failing after only 8 years. He submitted that the managing agents were too anxious to get the jobs done rather than investigate why they needed to be carried out.

89. Dr Gommer went on to question the work that was carried out. He said the leak around the gas valve could have been welded rather than a replacement of the valve. The breakdowns have continued despite the work that was carried out. He said that there had been over 70 breakdowns since the new heat exchangers were installed. All four boilers had on occasion failed. What was required was expert report on the system and new boilers as was recommended to Mr Coles by PHP in July 2021.

90. Dr Gommer said that the new pumps had still not been commissioned and he had been told they were not appropriate. He said he had been asked about the new replacement pump and referred to an email in which he had said that expert advice should be obtained.

91. With regard to the filtration system Dr Gommer said that there was a cheaper alternative filtration system to which PHP referred which should have been considered- He said again that an expert should have been instructed to advise on the best system. If an expert had been employed all these points could have been highlighted and alternative quotations obtained for each of the respective parts.

92. Dr Gommer said that the only reason given for not following the procedure was that the work was urgent. He disputed the urgency of the works saying that the breakdowns which the Additional Works were intended to deal with continued. The work could just have well been done in March or July of 2022.

93. Mr Tolly in reply said that initially the Leaseholders required gas certificates and were pressing for remedial work to be carried out so that these could be issued. He had then received numerous complaints prior to the Additional Works about breakdowns and the lack of hot water and later heating. PHP had advised him that the Additional Works of a new pump and filtration system were needed to prevent further problems with the boilers. Nicola Murray had told the Residents Association of the estimated costs in an email date 30th November 2021 and a letter was sent to all Leaseholders on 10th December 2021. Being at the beginning of winter it was considered necessary to ensure the heating system was in full working order and therefore the work was considered to be urgent and that a section 20 procedure would take too long. Following the works being carried out he said there had been a significant reduction in complaints.

94. The Tribunal referred to the correspondence between Flaxfields and PHP in July in which PHP recommended that the boilers be replaced, a point repeated at the end of the Invoice number 18056 dated 17th September 2021. The Tribunal noted that the Leaseholders were never told that there were two options and were never consulted about which option they would prefer, notwithstanding that it was cheaper to have the heat exchangers alone replaced.

95. Counsel for the Applicant submitted that this was a choice the Respondent was entitled to make. Having made the decision to replace the heat exchangers then that is what the Tribunal should consider and not whether other works such as the replacement of the boilers would or would not have been a better alternative.

96. Counsel said no issue was raised with regard to the pipe work. The replacement of the gas valve was on the advice of PHP. The Applicant was advised the valve was

leaking and should be replaced. The Applicant was right to rely on the expertise of the contractor and was not in a position to suggest another form of repair such as welding. Counsel said that the pressure valve was damaged and needed to be replaced. There was no evidence to suggest the valve had been damaged by the contractor.

97. Counsel said that PHP had made it clear that a new filtration system was required to improve the operation of the system.

98. With regard to relevant prejudice Counsel said that although the Respondents refer to requiring expert evidence, they have not provided any. She questioned whether they would have asked for an expert's report if a consultation had taken place.

99. Had a consultation taken place, based upon the previous cases, the Respondents would have contended that the Developer should pay and not them.

100. The contractors provided all the information about the system and so obtained a quotation for a pump recommended by the manufacturer which they understood to be the correct size and proceeded on that basis.

101. There had been communication with both the Residents' Association and the Leaseholders. Counsel submitted that the Respondents could not say that they had no idea what was being undertaken. In addition, the estimated costs were provided in an email date 30th November 2021. These emails suggested partial compliance.

102. Irrespective of the issue of consultation, an estimate was obtained in December and due to the need for heating over the winter and taking into account the number of complaints received and the time that a section 20 procedure would have taken it was reasonable to press ahead with the work as a matter of urgency and to seek retrospective dispensation.

103. The comments that were made to Mr Coles and which were set out in his witness statement about the Further Works related to wanting the works done rather than what type of works were to be carried out.

104. Dr Gommer said that with more cooperation by the Applicant and it's managing agents with the Respondents the proceedings could have been avoided. The Applicant and its managing agents had held back information and what information was provided lacked formality. There were three occasions when the Applicant should have consulted.

105. Dr Gommer said that because there had been no expert's report it was still not clear why the boilers break down, why a new filtration system was required. The system is still not providing hot water and heating. Dr Gommer submitted that the root of the problem was that the boilers needed replacing.

Decision

106. The Tribunal considered all the evidence adduced and submissions made in the written and oral representations. In determining whether the Respondent had suffered prejudice by the section 20 procedure not being followed the Tribunal in

respect of the Qualifying Works the Tribunal treated the Further Works and the Additional Works separately. The justification for this was that the works were separated by several months. The Further Works were carried out in July whereas the Additional Works were carried out in December. The Further Works were carried out while Flaxfields were the agents and the Additional Works while Premier were the agents.

107. Firstly, the Tribunal considered the urgency of the Qualifying Works.

108. The Applicant had submitted that the Qualifying Works as a whole were urgent because if they had not been carried out when they were actually undertaken the Leaseholders including the Respondents would not have had hot water and heating because the boilers were failing and breaking down and the works carried out were a) the Further Works of repairing the boilers (Replacement of boiler heat exchangers and related pipework and valves) and b) the Additional Works were to make the system more reliable (installation of a new filtration system and pump).

109. The Tribunal accepted that the Further Works were urgent. The Tribunal found that the Leaseholders would be prejudiced if the Further Works were not carried out expeditiously.

110. The Additional Works were preventative in that it appeared the system could have operated with the existing filtration system but there was a risk that debris and sludge would build up in the system, causing it to fail. Therefore, it needed to be carried out expeditiously but there was not the same urgency as with the boilers.

111. Secondly, the Tribunal considered whether any of the procedure had been complied with.

112. With regard to the Qualifying Works generally the Tribunal accepted that for an industrial size heating and hot water system there were a limited number of contractors who would be prepared tender and carry out repair, replacement or maintenance work. Two contractors had carried out maintenance work being PHP and Huttie. Either appeared capable of undertaking the Further and Additional Works. However, only PHP was engaged. No explanation was given as to why Huttie was not asked to tender or to offer an opinion as to what action could be taken with regard to either the Further or Additional Works.

113. With regard to the Further Works, PHP had installed the new flues and on testing they found the boilers were in a parlous state. The emails from PHP to Flaxfields of the 7th July 2021 setting out the problem with the boilers, of 17th July 2021 explaining why the boilers need to be replaced and of the 23rd July 2021 setting out the options available were clear. The Tribunal could not see why Flaxfields and PHP did not share this information with the Leaseholders. Mr Coles's letter to the Leaseholders was sparse in comparison. PHP's email of 23rd July gave some idea of costs but this was not shared with the Leaseholders despite Mr Coles saying it would be as soon as it was known. Mr Coles's letter also referred to replacing the boilers whereas in fact a decision was made unilaterally by the Applicant or its managing agent, without consultation with the Leaseholders, to replace the heat exchangers. This was against the advice of PHP which Mr Coles said the Applicant would rely on.

114. The advice to renew the boilers was repeated in the invoice for the new heat exchangers confirming that in their opinion this work would be required sooner rather than later.

115. The Tribunal is satisfied that failure by the Applicant's managing agent at the time to consult with the Leaseholders by providing them with the information that the Applicant and it's managing agent had, caused the Leaseholders prejudice.

116. The Tribunal does not agree that the Tribunal can only look at the qualifying works which a landlord decided to have carried out. In this case the Applicant Landlord was given a choice to repair or to renew the boilers. The choice came with advice, which was, in this instance, to renew rather than replace. If the Respondents, as Leaseholders had been told of the alternatives in the course of consultation the Tribunal is confident that they would have made observations to which the Applicant Landlord through its managing agent would have been obliged under the section 20 consultation procedure to have responded. The choice was between what PHP considered from the emails (and the invoice) to be a cheaper short-term remedy of repair, by replacing the heat exchangers, which had no guarantee and a much more expensive long-term remedy of replacing the boilers which would have carried with it a guarantee of usually 5 years.

117. In the course of consultation, the Leaseholders might, notwithstanding PHP's advice, have expressed a preference for the cheaper option or they may have considered the more expensive option to be better with its 5 year guarantee. Either way the Applicant Landlord would have had to respond to the observations to justify its choice. A justification that the Leaseholders were entitled to receive as the people paying and receiving the service. The Tribunal is confident the Residents' Association would have made observations as would some of the Leaseholders, as evidenced from the evidence adduced and Mr Coles's witness statement.

118. As stated above the Tribunal accepts that there was a degree of urgency to ensure continued hot water at any time of the year and to ensure heating by November when the weather would almost certainly be getting cold. Nevertheless, merely because the need for work to be done urgently does not allow of a full section 20 consultation procedure to be carried out does not mean an attempt should not be made at a truncated version. The information, including the costings, provided by PHP in the emails in July 2021 could and should have been appropriately edited and provided to the Leaseholders, together with the opinion of the Landlord and, say, a 14 day response time for observations. The Landlord through its managing agents could say what had been decided based on or in spite of the observations. This process could have been completed by the end of August and PHP could have carried out the work of repair or replacement of the boilers. This suggested timescale does not seem unreasonable and is one that the Tribunal would have specified as a condition had this Application been made before the work was carried out. PHP as the chosen contractor was available as evidenced by the work carried out in installing the filtration system at around that time.

119. Mr Coles in his communications with PHP showed real concern and asked the right questions as a managing agent and his letter of 17th July 2021 went some way to explaining the situation to the Leaseholders. However, in that letter he said he

would be guided by PHP, as the experts who recommended replacing the boilers, and would let the Leaseholders know of costings when they were available but he did neither. He went against PHP's advice and did not keep the Leaseholders informed. If Mr Coles had provided, at least the Residents' Association with a copy of PHP's quotations of 12th and 14th July 2021 they would have made a form of Notice of Intention under the section 20 procedure.

120. The Tribunal accepts that the pipework and replacement valves were required whether the heat exchangers or the boilers were replaced. No evidence was adduced to show that these works were unnecessary or that the Respondents would have challenged these works had there been a full or partial consultation causing them to be prejudiced. With regard to the leak and whether it could be welded the Tribunal found that the Applicant was entitled to take the advice of the contractor.

121. Therefore, the Tribunal determines that it is not reasonable to dispense with the consultation requirements in relation to the Further Works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to the Further works in respect of the cost of the replacement of the pipework and valves.

