Hilary Term
[2013] UKSC 14
On appeal from: [2011] EWCA Civ 38

JUDGMENT

Daejan Investments Limited (Appellant) *v* Benson and others (Respondents)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lord Clarke
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

6 March 2013

Heard on 4 December 2012

Appellant
Nicholas Dowding QC
Stephen Jourdan QC
(Instructed by GSC Solicitors LLP)

1st-4th Respondents
Philip Rainey QC
Jonathan Upton
(Instructed by Excello Law Limited)

5th Respondent
James Fieldsend

(Instructed by Jaffe Porter Crossick LLP)

LORD NEUBERGER (with whom Lord Clarke and Lord Sumption agree)

1. Almost all long leases of flats contain an obligation on the landlord (or a service company) to provide services, such as repairing the exterior and common parts of the block, and a concomitant obligation on the tenants to pay service charges, ie a specified proportion of the cost of providing such services. The right of a landlord to recover such service charges obviously depends on the terms of the particular lease, but, since 1972, Parliament has imposed certain statutory requirements and restrictions on a landlord, which impinge on its ability to recover service charges.

2. The current statutory requirements are contained in the Landlord and Tenant Act 1985 ("the 1985 Act"), which has been frequently amended, most relevantly for present purposes by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). All references hereafter to sections are to sections of the 1985 Act as amended, unless the contrary is stated.

3. Section 20(1) provides that unless certain "consultation requirements" are (a) "complied with" by the landlord (or service company), or (b) "dispensed with" by the Leasehold Valuation Tribunal ("LVT"), the landlord cannot recover more than a specified sum in respect of works for which the service charge would otherwise be greater. The issue on this appeal concerns the width and flexibility of the LVT's jurisdiction to dispense with the consultation requirements, and the principles upon which that jurisdiction should be exercised.

The statutory provisions

4. Sections 18 to 30 are in a portion of the 1985 Act headed "Service charges". Section 18 is headed "Meaning of 'service charge' and 'relevant costs'". Subsection (1) defines "service charge" as being "an amount payable by a tenant of a dwelling … for repairs, maintenance … the whole or part of which varies … according to the relevant costs". Section 18(2) defines "relevant costs" as "the costs … incurred … in connection with the matters for which the service charge is payable".

5. Section 19 is headed "Limitation of service charges: reasonableness". Subsection (1) provides that relevant costs "shall be taken into account in determining the amount of a service charge … (a) only to the extent that they are reasonably incurred, and (b) … only if the … works are of a reasonable standard".

6. Section 20 is headed "Limitation of service charges: consultation requirements", and section 20ZA is headed "Consultation requirements: supplementary". By virtue of section 20(3), (4)(a) and (5) and section 20ZA(2), section 20 applies where the cost of qualifying works exceed "an appropriate amount

set by regulations". Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987 ("the 2003 Regulations") sets that amount at a sum which results in the service charge contribution of any tenant to the cost of the relevant works being more than £250.

7. The centrally relevant provisions for present purposes are to be found in sections 20(1) and 20ZA(1).

8. Section 20(1) states that:

> "… [T]he relevant contributions of the tenants are limited in accordance with subsection (6) … unless the consultation requirements have been either –
>
> a) complied with in relation to the works …, or
>
> b) dispensed with in relation to the works … by (or on appeal from) a [LVT]."

9. Section 20ZA(1) provides that:

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

10. Section 20(2) defines "relevant contribution" as being, in effect, the amount due under the service charge provisions in respect of the works, and section 20(7) limits the contribution to £250 per flat – see regulation 6 of the 2003 Regulations.

11. The "consultation requirements" are defined in section 20ZA(4) as being "requirements prescribed by regulations", which section 20ZA(5) states "may in particular include provisions requiring the landlord" to take certain steps. Those steps include providing details of the proposed works to the tenants, obtaining estimates, inviting the tenants to propose possible bidders, and having regard to the tenants' observations on the proposed works and estimates.

12. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the 2003 Regulations. A summary of those requirements were helpfully agreed between the parties in the following terms (which I have slightly abbreviated):

Stage 1: Notice of intention to do the works
Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates
The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about Estimates
The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons
Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

13. Sections 20A to 20C set out certain further "Limitation[s] of service charges", and sections 21 to 23A give rights to tenants and impose obligations on landlords with respect to the provision of information about service charges. Sections 26 to 30 contain other ancillary provisions with regard to service charges.

The factual background

14. Queens Mansions ("the building") is a building in Muswell Hill, north London, the freehold of which is owned by Daejan Investments Ltd ("Daejan"), the appellant in this appeal. The building consists of shops on the ground floor and seven flats on the upper floors. Five of the seven flats are held under long leases, and each of those leases is held by a respondent to this appeal (collectively "the respondents"). Each lease includes an obligation on the landlord to provide services, including the repair and decoration of the structure, exterior, and common parts of the building. Each lease also includes an obligation on the tenant to pay a specified fixed proportion of the cost of providing, inter alia, the services which the landlord is obliged to provide.

15. The five respondents were, at all material times, members of the Queens Mansions Residents Association ("QMRA"), which is chaired by Ms Marks, who is the partner of one of the respondents. The building is managed by Highdorn Co Ltd,

which, like Daejan, is part of the Freshwater group of companies, and which carries on business under the name of Freshwater Property Management ("FPM").

16. By early 2005, it was clear that major works were required to the building, and, in February that year, FPM told the respondents and QMRA that Daejan intended to carry out such works. Three weeks later, FPM sent QMRA a specification in respect of the proposed works. Thereafter, pursuant to a request from Ms Marks, FPM appointed Robert Edward Associates ("REA"), who had been advising QMRA on the proposed works, as contract administrator.

17. In his judgment at para 98, Lord Wilson has given a fairly full account as to what then happened. A briefer summary is as follows.

18. REA prepared a fresh specification, which was sent to QMRA and the respondents on 30 August 2005, a few weeks after a stage 1 notice of intention to carry out works had been sent, on 6 July 2005. This specification was then the subject of discussion with Ms Marks, some of whose observations were then incorporated into the specification.

19. Following that, tenders were sought, and priced tenders were received by REA from four contractors. In a fairly full report sent to the respondents on 6 February 2006, REA stated that two of those tenders appeared to be the most competitive. One was from Rosewood Building Contractors ("Rosewood"), who had quoted £453,980 for a 24-week contract period; the other was from Mitre Construction Ltd ("Mitre"), who had quoted £421,000 for a 32-week contract period, although its tender did not comply entirely with the tender directions. The respondents and QMRA were only provided with the priced specification submitted by Mitre and not that submitted by Rosewood.

20. During 2006, Ms Marks was pressing FPM for the opportunity to inspect the priced tenders, and, although this request had not yet been satisfied, FPM was indicating a preference for instructing Mitre. In the meantime, in a letter of 14 July 2006, Ms Marks made a large number of fairly detailed points about the proposed Works to FPM, making it clear that those points were provisional until she had seen all the priced tenders. FPM purportedly served Stage 3 notices on QMRA and the respondents on 14 June and on 28 July 2006, each of which stated when the priced estimates could be inspected. However, such estimates were not available for inspection by the respondents or QMRA until 31 July 2006.

21. Before the estimates were inspected, the respondents and QMRA were informed by Daejan (orally on 8 August and by letter two days later) that the contract for the proposed works had been awarded to Mitre, and, at least by implication, that the statutory consultation process had accordingly ended. It appears that this information was, in fact, inaccurate, but it was never corrected. Despite this, there

were some further communications between Ms Marks and FPM about the proposed works.

22. It appears that it was, in fact, only on 11 September 2006 that Daejan contracted for the proposed works ("the Works") with Mitre, and this was formally communicated to the respondents and QMRA 16 days later. On 3 October 2006, Mitre started carrying out the Works, and completed them, albeit apparently late and not without criticisms from the respondents and QMRA.