122. This does not preclude the Respondents from applying for a section 27A determination with regard to the costs that have been incurred for the work for which dispensation has not been granted.

123. With regard to the Additional Works Mr Tolley said in his witness statement that an email was sent to the Residents' Association on Tuesday 30th November 2021 from Premier Estates which listed the cost of the Further Works, which had already been carried out, and the estimated cost of replacing the pump and the filtration system, although the estimate given in the email was half the actual cost. The Tribunal found this of little help to the Leaseholders with regard to the proposed Additional Works.

124. Mr Tolley said in his witness statement that on Friday 10th December 2021 all Leaseholders were sent a letter informing them of the problems with the heating and that work would commence on 13th December 2021. He said this letter did not have any costs as these might change. Therefore, no details were shared with the Leaseholders and although he said in his statement that the information was available on request, he did not say so in his letter. Therefore, the Leaseholders did not know that they could ask for a copy of the very clear quotation of PHP which set out the stages of the work, what was to be done at each stage and the estimated cost.

125. As with Mr Coles's letter of 17th July 2021, if Mr Tolley had provided, at least the Residents' Association, with a copy of PHP's quotation of 9th December 2021 it would have made a form of Notice of Intention under the section 20 procedure.

126. *Daeian Investments Ltd v Benson* [2013] UKSC 14 is concerned with the consultation requirements of section 20 which have the purpose set out in that

judgement. However, the Tribunal is of the opinion that consultation is not the only purpose of the section. It is also to ensure that Leaseholders have notice of major works. The Notices to be issued under the procedure should describe the works and why they are necessary, when they are to take place and what the estimated cost of the works is and what the leaseholders contribution is likely to be.

127. The managing agents in this case appear to take the view that as little information as possible about Qualifying Works is to be provided to the Leaseholders until the work is done. The Tribunal were of the opinion that this approach was likely to lead to disputes between a landlord and tenant.

128. The letter dated 23rd March 2022 setting out the works and their costs, which corresponded to PHP's quotation dated 9th December 2021 is of little help to these proceedings. These proceedings are about dispensing with the requirements of the secton 20 procedure and that letter was sent after the works were completed.

129. The Tribunal went on to consider whether, notwithstanding the lack of compliance with the section 20 procedure, the Leaseholders were prejudiced. Both parties agreed that the heating and hot water system did not operate effectively or consistently. The advice of PHP was that the pump and filtration system needed to be replaced which is what the Applicant proposed to do. The onus is on the Respondents to prove that if they had been consulted about this proposal, they would have been able to show, that contrary to PHP's advice, the Additional Works would not have been necessary. Alternatively, if they had been necessary, they would have been able to show that another more cost-effective pump and filtration system than that recommended by PHP should have been used.

130. The Tribunal examined the advice and description of the Additional Works and found that irrespective of whether the heat exchangers were replaced or the whole boiler was replaced some action was required with regard to the pump and filtration system. The pictures of the sludge that had built up following the flushing of the system provided evidence, be it as it may, retrospectively, that some action was needed to improve the efficacy of the system and to protect the boilers from breakdown.

131. Notwithstanding that PHP were "only plumbers" they had knowledge and experience of the particular system and their advice was to replace both. The Respondents did not provide sufficient evidence to show that this position would have altered had the Leaseholders been consulted. In the absence of evidence to the contrary the Tribunal finds that it was necessary to replace the pump and filtration system.

132. With regard to an alternative pump or filtration system, it was agreed that Dr Gommer had been asked on behalf of the Residents' Association by the Applicant as to whether he had any suggestions as to the pump that should be purchased. He said that he did not have an opinion and that an expert should be instructed to advise. The Applicants chose to rely upon the advice of the contractor, PHP, as to which pump and filtration system should be used.

133. With the Further Works there was a choice between a repair which was not guaranteed and a replacement which was and where the contractor had advised the latter. With the Additional Works, given that they were necessary, there did not appear to be a choice, only advice by the contractor which was explained, at least to the managing agent, in its quotation. PHP was subsequently instructed to install a suitable pump and filter. The Respondents said that if the Leaseholders had been consulted, they would have made the observation that an expert should be instructed, by which they presumably meant an independent expert, as the Applicant was relying on the knowledge and expertise of the contractor. The Tribunal is of the opinion that in this case there was no obligation upon the Landlord to instruct an independent expert and if the Leaseholders consider an alternative system should be used it is for them to instruct their own expert to advise them. If the Application for dispensation from the section 20 procedure in respect of the Additional Works had been made before they were carried out the Tribunal would have made the same decision. The only condition would have been to share the advice and explanation given by PHP to the Applicant's managing agents with the Leaseholders so they would know what was to be done, when and, of particular importance how much.

134. The quotation by PHP acknowledged that the Additional Work was carried out during a high demand season. Nevertheless, as the system provided both hot water and heating a plant room would have been required no matter what time of year the work was done. The Respondents questioned whether the plant room was necessary for the Additional Work to be carried out. PHP said it was and in the absence of evidence to the contrary the Applicant was entitled to accept that advice.

135. If the Respondents consider the cost or standard of work related to the installation of the pump and/or filtration system were unreasonable then their action lies in an application under section 27A of the 1985 Act.

136. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of the Additional Works.

137. The Respondents raised the point that if they had been consulted on the Qualifying Works, they would have raised the issue that the system was only 7 years old and the Developer should bear some responsibility. This is not a matter that is within the Tribunal's jurisdiction.

Costs

138. There was a mention in the Bundle of an application under section 20C of the Landlord and Tenant Act 1985 which prompted the Applicant's solicitor to inform the Tribunal that an offer had been made by letter prior to the hearing (copy provided) which said that the Applicant would not seek costs if the Respondent did not pursue the matter further.

139. The Respondents replied that the Applicant's offer regarding costs amounted to telling the Respondents that if they did not question the Application then they would not be charged any costs.

140. Following the decision in the case of *Daeian Investments Ltd v Benson* [2013] UKSC 14 the Tribunal is of the opinion that generally the proper manner of dealing with costs incurred in respect of an application under secton 20ZA is by a condition in the Tribunal's decision.

141. Whereas the Tribunal finds that there was a need to act expeditiously, the Qualifying Works were not so urgent as to instruct contractors to carry out the Further Works without consulting, not matter how briefly, on the issue of repairing the boilers by replacing the heat exchangers or replacing the boilers completely, in accordance with the contractor's advice, notwithstanding that the latter would cost more, and which prejudiced the Leaseholders. In addition, as stated above, the Tribunal is critical of the failure by the manging agents to share with the Leaseholders key information with regard to both the Further and Additional Works. This information if shared and the consultation if undertaken would probably have avoided these proceedings.

142. Taking this into account, the Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Leaseholders.

143. The Tribunal also makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for submissions prior to a determination of such costs.

Rule 13 Costs

144. The Respondents' Representative claimed costs under Rule 13 submitting that the Applicant had acted unreasonably in bringing, defending or conducting proceedings.

145. The Tribunal considered all the submissions of the parties in the course fo these proceedings.

146. The Tribunal starts from a position that its jurisdiction is one in which costs are generally not awarded. The only exception being where a party has acted unreasonably. The Civil Procedure Rules do not apply to tribunals including the provision relating to costs and "*there is no equivalent general rule that the unsuccessful party will be ordered to pay the costs of the successful party*" as per paragraph 28 of *Ridehalgh v Horsefield* [1994] Ch 2015.

147. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application "*should not be regarded as routine, should not be abused to discourage access to*

the tribunal, and should not be allowed to become major disputes in their own right".

148. The Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
    (i) Whether the Applicant had acted unreasonably, applying an objective standard;
    (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
    (iii) If so, what should the terms of the order be?

149. The Tribunal also took into account the meaning of "unreasonable" in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:

    "Unreasonable" means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

150. The Tribunal considered whether the Applicant *has acted unreasonably in bringing, defending or conducting proceedings*.

151. The Tribunal found that the managing agents should have carried out some consultation with regard to the Further Works and should have shared information in relation to the Qualifying Works and the Tribunal's decision reflects those findings. However, these findings did not show that the Respondent had acted unreasonably in bringing or conducting proceedings under secton 20ZA for dispensation of the consultant requirements under section 20 of the Landlord and Tenant Act 1985.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

2. 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.

3. 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.

4. 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.

APPENDIX 2 – The LEASE

1. The relevant terms of the Leases were identified as follows (references to the Property are to the individual Apartment to which the Lease relates):

2. Clause 1 Definitions

'The Block'
An area within which the Building is situated

Note: The Property is the Apartment within the Building. Therefore, the term Block in the Lease includes the Building. As noted above there are two Buildings and the heating is shared by both buildings.

'Building Communal Areas'
Those parts of the Building of which the Property forms part (excluding the Property) laid out as…ducts risers communal boilers/Heat Installations and Energy Centre (if any) and all other parts of the Building intended to be or are capable of being enjoyed or used by some or all of the owners tenants and occupiers of premises in the Building".

'Conduits'
Pipes downpipes sewers (excluding Estate Sewers) drains pumping stations soakaways channels gullies gutters watercourses conduits ducts flues Wires cables and other service conducting media or apparatus for the supply or transmission of water sewerage electricity gas (if any) telephone (if any) and other communications media now or to be constructed in any part of the Estate and serving the Property but shall not Include any conduits belonging to any local or other Statutory Authorities

'Heat installations'
The network of pipes wires and other ancillary plant and equipment serving the Building (together with any other buildings) that transfer Heat from the Energy Centre to the Heat interface Unit together with all connected meters and monitoring equipment

'Heat'
Heat in the form of hot water generated from the Energy Centre and also cold water to be supplied to the Tenant through the Heat Interface Unit

'Energy Centre'
The energy centre serving the Building (together with any other buildings) from which the Energy Service Company supplies Heat

'Energy Service Company'
The Landlord or any organisation appointed by the Landlord from time to time to move and/or procure the provision of Heat to the Building (together with any other buildings)

'Heat Interface Unit'
A unit composing a heat exchanger pump and associated valves and controls used to transfer Heat from Heat Installations to the Tenants Internal heating and hot and cold-water system

'Proportion'
The Part A Proportion the Part B Proportion and the Part C Proportion which are each defined as being a fair and proper proportion (assessed by the Landlord acting reasonably) of the Service Charge attributable to the respective Part A, B and C Services

'Services'
The services carried out by or on behalf of the Landlord from time to time as set out or referred to in Parts I, II and III of the Fifth Schedule

'Service Charge'
The total cost of providing the Services

3. Clause 4 The Tenant hereby covenants with the Landlord as follows: -

4.3 To pay to the Landlord in respect of every Service Charge Year, the Proportion of the Service Charge by two equal instalments in advance on the Half Yearly Dates (those being 19th September and 1st March).

4.4 To pay to the Landlord on demand, the Proportion of the appropriate Service Charge Adjustment pursuant to the Fourth Schedule.

4.5 To pay to the Landlord on demand, the Proportion as the case may be of any Additional Contribution that may be levied by the Landlord. Additional Contribution is defined within the Lease as "any amount which the Landlord shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under Paragraph 2.2 of the Fourth Schedule

Schedule 5 -Services

Part 1 Building Communal Area Services (Part A)

1. To keep the Building Communal Areas [which includes the Energy Centre, Heat Installations and the Heat Interface Unit] in good repair and condition

7. To keep the Energy Centre and the plant and machinery housed within the Energy Centre and the Heat Installations serving the Premises [also known as the Property] in good repair order and condition including the renewal and replacement of all worn or damaged parts

Part 2 Building Services (Part B)

21. To carry out all repairs to any other part of the Building for which the Landlord may be liable and to provide and supply such other services of the benefit of the Tenant … as the Landlord shall consider necessary to maintain the Building as a good class development

Part 3 Block Communal Area Services (Part C)

3. To keep all Conduits… in good repair and condition.

13. To carry out all repairs to any other part of the Block Communal Areas for which the Landlord may be liable and to provide and supply such other services for the benefit of the Tenant and the tenants of other properties in the Block and to carry out such other repairs and improvement works additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Landlord shall consider necessary to maintain the Block Communal Areas as a good class development or otherwise desirable in the general interest of the Tenant and the tenants of other properties in the Block.

APPENDIX 3 – THE LAW

The Law

1. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.

2. The consultation provisions appropriate to the present case are set out in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The Procedure of the Regulations and are summarised as being in 4 stages as follows:

   A Notice of Intention to carry out qualifying works must be served on all the tenants. The Notice must describe the works and give an opportunity for tenants to view the schedule of works to be carried out and invite observations to be made and the nomination of contractors with a time limit for responding of no less than 30 days. (Referred to in the 2003 Regulations as the "relevant period" and defined in Regulation 2.)

   Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants.

   A Notice of the Landlord's Proposals must be served on all tenants to whom an opportunity is given to view the estimates for the works to be carried out. At least two estimates must be set out in the Proposal and an invitation must be made to the tenants to make observations with a time limit of no less than 30 days. (Also referred to as the "relevant period" and defined in Regulation 2.) This is for tenants to check that the works to be carried out are permitted under the Lease, conform to the schedule of works, are appropriately guaranteed, are likely to be best value (not necessarily the cheapest) and so on.

   A Notice of Works must be given if the contractor to be employed is not a nominated contractor or is not the lowest estimate submitted. The Landlord must within 21 days of entering into the contract give notice in writing to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the Landlord's response to them.

3. Section 20ZA allows a Landlord to seek dispensation from these requirements, as follows –

   (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the

tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
if it is an agreement of a description prescribed by the regulations, or in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,
c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) and (7)... not relevant to this application.

4. Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Rule 13 (1) states that:
The Tribunal may make an order in respect of costs only-

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-

(ii) a residential property case

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LDC/2021/0018**
HMCTS	**:**	**CVP**
Property	**:**	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Great East Court, Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Landlord)	**:**	**RMB 102 Limited**
Representative	**:**	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Respondents (Tenants):		**The Long Leaseholders identified in the Schedule to the Application**
Representative	**:**	**Dr Frank Gommer**
Type of Application	**:**	**1) To dispense with the consultation Requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA of the Landlord and Tenant Act 1985** **2) To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge J R Morris** **Mr N Miller BSc**
Date of Application	**:**	**14th April 2022**
Date of Directions	**:**	**16th May 2022 and 20th June 2022**
Date of Hearing	**:**	**13th September 2022**
Date of Decision	**:**	**24th October 2022**

DECISION

Decision

1. The Tribunal determines that with regard to the Further Works it is not reasonable to dispense with the consultation requirements in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat but that it is reasonable to dispense with the consultation requirements in relation to the cost of the replacement of the pipework and valves.

2. The Tribunal determines that with regard to the Additional Works it is reasonable to dispense with the consultation requirements.

3. The Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Tenants.

4. The Tribunal makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for written submissions prior to a determination of such costs.

5. The Tribunal does not make an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Reasons

Application

6. On 14th April 2022 the Applicants applied for a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 that the requirement to comply with all the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) ("the Consultation Requirements") should be dispensed with (the Dispensation Application).

7. On 30th June 2021 an Application, case number CAM/12UB/LDC/2021/0026, was made under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements under section 20 of the 1985 Act for qualifying works. The qualifying works were the replacement of the boiler flues. In April 2021 the boiler flues were found to be leaking and therefore defective with a health and safety risk of carbon monoxide being emitted. In addition, servicing and maintenance work could not be carried out on the boilers as any readings regarding their operation would be unreliable due to the defective flues.

8. The tribunal hearing that application determined for reasons set out in its Decision dated 4th March 2021 that retrospective dispensation should be given for those qualifying works.

9. The present application is quite separate and the only relevance to the decision concerning the flues is that, on completion of their replacement in June 2021, the contractors, Pure Heating and Plumbing ("'PHP"), were then able to carry out an accurate test of the boilers and related installation with a view to service and maintenance.

10. In doing so the Applicant states that it found that "Further Works" were required, they being further to the replacement of the flues. In an email exchange between the PHP and the Landlord's Agent, in July 2021 the following work was identified as being required:
    - Replacement of gas pipe work –
      Quotation 7180 dated 12th July 2021 and Invoice 17728 dated 11th August 2021 for **£7,608.30**
    - Replacement of boiler heat exchangers -
      Quotation 7193 dated 14th July 2021 and Invoice 18056 dated 17th September 2021 for **£13,511.95**
    - Replacement of Gas Isolation Valve - **£871.44**
    - Replacement Pressure Switch - **£358.08**

11. In addition to the above PHP identified the following "Additional Works" as being required, they being additional to the Further Works relating to the boilers:
    - A new pump and filtration system -
      Quotation 7858 dated 12th December 2021 for **£26,622.96**
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation **£12,910.76**
    - Flushing of system - **£2,340.00**

12. In order to carry out the installation of the new pump and filtration system the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room & filtration system -
      Quotation 7857 dated 12th December 2021 of **£13,351.30**
    - Additional Cost of hire of Temporary plant room due to delivery date for pump - **£3,024.00**
    - Decommissioning costs temporary plant room -
      Quotation 7859 dated 9th September 2021 of **£2,210.40**

13. These are hereafter referred to collectively as "the Qualifying Works". Their total cost was **£82,809.19.** However, following the evidence and submissions at the hearing the Tribunal found it appropriate to distinguish between what were two sets of work and so identify each by reference to the terms "Further Works" and "Additional Works".

14. The Applicant said that the work was necessary and urgent. Due to the time of year (December), the number of failures within apartments and the demand for heating and hot water meant that the temporary plant hire was an absolute necessity. The work could not be completed without the temporary plant hire as there were major pipework modifications required within the plant room which could not be done without the temporary plant hire. Some of the work took days to complete and

therefore, this would have caused a greater issue with residents and the obligations relating to heating and hot water as it was during the winter months.

Description

15. The Tribunal did not consider it necessary to inspect the Property. The following description is based upon the Statements of Case, photographs, the Lease and the Internet.

16. What is referred to in this Decision and Reasons as the "Property" in the Lease is the Block which comprises two buildings, 117 – 131 (Odds) The Cherry Building, containing 8 purpose-built Apartments, and 133-171 (Odds) Addenbrookes Road, containing 20 purpose-built Apartments, which have joint communal facilities including a central heating system.

The Law

17. The Law relating to these proceedings is set out in Annexe 2 and should be read in conjunction with this Decision and Reasons.

The Leases

18. Each Apartment is subject to a long residential lease. Each lease is similar in terms as to the relevant covenants.

19. A copy of the lease relating to Plot 305 dated 30th September 2013 and made between (1) Countryside Cambridge One Limited and Countryside Cambridge Two Limited, (2) Countryside Properties (UK) Limited and (3) Kurt Stadler and Friedelind Stadler (the "Lease") was provided. The terms of the Leases are understood to be common to all Apartments.

20. On 8th August 2014, Countryside Properties (UK) Limited ("the Developer") assigned the freehold title to the Property to E&J Ground Rents N06 LLP who then assigned the Property to the Applicant, RMB 102 Ltd, on 26th July 2019. E&J Ground Rents N06 LLP and RMB 102 Ltd form part of the same holding group. RMB 102 Ltd is therefore the Landlord and the long leaseholders of each of the apartments is a Tenant.

21. As at 2018 APT Property Management ("APT") was the managing agent for the Property. On 1st February 2019 the Applicant appointed Flaxfields Ltd ("Flaxfields") as its managing agent for the Property to carry out all of the Respondent's obligations and duties under the Leases, ensure that all statutory requirements had been complied with and collect the service charges that have fallen due. On 1st September 2021 Flaxfields' appointment ceased, and Premier Estates ("Premier") were appointed in Flaxfields' place. On 29th June 2022 an RTM company has taken over the management of the Property and Urang Ltd have been appointed managing Agents.

22. Relevant provisions of the Leases are set out in Annex 2 of this Decision and Reasons.

Written Statements and Hearing

23. Both parties provided written statements which were confirmed and developed at the hearing. The cases summarised below include both the written and oral cases presented to the Tribunal. The hearing was attended by Ms Rebecca Ackerley Counsel for the Applicant, Mr Paul Tolley of Premier, the Applicant's current Managing Agents and Dr Frank Gommer, the Respondents' Representative.

    Other persons in attendance included Ms Cheryl Earle and Mr Steve Boon of E & J Estates Ltd and Ms Hannah McLeod of JB Leitch the Applicant's Solicitors.

Preliminary Issue

24. The Applicant submitted a late witness statement from Mr Tolley. The Respondent's Representative objected to the late production saying that he had only received the witness statement the day before the hearing and had not had an opportunity to either read or consider it and therefore it should be excluded. Counsel for the Applicant accepted that the witness statement had been provided late in the day but the Tribunal had not made a Direction for the Applicant to reply to the Respondents' Statement of Case.