The procedural history

23. On 14 July 2006, four of the respondents applied to the LVT for a determination of the service charges payable under their respective leases for the period between 1994 and 2007 (as they were entitled to do under section 27A). Those proceedings were concerned with the respondents' allegations of failures on the part of Daejan in relation to (i) the provision of services over 14 years, and (ii) the Works. Inevitably, a number of issues and sub-issues were raised. Of those issues, only one is directly relevant to the present appeal. It is what the LVT called "Issue 10", which was whether Daejan had complied with the requirements of part 2 of Schedule 4 to the 2003 Regulations ("the Requirements") in relation to the Works.

24. Following a hearing and determination on a preliminary point, there was an eight-day hearing which took place in disconnected periods between February and November 2007 (partly explained by illness of counsel). Thereafter, the LVT (Miss A Seifert FCI Arb, Mr MA Matthews FRICS and Mr LG Packer MA MPhil) issued its decision on 11 March 2008 – Case Reference LON/00AP/LSC/2006/0246. Crucially for present purposes, the LVT concluded on Issue 10 that Daejan had failed to comply with the stage 3 Requirements in two respects. First, neither of the purported stage 3 notices contained any "summary of observations". Secondly, "the estimates were not available for inspection as stated [in either notice], and were only inspected on 11 August". It is also worth mentioning that the LVT considered, under what it called "Issue 11", a number of criticisms of the Works, which were being carried out during the hearing, and dismissed almost all of them.

25. There was then a further, one-day, hearing before the LVT, devoted to the issue of whether the Requirements should be dispensed with in relation to the Works pursuant to sections 20(1)(b) and 20ZA(1). Daejan relied on the fact that, if it had been free to enforce the service charge provisions in all the leases held by the respondents, it would be entitled to recover just under £280,000 in total from the respondents by way of service charge payments in respect of the Works, whereas, if no dispensation was granted, it would be limited to recovering service charges of £250 per respondent in respect of the Works, ie a total of £1,250.

26. On 8 August 2008, the LVT issued its decision that it should not dispense with the Requirements in relation to the Works - LON/00AP/LSC/2007/0076. The LVT

observed in para 98 that it was "matter of speculation what comments may or may not have been made by Ms Marks and [the respondents] and how this may have influenced the carrying out of the major works had they had the opportunity to comment having seen all the estimates". It had earlier said in paras 86-87 that "the failure by Daejan to comply with the … [Requirements] [had] caused substantial prejudice to the respondents", and "that it was a matter of great concern to Ms Marks … that Daejan had not provided copies of all the estimates". The LVT continued at para 90:

> "the cutting short of the consultation period, by indicating … that the decision had been made to award the contract to Mitre … removed from the leaseholders the opportunity to make observations on the estimates to which landlord was obliged to have regard. This opportunity to make informed comment on these matters was central to the consultation process. It had been stressed in correspondence how important this was to the leaseholders."

27. The LVT concluded in paras 96-98 that:

> "Although this was not a case where the landlord made no attempt to comply with the … Regulations, and some extra-statutory consultation was carried out … this did not make good the landlord's omission in failing to provide the estimates and an opportunity to make observations. … The Tribunal considers that the fact that they did not have this opportunity amounts to significant prejudice."

28. The LVT then referred at para 99 to a proposal from Daejan that "if, contrary to [its] submissions, the Tribunal considered that there has been prejudice to the [respondents], the Tribunal should consider the fair figure to compensate [them] for any prejudice, such sum to be deducted from the cost of the eventual charge when calculating the service charges for the [W]orks". During the course of the hearing, Daejan had proposed a deduction of £50,000, which it had described as "more than generous", but which had not been accepted by the respondents. The LVT rejected this proposal at para 101, saying that "there was no explanation of [how] the figure of £50,000 could be regarded as generous or as sufficient compensation for the prejudice suffered". It also said at para 103 that "the offer does not alter the existence of substantial prejudice to the leaseholders".