25. With regard to the content of the witness statement Mr Tolley said that he wished to make certain points clear which he felt the Respondents had misrepresented by being selective in their supporting documents, in particular certain emails had been omitted. He said the exhibits he had provided to his witness statement in Reply to their Statement of Case included the whole email exchange particularly between Mr Cole and PHP. Mr Tolley said that he could see no objection to admitting the documents as they were known to the Respondents either because they were the recipients or because they had been included in the bundles of the two previous cases.

Decision re Preliminary Issue

26. The Tribunal had not considered a direction to reply to the Respondent's Statement of case was necessary for a section 20ZA Application. It also considered that the Applicant through Mr Tolley's oral evidence could draw attention to any points in the Respondents' Statement of Case which he felt were misleading and refer to documents if, as he said, they were in the knowledge of the Respondents.

27. Therefore, the Tribunal refused permission to admit Mr Tolley's witness statement in reply.

Applicant's case

28. The Applicant provided a Statement of Case in the form of a Witness Statement by Mr Tolley. With regard to the replacement gas pipework and the boilers he referred to the Witness Statement of Mr Jonathan Coles, director of the Applicant's previous Management Agent, Flaxfields.

29. Mr Tolley stated that his predecessor Mr Coles for Flaxfields was told by PHP in July 2021 that the Further Works would be required. Mr Tolley referred the

Tribunal to Witness Statement of Mr Coles, which was prepared for case number CAM/12UB/LDC/2021/0026 regarding an application under section 20ZA of the Landlord and Tenant Act 1985 in respect of the Works to replace flues. Mr Coles's statement dealt with the identification by PHP and the notification to the Leaseholders of the Further Works and was supported by correspondence attached to his statement.

Mr Coles's Witness Statement re Further Works

30. The relevant part of Mr Coles's Statement said that following completion of the installation of the flues PHP advised that Further Works to the gas pipework in the plantroom was required and two of the four boilers needed replacing. Quotes were obtained totalling £20,780.88 (£7,608.30 for the replacement of the gas pipework and £13,172.57 for replacement of the heat exchangers) and a copy of which was provided.

31. Following application CAM/12UB/LDC/2021/0026 to the Tribunal for dispensation regarding the works to the flues in which reference was made to these Further Works which were qualifying works under section 20 of the 1985 Act, the following objections were received from the Respondents which are followed by the Applicant's responses. These mostly refer to the Further Works of replacing the boilers but some refer to the flues as well.
    a. Frank Gommer on behalf of a formally recognised tenants association at the Premises;
    b. Linda Skeggs and Glen Skeggs of 135 The Cherry Building,
    c. Julie Vaughan of 151 The Cherry Building,
    d. Michael Opel of 127 The Cherry Building,
    e. Roberto Lattuada and Silvana Filipponi of 137 The Cherry Building,

32. The objections of Dr Frank Gommer on behalf of the Cherry Building Residents' Association:
    1. The Application does not concern qualifying works;
    2. The plant room including the flue is still in the defects' liability period of the Developer;
    3. The leakage of the flue has been known to the landlord since 2018; and
    4. The Landlord's managing agents have made no attempt to explain the issue and potential costs after the state of the flue became so severe that no further operation could be permitted.

33. The Applicant's Response:
    1. Qualifying works. under the Landlord and Tenant Act 1985 are defined as "works on a building or any other premises". This includes any repair, replacement and maintenance works. As the Works to the flues and boilers are replacement works on the Property, they therefore fall under the definition of qualifying works.
    2. The Developer confirmed those other parts of the system other than the flue are not under warranty and therefore it was understood that the flue itself is also not under warranty.
    3. Prior to Flaxfields management of the Property the issue of the flues leaking was raised with PHP who were in the process of fixing the leak. After the

completion of the works, the flues were still leaking, and probably the leaks had never fully been repaired.

4. The Managing Agents have tried to update leaseholders throughout the process. Due to the number of leaseholders at the property, there may have been delays in responses, but this was never due to a lack of attempting to contact. Three updates had been provided to all leaseholders throughout this process, as well as individual concerns being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

34. The objections of Linda and Glen Skeggs:
    1. The Respondents believe Flaxfields have failed to comply with the terms of the lease.
    2. The Respondents state the issues relating to the heating and hot water have made it difficult to manage the Flat.
    3. The Respondents believe that the plant room hasn't been maintained properly since they've purchased the flat and that this would not be a matter of urgency if the boilers were regularly maintained.
    4. The Respondents are unhappy as Flaxfields have billed over the £250 permitted by the lease without consultation.

35. The Applicant's Response:
    1. It is refuted that the Applicant breached the terms of any leases. The issues were only identified in April 2021 after PHP's site inspection. Alternative advice was obtained quotes were compared in order to act reasonably and in the interests of the leaseholders, the Works started swiftly on 29 June 2021. It was unfortunate that the Further Works were identified but these could not be foreseen.
    2. The inconvenience is appreciated although these issues have been out of the Applicant's control.
    3. No evidence has been given of any suggested failure for failing to maintain the plant room.
    4. The full consultation process was not completed, hence the reason for making the S20ZA application. Correspondence was sent to keep leaseholders informed as much as possible in respect of the Works. The reason the Dispensation Application was made was because Flaxfields were aware of the obligation to consult when billing over the permitted £250 limit.

36. The objections of Julie Vaughan
    1. This situation regarding the hot water supply has been occurring for too long a period of time causing severe disruption to her Tenant.
    2. Flaxfields have been poor at replying to correspondence and they have provided misleading emails stating gas inspections have been carried out when they have not.

37. The Applicant's Response:
    1. The disruption was appreciated but the amount of time to rectify the problems was out of the Applicant's control. The Works were instructed as soon as reasonably practicable and unfortunately, the Further Works were found to be necessary.

2. PHP had been booked for the gas inspections to take place but when PHP attended, they informed Flaxfields that they could not be carried out due to the leaking flues.

38. Objections of Michael Opel and Applicant's Response
    1. Already dealt with under Dr Gommer's objections
    2. He said he was unaware of the issues when he bought the Flat on 30 June 2021. However, the Managing Agent did inform him that there were two section 20 works in process.

39. The Objection of Roberto Lattuada and Silvana Filipponi:
    1. The numerous problems with the heating system have led them to feel let down by the managing agents.
    2. There has been a lack of communication with regards to the works with too many delays and interruptions of services.

40. The Applicant's Response
    1. It is not fair to associate the problems with the heating and hot water system with the quality of service provided by the managing agents. Flaxfields on behalf of the Applicant responded to all the problems that have arisen to the best of its ability. When made aware of the problems, quotes for the Works were obtained and PHP were instructed. It was unfortunate that the Further Works were then deemed necessary.

41. Mr Coles said that Flaxfields' had tried to update leaseholders throughout the process and there has been no lack of communication. Due to the number of leaseholders at the Property, there may have been delays in responses, but this was never out of not attempting contact. Updates have been provided to all leaseholders throughout this process, as well as individual concerns also being addressed separately. Therefore, a genuine attempt had been made to explain the issues and potential costs to leaseholders.

Correspondence with PHP and the Respondents re the Further Works

42. Email correspondence between Mr Coles and PHP and the Leaseholders regarding the Further Works was provided. Mr Tolley said that it was important to look at the whole email exchange between Mr Coles and PHP as it showed that they were discussing the best way forward to remedy the problems with the heating system at as low a cost as would be reasonable. The Correspondence comprising emails between PHP and Flaxfields was provided which was said to show the need for the works to be carried out as follows:

    7th July 2021

    PHP confirms that the new flues had been installed but that there were problems with all four of the boilers which was set out in considerable detail. PHP identify the likely cause as the heat exchangers.

13th July 2021

Mr Coles sought confirmation that the replacement of the boilers is on top of the £8,000 for the recommended replacement of the gas pipes.

15th July 2021

PHP confirm that the heat exchangers have failed due to them coming to the end of their life and that the gas pipe work will also be needed.

14th July 2021

Mr Coles wrote to the Leaseholders as follows:
"I am writing to all owners with a comprehensive review of how things stand currently and what actions are being taken to address all the apparent issues.

The recent flue works were very frustrating for you all, we totally understand this and appreciate your patience during the works. The flue works have been fully carried out to the specification quoted as we are satisfied with the end result.

We are aware that since the flue works were completed that it has resulted in some minor repair works needed to circa 6 out of 30 HIU's which have subsequently been addressed or are booked in with engineers.

Flaxfields Ltd have recently been advised by Pure Plumbing & Heating that 2 of the four boilers need replacing and that some further works to the gas pipework in the plantroom is required.

Their comments on the boilers are as follows:

Boiler 1
Safety time exceeded. The boiler is igniting but not recognizing the flame. Probe could be faulty from the excessive heat in the burner or water damage from the heat exchanger leak.

Boiler 2
The boiler is currently the best performing staying on the majority of the time but does reach temperature faster than expected which is no doubt connected with the partially blocked heat exchanger.

Boiler 3
Reaching high temperature very quickly. Boiler only stays on for 1 minute before it gets to 80 degrees and the flame goes off. The boiler temperature does continue to climb and often reached near 100 degrees. Boiler sometimes recognises excessive temperature and cuts out but does reset itself after the temperature reduces. Then the process repeats.

Boiler 4
Same as boiler 1.

Recently Pure monitored the operation and although not right the boilers are slowly heating the district system. Peak time approaching and the system temperature was maintaining between 58 and 62 degrees. Additional heat is needed for the system to deliver effectively, which means, ideally, 2 new boilers.

From early conversations with Pure Heating & Plumbing it does sound like this may be an expensive issue to address so we are obtaining quotes as we speak whilst trying to keep the system going.

We can only apologise for the issues you are experiencing and assure you that we are doing all we can to minimize any ongoing disruption to services. Flaxfields Limited have acted on every recommendation made by Pure and continue to rely on their advice as accredited professionals. We will report back on costs as soon as known."

17th July 2021

PHP provides an account of the lifespan of the boilers as follows:

"Commercial boilers generally have a life span of 10-15 years, however, during this time repairs and individual parts and components will require replacement, the more operational time the boiler goes through the more chance there is of these repairs and replacements being needed. For example, a domestic boiler may last between 10 ~ 15 years, depending on the manufacturer, however, after 5 - 10 years individual components Within that boiler will need replacing. As with commercial boilers that are running 24/7 parts will need replacing but more frequently. The more boilers you have on your system the less stress and wear and tear is caused on each boiler.

There is no way of telling how long a boiler will last. Most manufactures will on average provide a 5 warranty. There are a few factors that cause a boiler to deteriorate and in turn, reducing its operational life span. Leaks and water conditions being a couple.

The system at the Cherry building has been treated and the closed system has been maintained correctly as part of the service agreement. Unfortunately, a part, the heat exchanger has failed on boilers 1 and 4 and leaked which has caused the damage and the system to deteriorate rapidly.

Installing the new boilers ensuring the PPM is carried out, continued monitoring and all remedial works when required on equipment going forward, are authorised and carried out promptly will help to ensure that the system operates and lasts to its potential.

The issues with the HIU do not have anything to do with the Installation of the flues. The reasons HIU filters are blocked is due to the damaged heat exchangers and the condition of the system.

Switching off the flow and return valve to the HIU will help protect the HIU but in doing this the unit will not operate as it needs continuous flow from the system to produce heating and hot water."

23rd July 2021

PHP suggested two options:

"Option 1
Replace the leaking heat exchangers and probes in the current boilers and install a temporary side stream filtration unit for a period of 4 weeks and have a full system flush and close of light oxide and sludge removing chemical. This will pass through the system clearing any blockages and sludge that may have built up.
Quote 7193 has been revised and resubmitted at the cost of £10,977.15 Plus VAT
However, PHP recommended

Option 2:
Replace the 4 no existing boilers and replace them with 4 No new Ideal Evo MaxZ Boilers and an Ideal Evo Max plate heat exchanger.
Installation of the plate heat exchange will mean the heating system will be separated for the boiler system, reducing future potential risk to the boilers.
The cost for this would be £43,321.87 Plus VAT
Please note:
The works on the gas pipe will still need to be carried out at the cost of £6,340.25 Plus VAT with either option."

Mr Tolley's Witness Statement re Additional Works

43. Mr Tolley was only able to address the Additional Works. As noted from Mr Coles's witness statement, the Further Works were carried out before Premier were appointed as managing agents. Mr Tolly set out the Qualifying Works as follows:
    - Gas pipework needed to be replaced – Quotation 7180 dated 12th July 2021 for £7,608.30
    - Boiler heat exchangers or replacement of boilers were needed - Quotation 7193 dated 14th July 2021 for £13,511.95
    - Gas Isolation Valve needed to be replaced - £871.44
    - Replacement Pressure Switch - £358.08

44. The replacement of the gas pipework was completed on 11th August 2022 and the work to replace the heat exchangers was completed on 17th September 2021. In the course of carrying out the works it was found that the gas isolation valve needed to be replaced and the replacement pressure switch was broken and was renewed.

45. Mr Tolley said that in December 2021, he was told the following Additional Works were needed:
    - A new pump and filtration system would need to be installed - Quotation 7858 dated 12th December 2021 for £26,622.96
    - Grundfos Primary District Pump to replace the existing Wilo pump – Quotation £12,910.76
    - The system would need to be flushed out at a cost of - £2,340.00

46. Mr Tolley said that these works were completed in April 2022.

47. In order to carry out the Additional Works of installation of the new pump and filtration system, the heating had to be closed down and therefore a temporary plant room had to be hired to provide hot water and heating for which there were:
    - Commissioning costs of temporary plant room - Quotation 7857 dated 9th September 2021 for £13,351.30
    - Due to the time taken for the pump to be delivered an additional cost of hire was incurred of £3,024.00
    - Decommissioning temporary plant room - Quotation 7859 dated 9th September 2021 for £2,210.40.

48. A copy of the details and as to how the work was to be undertaken as set out by PHP was provided. It is a very detailed document and is not repeated here but stated that the work would be carried out in three stages and in outline:
    Stage 1
    - Setting up and commissioning a temporary plant room.

    Stage 2
    - The installation of a X-pot 6 side stream filtration unit and inline strainer & Microfil unit to replace the existing pressurisation unit.
    - Installation of a Grundfos Primary District Pump to replace the existing Wilo pump.
    - The flushing of each riser to ensure the system is clear of debris

    Step 3
    - Decommissioning the temporary plant room

49. With regard to the necessity and choice of filtration system PHP said in its quotation:

    "Pure to revisit site (the temporary plant room now providing heat to the building) and carry out the removal of the prefabricated steel district supplied pipe work inclusive of the existing Wilo pump set and Spirotec air/dirt separator. Carry out necessary pipework modification using carbon steel mapress pipework, this will include a new X-pot 6 side stream filtration unit and inline strainer (document attached). We previously quoted to supply and install a Magnetic filter and dirt & air separator; we feel this solution provides better system protection and a more cost-effective option.

    The previous price was £10,953.57 plus VAT. The new X Pot solution also incorporates built-in a side stream filter, dosing pot, and magnet filter, there will be savings made with this unit. Prior to connecting onto the existing header, Herts Environmental will carry out a flush of the existing boilers cascade header and main primary header to remove any magnetite using medium-strength cleaning chemicals with the existing boilers isolated. Upon completion of header flushing works the boilers will then be flushed to dear any debris in each individual heat exchanger using a low strength chemical in preparation of reinstatement. We will strip down the existing headers prior to flushing to ensure these are not too heavily blocked with magnetite sludge. This is the most cost-effective option without replacing the headers or boilers.

    Supply and install new Grundfos twin head pump set (model to be confirmed and cost), cost will include link up to the existing BMS panel.

We recommend the existing pressurization unit is replaced with a Microfil unit; the existing setup is an open vented tank which is subsequently open to the elements. This when filling can create oxidization (corrosive) and can cause the integrity of the system to corrode, rust, and leads to magnetite and cavitation.

Labour and Materials - £22,185.80 plus VAT"

50. With regard to the Pump Mr Tolley said that Dr Gommer as representative for the Respondents was asked for his input on the type of pump that was to be used. As a result of the discussions with Dr Gommer, the pump that has been installed is a pump which regulates with the demand, if the system is not used the flow drops to around 20% and if everybody used the system it would reach 100% of the demand. using the most energy.

51. The need for the system to be flushed out was said to be shown from the photographs taken by Harts Environmental who carried out that part of the work. These depicted a large quantity of sludge having been taken out of the system. Copies of the photographs were provided.

52. It was noted that the Respondents disputed the Work Order value. Premier Estates provided Pure Heating & Plumbing with the Work Order to proceed with the pump replacement at the budgeted cost and later amended the figure once an official quote from Pure for the new pump had been received

53. Mr Tolley said there was a delay in obtaining the pump which meant the hire of the temporary plant room had to be extended.

Correspondence with the Respondents re the Additional Works

54. Mr Tolly outlined the extent to which the Leaseholders were notified of the Additional Works. He said that on Friday 10th December 2021 all Leaseholders were sent a letter as follows:

"We recognise that the current communal heating/hot water system is struggling to provide all apartments with sufficient hot water and heating. In an attempt to restore the supply for residents we are regularly instructing Pure Heating & Plumbing to attend to investigate.

We have instructed Pure Heating and Plumbing to complete a series of works to the communal heating system that should result in greater reliability, less faults and reduced call outs, subject to regular maintenance in line with manufacturer's guidelines. However, to complete the required work, we need to implement a temporary plant room which will ensure the hot water/heating supply is not lost for the duration. The temporary plant room will be installed by the end of Monday 13th December 2021 at the latest and works will commence for an estimated duration of 8 weeks, taking into effect the Christmas period.

As part of the works, the temporary plant room will be stored outside of the existing plant room and will provide consistent supply of hot water/heating to all apartments with heat more than the existing system currently."

55. He said this letter did not have any costs as these costs could change (similar to the pump costs), hence no information was shared to all residents, but was available upon request.

56. On Tuesday 30th November 2021 Nicola Murray of Premier Estates sent an email (copy provided) with service charge estimates for the Residents Association to review and the estimated costs (for some of the work) were listed as follows:
- Replacement failed pressure switch on boiler 2 £358
- Boiler Heat Exchange replacement £13,512
- Replacement WILO pumps £10,500
- Permanent filtration system £13,800
- Boiler 4 switch and gas lever repair £872

57. Mr Tolley said that Dr Gommer and the Respondents already knew about the estimated costs for a lot of the work as it was included within the service charge estimate. He said that there were some unexpected costs which were included in the mid-term service charge levy which was set out in an email (no copy was provided).

58. In response to the Respondents' claim that they were not able to enter the plant room to make adjustments to the heating Mr Tolly acknowledged that Premier Estates had requested that residents do not access the plant room. He said that this request was appropriate due to the equipment there and that contractors are available to attend any faults and residents have been advised to contact the Out of Hours team whereby a callout will be made to Pure Heating & Plumbing.

59. Mr Tolley also said that a letter was sent to Leaseholders on 23rd March 2022 on completion of the Qualifying Works which set out what was done and the cost as stated in the section headed Application above.

Respondents' Case

60. The Respondents stated that they were not notified of the works and estimated costs of the Qualifying Works, as required by the Tribunal's directions dated 16th May 2022. As a result, the Respondents remain largely in the dark about significant aspects of the Applicant's case, including as to the true scope of the qualifying works, their full cost, whether they were in fact needed and what, if any, alternative course of action was considered and quotes obtained.

61. In the circumstances, the Respondents are unfairly prejudiced in these proceedings by the lack of documents and information provided by the Applicant that would have enabled the Respondents to provide a more comprehensive response to the present application.

62. Dr Gommer outlined the law as follows:

Section 20ZA(1) of the Landlord and Tenant Act 1985 provides as follows:

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make

the determination if satisfied that it is reasonable to dispense with the requirements.

The correct approach to considering an application for dispensation has been set out in *Daeian investments Ltd v Benson* [2013] UKSC 14, as summarised in Woodfall on Landlord and Tenant, at 1199.8 as follows:

(1) the consultation requirements are not an end in themselves, but a means to the end of the protection of tenants in relation to service charges: their purpose is to ensure that tenants are protected from paying for inappropriate works, or from paying more than would be appropriate;
(2) in considering dispensation requests, the tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
(3) it is neither convenient nor sensible to distinguish between a serious failing and a minor oversight, save in relation to the prejudice it causes;
(4) the financial consequences to the landlord of not granting dispensation are not a relevant factor, and neither is the nature of the landlord;
(5) while the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants: once they have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
(6) the tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application;
(7) insofar as the tenants will suffer relevant prejudice, the tribunal 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;
(8) that conclusion does not enable a landlord to buy its way out of having failed to comply with the consultation requirements, because it will still face significant disadvantages for non-compliance, namely
    (i) it must pay its own costs of making and pursuing an application to the tribunal for a dispensation,
    (ii) it must pay the tenants' reasonable costs of investigating and challenging that application, and
    (iii) it must accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.