29. Daejan appealed to the Upper Tribunal (Lands Chamber) (Carnwath LJ and Mr NJ Rose FRICS), which rejected the appeal - [2009] UKUT 233 (LC), [2010] 2 P&CR 116. The Upper Tribunal agreed with the LVT that Daejan had failed to comply with the stage 3 Requirements in the two respects identified by the LVT.

30. However, the Upper Tribunal considered that the failure to include a summary of observations in the stage 3 notice was a relatively minor breach, which caused no

prejudice to the respondents, as "there [was] no reason to think that [it] would have assisted" them, because they all knew what observations Daejan had received about the proposed works – see paras 47-48.

31. Daejan's more important failure, according to the Upper Tribunal in para 52, was the fact that "the consultation process was for all practical purposes curtailed", a finding which had been open to the LVT. The Upper Tribunal was, however, troubled by the LVT's finding that the respondents had suffered any consequential prejudice. Only one specific item was seen to be of any weight, namely the respondents' preference for Rosewood over Mitre, but, as the Upper Tribunal pointed out, this was based on evidence two years after the event, and it was hard to see why it could not have been raised by the respondents during the period of consultation which Daejan had allowed.

32. Nonetheless, at para 61, the Upper Tribunal said that the LVT was "entitled to regard this as a [case involving a] serious breach, rather than a technical or excusable oversight", as the respondents' "right to make further representations [at stage 3] was nullified". The Upper Tribunal also said that it was not for the respondents to show prejudice, but for Daejan to show that they had suffered no prejudice, as a result of Daejan's default, and that, in that connection, it was "enough that there was a realistic possibility that further representations might have influenced" Daejan's decision to engage Mitre rather than Rosewood. The Upper Tribunal said that it "had not found this an easy case", because "the evidence of actual prejudice is weak". Nonetheless, at para 62, it decided that, as the LVT was the primary decision-maker, its decision to reject Daejan's application to dispense with the Requirements in relation to the Works should be respected, as it was a view which the LVT had been "entitled" to arrive at.

33. Daejan was given permission to appeal to the Court of Appeal, on terms that it would not seek its costs if the appeal succeeded. The court (Sedley, Pitchford and Gross LJJ) dismissed the appeal, for reasons principally given by Gross LJ – [2011] EWCA Civ 38, [2011] 1 WLR 2330.

34. In his judgment, Gross LJ concentrated on what he considered to have been the three principal points which had been debated. First, he held in para 59 that "the financial effect of the grant or refusal of dispensation [on the individual landlord and tenants] is an irrelevant consideration when exercising the discretion under section 20ZA(1)". Secondly, in paras 66-67, he held that the LVT had not erred in treating Daejan more harshly than if it had been a landlord controlled or owned by the lessees. Thirdly, in para 72, Gross LJ accepted Daejan's contention that "significant prejudice to the tenants is a consideration of first importance in exercising the dispensatory discretion under section 20ZA(1)".

35. However, in the following paragraph, Gross LJ said that Daejan's failure in this case "constituted a serious failing and did cause the respondents serious prejudice", and he echoed the LVT and Upper Tribunal in saying that this was not "a technical, minor or excusable oversight". He also said that the LVT was entitled not to speculate

on what would have happened if there had been no breach, on the ground that the respondents' "loss of opportunity (to make further representations and have them considered) … itself amount[ed] to significant prejudice". In para 76, in agreement with the Upper Tribunal, Gross LJ doubted that the LVT would have been entitled to accede to Daejan's offer to reduce the chargeable amount by £50,000, and that, anyway, the LVT was entitled to reject that proposal.

36. Sedley LJ delivered a short concurring judgment, and Pitchford LJ agreed with both judgments.

37. Daejan was given permission to appeal to this court on terms similar to those which were imposed when permission was given to appeal to the Court of Appeal.