Respondents suffered prejudice

63. Dr Gommer said that it was indisputable that in the present case the Respondents suffered relevant prejudice.

64. First, as a result of the lack of information about the qualifying works and the Applicant's refusal to engage with the Respondents, the true scope of the works and costs were not known to the Respondents. Dr Gommer referred to correspondence as follows:

- on 13th July 2021, Flaxfields the previous managing agent to PHP expressly told them not to provide any information about the works to the Respondents.
- on 12th August 2021 and 3rd September 2021, the Respondents asked the Applicant to provide them with information on costs and further details about the works but received no answer.
- on 10th December 2021, the Applicant sent a letter to the Respondents purporting to provide information about, and costs of the qualifying works. However, that letter did not contain any information about costs.

65. The Applicant takes an aggressively unhelpful stance for example it has failed to provide information as part of the right-to-manage process (with the acquisition date on 29 June 2022) The Applicant has expressly instructed its managing agents not to assist the Respondents.

66. The reason that the Respondents were actively seeking information about the works and costs was to ensure that the Qualifying Works were in fact necessary and appropriate, and that the costs of those works (so far as they were necessary) were reasonable in amount. Had the Respondents received the information they sought, and which was required to be provided by the consultation requirements, they would have engaged an independent surveyor and specialist engineer to advise on the necessity of the works and alternative cheaper courses of action. The Respondents would also have obtained information about alternative suppliers to ensure that the Applicant obtained competitive quotes.

67. Secondly, the Applicant's failure to follow the consultation process, together with its opaque processes, has meant that the Respondents may now be less able to pursue an application to determine payability and reasonableness of service charges. If the consultation process had been followed, the Respondents would have obtained (or at least would have had the opportunity to obtain) contemporaneous quotes based on the actual state disrepair. That opportunity to obtain contemporaneous documents and information is now lost. Even if the Respondents now decide to obtain indicative quotes, they would necessarily be somewhat speculative and based on an assumed state of disrepair.

68. Thirdly, as a result of the Applicant's failure to follow the statutory consultation process, the Respondents are now faced with exorbitant service charge demands in respect of works which failed to remedy the original disrepair. The plant room is still not functioning as designed. All four boilers fail regularly leaving residents without hot water. The system is only 7 years old. It was submitted that had the Applicant followed the consultation process, the Respondents (who in fact live in the subject property and are extremely familiar with the problems there) would have provided detailed comments on the works specifications, would have nominated alternative providers and would have submitted comments on the estimates of costs (it appears that the Applicant had not sought any alternative quotes).

69. The only time resident input was requested was in regards with the proposed replacement of the pumps. In turn, the property managers have been provided with the statement of an expert witness from the developer suggesting significantly more

work in respect to the pump specifications are required. Therefore, residents suggested that an expert opinion is to be obtained to select the correct pumps size. This seems not to have happened and, in fact, the pumps installed appear to be even larger than the previously used oversized ones.

70. Fourthly, documents provided in the course of the earlier dispensation application suggest that the Applicant had received the recommendation to replace the boilers in the plant room rather than attempting a repair. The Applicant had decided not to follow expert advice. It seems certain that many of the problems now being experienced, together with the further costs of rectifying them, are a direct result of that decision. Had the Applicant followed the consultation process, the Respondents would have requested their own expert to analyse the two options in July 2021.

71. Fifthly, the Applicant's deliberate decision to push on with the works regardless, in an apparent hope that a dispensation could be obtained at a later date, resulted in the present application and the Respondent's need to spend time and money opposing it. It was clear from the outset that the Respondents were keen to engage with the Applicant in relation to the works and their costs. The works were not urgent and there was ample time for the Applicant to consult the Respondents.

72. Unlike the previous occasion involving a flue potentially leaking harmful gases into communal areas, there were no problems with the plant room requiring urgent works. The severe delays with carrying out the works shows their non-urgent nature.

Expert Report Costs

73. Dr Gommer said that when he was asked about the replacement pump, he had said that expert advice should be obtained as to whether the pump should be replaced at all and if so, what pump was required. He added that an expert in heating systems of this kind was required because PHP were in their own words, “only plumbers”,

74. He submitted that if the Tribunal was minded to grant the application for dispensation, a condition should be included that the Applicant pays the Respondent's costs of obtaining an expert report - *Aster Communities v Chapman* [2021] EWCA Civ 660.

75. The Applicant’s failure to provide any information highlights the need for such an expert report, especially as it is not clear if the works suggested were actually required.

76. The quotation for the largest individual costs of over £26,622.96 for installation of a filtration system mentioned an initially cheaper version for £10,953.57 and even acknowledges that there is an existing set-up doing this job, covered under the service contract with PHP and only 7 years old.

77. The need to hire a filtration system for £2,016.00 and a temporary plant room should have been examined by an expert to establish if the work (if required) could have been done without these extra costs with the boilers being worked on individually, which seems easily feasible as each boiler can be isolated separately from the system.

78. In addition, the decision to replace a large amount of only 7-year-old gas pipe because of a micro-leakage supposedly within accepted tolerances seems excessive and onsite welding would have incurred a fraction of the costs.

79. Also, the works were identified in July 2021 a time when very little heating demand is required from the system, therefore it should not have been left until December for the work to be carried out.

80. The Respondents then referred to a number of matters which were not relevant to the issue of whether or not dispensation should be granted i.e breakdowns during the works being carried out; flushing works being carried out by Huttie; a loan being made by the Landlord.

81. The Respondents submitted that the Tribunal refuse the Application for dispensation and that the charge for the Qualifying Works is limited to £250 each.

82. Should the Tribunal nevertheless be minded to grant the application, it should be on condition that the Applicant pays the Respondents' costs of engaging an expert to prepare a report on the qualifying works, such report to be used in a future application to determine payability and reasonableness of costs.

83. The Tribunal should also order the Applicant to pay the Respondent's costs

Discussion

84. The parties confirmed their written statements in the hearing.

85. In response to Counsel's questions Dr Gommer said that he had difficulty in preparing the case because information was not handed over in June 2022 when the RTM Company took over management. PHP were not prepared to provide any information about the system therefore he said the RTM Company had little choice but to continue employing them for maintenance. However, advice was being sought from expert engineers and an alternative maintenance contract was being considered.

86. Dr Gommer said that an expert report was needed to assess what was wrong with the system and to obtain a quotation to remedy the defects.

87. Counsel said that when it was known in April 2021 that the flues needed to be replaced and in July that the heat exchangers needed to be replaced the Respondents did not appear to be concerned about employing an expert to report on defects. Their main concern was passing the cost of the works on to the Developer.

88. Dr Gommer responded that the responsibility for the defects lay with the Developer. If the proper procedure had been followed regarding section 20 the Respondents would have questioned why a system that should have been effective for 15 to 20 years was failing after only 8 years. He submitted that the managing agents were too anxious to get the jobs done rather than investigate why they needed to be carried out.

89. Dr Gommer went on to question the work that was carried out. He said the leak around the gas valve could have been welded rather than a replacement of the valve. The breakdowns have continued despite the work that was carried out. He said that there had been over 70 breakdowns since the new heat exchangers were installed. All four boilers had on occasion failed. What was required was expert report on the system and new boilers as was recommended to Mr Coles by PHP in July 2021.

90. Dr Gommer said that the new pumps had still not been commissioned and he had been told they were not appropriate. He said he had been asked about the new replacement pump and referred to an email in which he had said that expert advice should be obtained.

91. With regard to the filtration system Dr Gommer said that there was a cheaper alternative filtration system to which PHP referred which should have been considered- He said again that an expert should have been instructed to advise on the best system. If an expert had been employed all these points could have been highlighted and alternative quotations obtained for each of the respective parts.

92. Dr Gommer said that the only reason given for not following the procedure was that the work was urgent. He disputed the urgency of the works saying that the breakdowns which the Additional Works were intended to deal with continued. The work could just have well been done in March or July of 2022.

93. Mr Tolly in reply said that initially the Leaseholders required gas certificates and were pressing for remedial work to be carried out so that these could be issued. He had then received numerous complaints prior to the Additional Works about breakdowns and the lack of hot water and later heating. PHP had advised him that the Additional Works of a new pump and filtration system were needed to prevent further problems with the boilers. Nicola Murray had told the Residents Association of the estimated costs in an email date 30th November 2021 and a letter was sent to all Leaseholders on 10th December 2021. Being at the beginning of winter it was considered necessary to ensure the heating system was in full working order and therefore the work was considered to be urgent and that a section 20 procedure would take too long. Following the works being carried out he said there had been a significant reduction in complaints.

94. The Tribunal referred to the correspondence between Flaxfields and PHP in July in which PHP recommended that the boilers be replaced, a point repeated at the end of the Invoice number 18056 dated 17th September 2021. The Tribunal noted that the Leaseholders were never told that there were two options and were never consulted about which option they would prefer, notwithstanding that it was cheaper to have the heat exchangers alone replaced.

95. Counsel for the Applicant submitted that this was a choice the Respondent was entitled to make. Having made the decision to replace the heat exchangers then that is what the Tribunal should consider and not whether other works such as the replacement of the boilers would or would not have been a better alternative.

96. Counsel said no issue was raised with regard to the pipe work. The replacement of the gas valve was on the advice of PHP. The Applicant was advised the valve was

leaking and should be replaced. The Applicant was right to rely on the expertise of the contractor and was not in a position to suggest another form of repair such as welding. Counsel said that the pressure valve was damaged and needed to be replaced. There was no evidence to suggest the valve had been damaged by the contractor.

97. Counsel said that PHP had made it clear that a new filtration system was required to improve the operation of the system.

98. With regard to relevant prejudice Counsel said that although the Respondents refer to requiring expert evidence, they have not provided any. She questioned whether they would have asked for an expert's report if a consultation had taken place.

99. Had a consultation taken place, based upon the previous cases, the Respondents would have contended that the Developer should pay and not them.

100. The contractors provided all the information about the system and so obtained a quotation for a pump recommended by the manufacturer which they understood to be the correct size and proceeded on that basis.

101. There had been communication with both the Residents' Association and the Leaseholders. Counsel submitted that the Respondents could not say that they had no idea what was being undertaken. In addition, the estimated costs were provided in an email date 30th November 2021. These emails suggested partial compliance.

102. Irrespective of the issue of consultation, an estimate was obtained in December and due to the need for heating over the winter and taking into account the number of complaints received and the time that a section 20 procedure would have taken it was reasonable to press ahead with the work as a matter of urgency and to seek retrospective dispensation.

103. The comments that were made to Mr Coles and which were set out in his witness statement about the Further Works related to wanting the works done rather than what type of works were to be carried out.

104. Dr Gommer said that with more cooperation by the Applicant and it's managing agents with the Respondents the proceedings could have been avoided. The Applicant and its managing agents had held back information and what information was provided lacked formality. There were three occasions when the Applicant should have consulted.

105. Dr Gommer said that because there had been no expert's report it was still not clear why the boilers break down, why a new filtration system was required. The system is still not providing hot water and heating. Dr Gommer submitted that the root of the problem was that the boilers needed replacing.

Decision

106. The Tribunal considered all the evidence adduced and submissions made in the written and oral representations. In determining whether the Respondent had suffered prejudice by the section 20 procedure not being followed the Tribunal in

respect of the Qualifying Works the Tribunal treated the Further Works and the Additional Works separately. The justification for this was that the works were separated by several months. The Further Works were carried out in July whereas the Additional Works were carried out in December. The Further Works were carried out while Flaxfields were the agents and the Additional Works while Premier were the agents.

107. Firstly, the Tribunal considered the urgency of the Qualifying Works.

108. The Applicant had submitted that the Qualifying Works as a whole were urgent because if they had not been carried out when they were actually undertaken the Leaseholders including the Respondents would not have had hot water and heating because the boilers were failing and breaking down and the works carried out were a) the Further Works of repairing the boilers (Replacement of boiler heat exchangers and related pipework and valves) and b) the Additional Works were to make the system more reliable (installation of a new filtration system and pump).

109. The Tribunal accepted that the Further Works were urgent. The Tribunal found that the Leaseholders would be prejudiced if the Further Works were not carried out expeditiously.

110. The Additional Works were preventative in that it appeared the system could have operated with the existing filtration system but there was a risk that debris and sludge would build up in the system, causing it to fail. Therefore, it needed to be carried out expeditiously but there was not the same urgency as with the boilers.

111. Secondly, the Tribunal considered whether any of the procedure had been complied with.

112. With regard to the Qualifying Works generally the Tribunal accepted that for an industrial size heating and hot water system there were a limited number of contractors who would be prepared tender and carry out repair, replacement or maintenance work. Two contractors had carried out maintenance work being PHP and Huttie. Either appeared capable of undertaking the Further and Additional Works. However, only PHP was engaged. No explanation was given as to why Huttie was not asked to tender or to offer an opinion as to what action could be taken with regard to either the Further or Additional Works.

113. With regard to the Further Works, PHP had installed the new flues and on testing they found the boilers were in a parlous state. The emails from PHP to Flaxfields of the 7th July 2021 setting out the problem with the boilers, of 17th July 2021 explaining why the boilers need to be replaced and of the 23rd July 2021 setting out the options available were clear. The Tribunal could not see why Flaxfields and PHP did not share this information with the Leaseholders. Mr Coles's letter to the Leaseholders was sparse in comparison. PHP's email of 23rd July gave some idea of costs but this was not shared with the Leaseholders despite Mr Coles saying it would be as soon as it was known. Mr Coles's letter also referred to replacing the boilers whereas in fact a decision was made unilaterally by the Applicant or its managing agent, without consultation with the Leaseholders, to replace the heat exchangers. This was against the advice of PHP which Mr Coles said the Applicant would rely on.

114. The advice to renew the boilers was repeated in the invoice for the new heat exchangers confirming that in their opinion this work would be required sooner rather than later.

115. The Tribunal is satisfied that failure by the Applicant's managing agent at the time to consult with the Leaseholders by providing them with the information that the Applicant and it's managing agent had, caused the Leaseholders prejudice.

116. The Tribunal does not agree that the Tribunal can only look at the qualifying works which a landlord decided to have carried out. In this case the Applicant Landlord was given a choice to repair or to renew the boilers. The choice came with advice, which was, in this instance, to renew rather than replace. If the Respondents, as Leaseholders had been told of the alternatives in the course of consultation the Tribunal is confident that they would have made observations to which the Applicant Landlord through its managing agent would have been obliged under the section 20 consultation procedure to have responded. The choice was between what PHP considered from the emails (and the invoice) to be a cheaper short-term remedy of repair, by replacing the heat exchangers, which had no guarantee and a much more expensive long-term remedy of replacing the boilers which would have carried with it a guarantee of usually 5 years.

117. In the course of consultation, the Leaseholders might, notwithstanding PHP's advice, have expressed a preference for the cheaper option or they may have considered the more expensive option to be better with its 5 year guarantee. Either way the Applicant Landlord would have had to respond to the observations to justify its choice. A justification that the Leaseholders were entitled to receive as the people paying and receiving the service. The Tribunal is confident the Residents' Association would have made observations as would some of the Leaseholders, as evidenced from the evidence adduced and Mr Coles's witness statement.

118. As stated above the Tribunal accepts that there was a degree of urgency to ensure continued hot water at any time of the year and to ensure heating by November when the weather would almost certainly be getting cold. Nevertheless, merely because the need for work to be done urgently does not allow of a full section 20 consultation procedure to be carried out does not mean an attempt should not be made at a truncated version. The information, including the costings, provided by PHP in the emails in July 2021 could and should have been appropriately edited and provided to the Leaseholders, together with the opinion of the Landlord and, say, a 14 day response time for observations. The Landlord through its managing agents could say what had been decided based on or in spite of the observations. This process could have been completed by the end of August and PHP could have carried out the work of repair or replacement of the boilers. This suggested timescale does not seem unreasonable and is one that the Tribunal would have specified as a condition had this Application been made before the work was carried out. PHP as the chosen contractor was available as evidenced by the work carried out in installing the filtration system at around that time.

119. Mr Coles in his communications with PHP showed real concern and asked the right questions as a managing agent and his letter of 17th July 2021 went some way to explaining the situation to the Leaseholders. However, in that letter he said he

would be guided by PHP, as the experts who recommended replacing the boilers, and would let the Leaseholders know of costings when they were available but he did neither. He went against PHP's advice and did not keep the Leaseholders informed. If Mr Coles had provided, at least the Residents' Association with a copy of PHP's quotations of 12th and 14th July 2021 they would have made a form of Notice of Intention under the section 20 procedure.

120. The Tribunal accepts that the pipework and replacement valves were required whether the heat exchangers or the boilers were replaced. No evidence was adduced to show that these works were unnecessary or that the Respondents would have challenged these works had there been a full or partial consultation causing them to be prejudiced. With regard to the leak and whether it could be welded the Tribunal found that the Applicant was entitled to take the advice of the contractor.

121. Therefore, the Tribunal determines that it is not reasonable to dispense with the consultation requirements in relation to the Further Works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of replacing heat exchangers to the boilers and therefore the cost is limited to £250.00 per flat. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to the Further works in respect of the cost of the replacement of the pipework and valves.

122. This does not preclude the Respondents from applying for a section 27A determination with regard to the costs that have been incurred for the work for which dispensation has not been granted.

123. With regard to the Additional Works Mr Tolley said in his witness statement that an email was sent to the Residents' Association on Tuesday 30th November 2021 from Premier Estates which listed the cost of the Further Works, which had already been carried out, and the estimated cost of replacing the pump and the filtration system, although the estimate given in the email was half the actual cost. The Tribunal found this of little help to the Leaseholders with regard to the proposed Additional Works.

124. Mr Tolley said in his witness statement that on Friday 10th December 2021 all Leaseholders were sent a letter informing them of the problems with the heating and that work would commence on 13th December 2021. He said this letter did not have any costs as these might change. Therefore, no details were shared with the Leaseholders and although he said in his statement that the information was available on request, he did not say so in his letter. Therefore, the Leaseholders did not know that they could ask for a copy of the very clear quotation of PHP which set out the stages of the work, what was to be done at each stage and the estimated cost.

125. As with Mr Coles's letter of 17th July 2021, if Mr Tolley had provided, at least the Residents' Association, with a copy of PHP's quotation of 9th December 2021 it would have made a form of Notice of Intention under the section 20 procedure.

126. *Daeian Investments Ltd v Benson* [2013] UKSC 14 is concerned with the consultation requirements of section 20 which have the purpose set out in that

judgement. However, the Tribunal is of the opinion that consultation is not the only purpose of the section. It is also to ensure that Leaseholders have notice of major works. The Notices to be issued under the procedure should describe the works and why they are necessary, when they are to take place and what the estimated cost of the works is and what the leaseholders contribution is likely to be.

127. The managing agents in this case appear to take the view that as little information as possible about Qualifying Works is to be provided to the Leaseholders until the work is done. The Tribunal were of the opinion that this approach was likely to lead to disputes between a landlord and tenant.

128. The letter dated 23rd March 2022 setting out the works and their costs, which corresponded to PHP's quotation dated 9th December 2021 is of little help to these proceedings. These proceedings are about dispensing with the requirements of the secton 20 procedure and that letter was sent after the works were completed.

129. The Tribunal went on to consider whether, notwithstanding the lack of compliance with the section 20 procedure, the Leaseholders were prejudiced. Both parties agreed that the heating and hot water system did not operate effectively or consistently. The advice of PHP was that the pump and filtration system needed to be replaced which is what the Applicant proposed to do. The onus is on the Respondents to prove that if they had been consulted about this proposal, they would have been able to show, that contrary to PHP's advice, the Additional Works would not have been necessary. Alternatively, if they had been necessary, they would have been able to show that another more cost-effective pump and filtration system than that recommended by PHP should have been used.

130. The Tribunal examined the advice and description of the Additional Works and found that irrespective of whether the heat exchangers were replaced or the whole boiler was replaced some action was required with regard to the pump and filtration system. The pictures of the sludge that had built up following the flushing of the system provided evidence, be it as it may, retrospectively, that some action was needed to improve the efficacy of the system and to protect the boilers from breakdown.

131. Notwithstanding that PHP were "only plumbers" they had knowledge and experience of the particular system and their advice was to replace both. The Respondents did not provide sufficient evidence to show that this position would have altered had the Leaseholders been consulted. In the absence of evidence to the contrary the Tribunal finds that it was necessary to replace the pump and filtration system.

132. With regard to an alternative pump or filtration system, it was agreed that Dr Gommer had been asked on behalf of the Residents' Association by the Applicant as to whether he had any suggestions as to the pump that should be purchased. He said that he did not have an opinion and that an expert should be instructed to advise. The Applicants chose to rely upon the advice of the contractor, PHP, as to which pump and filtration system should be used.

133. With the Further Works there was a choice between a repair which was not guaranteed and a replacement which was and where the contractor had advised the latter. With the Additional Works, given that they were necessary, there did not appear to be a choice, only advice by the contractor which was explained, at least to the managing agent, in its quotation. PHP was subsequently instructed to install a suitable pump and filter. The Respondents said that if the Leaseholders had been consulted, they would have made the observation that an expert should be instructed, by which they presumably meant an independent expert, as the Applicant was relying on the knowledge and expertise of the contractor. The Tribunal is of the opinion that in this case there was no obligation upon the Landlord to instruct an independent expert and if the Leaseholders consider an alternative system should be used it is for them to instruct their own expert to advise them. If the Application for dispensation from the section 20 procedure in respect of the Additional Works had been made before they were carried out the Tribunal would have made the same decision. The only condition would have been to share the advice and explanation given by PHP to the Applicant's managing agents with the Leaseholders so they would know what was to be done, when and, of particular importance how much.

134. The quotation by PHP acknowledged that the Additional Work was carried out during a high demand season. Nevertheless, as the system provided both hot water and heating a plant room would have been required no matter what time of year the work was done. The Respondents questioned whether the plant room was necessary for the Additional Work to be carried out. PHP said it was and in the absence of evidence to the contrary the Applicant was entitled to accept that advice.

135. If the Respondents consider the cost or standard of work related to the installation of the pump and/or filtration system were unreasonable then their action lies in an application under section 27A of the 1985 Act.

136. The Tribunal determines that it is reasonable to dispense with the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) in respect of the cost of the Additional Works.

137. The Respondents raised the point that if they had been consulted on the Qualifying Works, they would have raised the issue that the system was only 7 years old and the Developer should bear some responsibility. This is not a matter that is within the Tribunal's jurisdiction.

Costs

138. There was a mention in the Bundle of an application under section 20C of the Landlord and Tenant Act 1985 which prompted the Applicant's solicitor to inform the Tribunal that an offer had been made by letter prior to the hearing (copy provided) which said that the Applicant would not seek costs if the Respondent did not pursue the matter further.

139. The Respondents replied that the Applicant's offer regarding costs amounted to telling the Respondents that if they did not question the Application then they would not be charged any costs.

140. Following the decision in the case of *Daeian Investments Ltd v Benson* [2013] UKSC 14 the Tribunal is of the opinion that generally the proper manner of dealing with costs incurred in respect of an application under secton 20ZA is by a condition in the Tribunal's decision.

141. Whereas the Tribunal finds that there was a need to act expeditiously, the Qualifying Works were not so urgent as to instruct contractors to carry out the Further Works without consulting, not matter how briefly, on the issue of repairing the boilers by replacing the heat exchangers or replacing the boilers completely, in accordance with the contractor's advice, notwithstanding that the latter would cost more, and which prejudiced the Leaseholders. In addition, as stated above, the Tribunal is critical of the failure by the manging agents to share with the Leaseholders key information with regard to both the Further and Additional Works. This information if shared and the consultation if undertaken would probably have avoided these proceedings.

142. Taking this into account, the Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and also that those costs shall not be considered as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Leaseholders.

143. The Tribunal also makes it a condition that the Applicant pays the reasonable costs of the Leaseholders. If such costs cannot be agreed within 28 days of this determination the Tribunal gives leave for either party to make application to the Tribunal whereupon it will give Directions for submissions prior to a determination of such costs.

Rule 13 Costs

144. The Respondents' Representative claimed costs under Rule 13 submitting that the Applicant had acted unreasonably in bringing, defending or conducting proceedings.

145. The Tribunal considered all the submissions of the parties in the course fo these proceedings.

146. The Tribunal starts from a position that its jurisdiction is one in which costs are generally not awarded. The only exception being where a party has acted unreasonably. The Civil Procedure Rules do not apply to tribunals including the provision relating to costs and "*there is no equivalent general rule that the unsuccessful party will be ordered to pay the costs of the successful party*" as per paragraph 28 of *Ridehalgh v Horsefield* [1994] Ch 2015.

147. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application "*should not be regarded as routine, should not be abused to discourage access to*

the tribunal, and should not be allowed to become major disputes in their own right".

148. The Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
    (i) Whether the Applicant had acted unreasonably, applying an objective standard;
    (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
    (iii) If so, what should the terms of the order be?

149. The Tribunal also took into account the meaning of "unreasonable" in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:

    "Unreasonable" means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

150. The Tribunal considered whether the Applicant *has acted unreasonably in bringing, defending or conducting proceedings*.

151. The Tribunal found that the managing agents should have carried out some consultation with regard to the Further Works and should have shared information in relation to the Qualifying Works and the Tribunal's decision reflects those findings. However, these findings did not show that the Respondent had acted unreasonably in bringing or conducting proceedings under secton 20ZA for dispensation of the consultant requirements under section 20 of the Landlord and Tenant Act 1985.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

2. 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.

3. 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.

4. 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.

APPENDIX 2 – The LEASE

1. The relevant terms of the Leases were identified as follows (references to the Property are to the individual Apartment to which the Lease relates):

2. Clause 1 Definitions

'The Block'
An area within which the Building is situated

Note: The Property is the Apartment within the Building. Therefore, the term Block in the Lease includes the Building. As noted above there are two Buildings and the heating is shared by both buildings.

'Building Communal Areas'
Those parts of the Building of which the Property forms part (excluding the Property) laid out as…ducts risers communal boilers/Heat Installations and Energy Centre (if any) and all other parts of the Building intended to be or are capable of being enjoyed or used by some or all of the owners tenants and occupiers of premises in the Building".

'Conduits'
Pipes downpipes sewers (excluding Estate Sewers) drains pumping stations soakaways channels gullies gutters watercourses conduits ducts flues Wires cables and other service conducting media or apparatus for the supply or transmission of water sewerage electricity gas (if any) telephone (if any) and other communications media now or to be constructed in any part of the Estate and serving the Property but shall not Include any conduits belonging to any local or other Statutory Authorities

'Heat installations'
The network of pipes wires and other ancillary plant and equipment serving the Building (together with any other buildings) that transfer Heat from the Energy Centre to the Heat interface Unit together with all connected meters and monitoring equipment

'Heat'
Heat in the form of hot water generated from the Energy Centre and also cold water to be supplied to the Tenant through the Heat Interface Unit

'Energy Centre'
The energy centre serving the Building (together with any other buildings) from which the Energy Service Company supplies Heat

'Energy Service Company'
The Landlord or any organisation appointed by the Landlord from time to time to move and/or procure the provision of Heat to the Building (together with any other buildings)

'Heat Interface Unit'
A unit composing a heat exchanger pump and associated valves and controls used to transfer Heat from Heat Installations to the Tenants Internal heating and hot and cold-water system

'Proportion'
The Part A Proportion the Part B Proportion and the Part C Proportion which are each defined as being a fair and proper proportion (assessed by the Landlord acting reasonably) of the Service Charge attributable to the respective Part A, B and C Services

'Services'
The services carried out by or on behalf of the Landlord from time to time as set out or referred to in Parts I, II and III of the Fifth Schedule

'Service Charge'
The total cost of providing the Services

3. Clause 4 The Tenant hereby covenants with the Landlord as follows: -

4.3 To pay to the Landlord in respect of every Service Charge Year, the Proportion of the Service Charge by two equal instalments in advance on the Half Yearly Dates (those being 19th September and 1st March).

4.4 To pay to the Landlord on demand, the Proportion of the appropriate Service Charge Adjustment pursuant to the Fourth Schedule.

4.5 To pay to the Landlord on demand, the Proportion as the case may be of any Additional Contribution that may be levied by the Landlord. Additional Contribution is defined within the Lease as "any amount which the Landlord shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under Paragraph 2.2 of the Fourth Schedule

Schedule 5 -Services

Part 1 Building Communal Area Services (Part A)

1. To keep the Building Communal Areas [which includes the Energy Centre, Heat Installations and the Heat Interface Unit] in good repair and condition

7. To keep the Energy Centre and the plant and machinery housed within the Energy Centre and the Heat Installations serving the Premises [also known as the Property] in good repair order and condition including the renewal and replacement of all worn or damaged parts

Part 2 Building Services (Part B)

21. To carry out all repairs to any other part of the Building for which the Landlord may be liable and to provide and supply such other services of the benefit of the Tenant … as the Landlord shall consider necessary to maintain the Building as a good class development

Part 3 Block Communal Area Services (Part C)

3. To keep all Conduits… in good repair and condition.

13. To carry out all repairs to any other part of the Block Communal Areas for which the Landlord may be liable and to provide and supply such other services for the benefit of the Tenant and the tenants of other properties in the Block and to carry out such other repairs and improvement works additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Landlord shall consider necessary to maintain the Block Communal Areas as a good class development or otherwise desirable in the general interest of the Tenant and the tenants of other properties in the Block.

APPENDIX 3 – THE LAW

The Law

1. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.

2. The consultation provisions appropriate to the present case are set out in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The Procedure of the Regulations and are summarised as being in 4 stages as follows:

   A Notice of Intention to carry out qualifying works must be served on all the tenants. The Notice must describe the works and give an opportunity for tenants to view the schedule of works to be carried out and invite observations to be made and the nomination of contractors with a time limit for responding of no less than 30 days. (Referred to in the 2003 Regulations as the "relevant period" and defined in Regulation 2.)

   Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants.

   A Notice of the Landlord's Proposals must be served on all tenants to whom an opportunity is given to view the estimates for the works to be carried out. At least two estimates must be set out in the Proposal and an invitation must be made to the tenants to make observations with a time limit of no less than 30 days. (Also referred to as the "relevant period" and defined in Regulation 2.) This is for tenants to check that the works to be carried out are permitted under the Lease, conform to the schedule of works, are appropriately guaranteed, are likely to be best value (not necessarily the cheapest) and so on.

   A Notice of Works must be given if the contractor to be employed is not a nominated contractor or is not the lowest estimate submitted. The Landlord must within 21 days of entering into the contract give notice in writing to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the Landlord's response to them.

3. Section 20ZA allows a Landlord to seek dispensation from these requirements, as follows –

   (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the

tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
if it is an agreement of a description prescribed by the regulations, or in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,
c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) and (7)... not relevant to this application.

4. Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Rule 13 (1) states that:
The Tribunal may make an order in respect of costs only-

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-

(ii) a residential property case