The issues on this appeal

38. In the light of the arguments which have been addressed to us, it appears to me that three questions of principle arise, and need to be answered, before deciding how to resolve this appeal. Those questions are:

> (i) The proper approach to be adopted on an application under section 20ZA(1) to dispense with compliance with the Requirements;
> (ii) Whether the decision on such an application must be binary, or whether the LVT can grant a section 20(1)(b) dispensation on terms;
> (iii) The approach to be adopted when prejudice is alleged by tenants owing to the landlord's failure to comply with the Requirements.

39. I propose to consider those three questions (which inevitably overlap to some extent) in turn, and then to address the resolution of this appeal.

The proper approach to dispensing under section 20ZA(1)

40. Section 20ZA(1) gives little specific guidance as to how an LVT is to exercise its jurisdiction "to dispense with all or any of the [Requirements]" in a particular case. The only express stipulation is that the LVT must be "satisfied that it is reasonable" to do so. There is obvious value in identifying the proper approach to the exercise of this jurisdiction, as it is important that decisions on this topic are reasonably consistent and reasonably predictable. Otherwise, there is a real risk that the law will be brought into disrepute, and that landlords and tenants will not be able to receive clear or reliable advice as to how this jurisdiction will be exercised.

41. However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other

relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.

42. So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. This view is confirmed by the titles to those two sections, which echo the title of section 19.

43. Thus, the obligation to consult the tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works. Mr Rainey QC and Mr Fieldsend for the respondents point out that sometimes the tenants may want the landlord to accept a more expensive quote, for instance because they consider it will lead to a better or quicker job being done. I agree, but I do not consider that it invalidates my conclusion: loss suffered as a result of building work or repairs being carried out to a lower standard or more slowly is something for which courts routinely assess financial compensation.

44. Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

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

46. I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The Requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the Requirements leave untouched

the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them.

47. Furthermore, it does not seem to be convenient or sensible to distinguish in this context, as the LVT, Upper Tribunal and Court of Appeal all thought appropriate, between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes. Such a distinction could lead to an unpredictable outcome, as it would involve a subjective assessment of the nature of the breach, and could often also depend on the view one took of the state of mind or degree of culpability of the landlord. Sometimes such questions are, of course, central to the enquiry a court has to carry out, but I think it unlikely that it was the sort of exercise which Parliament had in mind when enacting section 20ZA(1). The predecessor of section 20ZA(1), namely the original section 20(9), stated that the power (vested at that time in the County Court rather than the LVT) to dispense with the Requirements was to be exercised if it was "satisfied that the landlord acted reasonably". When Parliament replaced that provision with section 20ZA(1) in 2002, it presumably intended a different test to be applied.

48. The distinction could also, I think, often lead to uncertainty. Views as to the gravity of a landlord's failure to comply with the Requirements could vary from one LVT to another. And questions could arise as to the relevance of certain factors, such as the landlord's state of mind. The present case provides an example of the possible uncertainties. In para 99 of his judgment, Lord Wilson understandably expresses a very unfavourable view of Daejan's failure in this case. However, to some people it might seem that Daejan's failure in the present case was not a "serious failing", given that (i) the evidence of any resulting prejudice to the respondents is weak, (ii) Daejan adhered fully to stages 1 and 2, and to a significant extent to stage 3, (iii) Daejan did consult the respondents, through both REA and FPM, (iv) Daejan did some things which went beyond the Requirements (eg employing REA at Ms Marks's request), and (v) Daejan did give summary details of the tenders even though it did not accord the respondents sight of the tenders themselves. So, too, views may differ as to whether Daejan should be blamed for not taking up the time of the LVT with attempts to excuse its failures, and as to whether it was an innocent misunderstanding or flagrant incompetence which caused Daejan's representatives to tell the LVT that the contract had been placed with Mitre weeks before it had been. (None of those points undermines the basic fact that there was an undoubted failure by Daejan to comply with the Requirements).

49. I also consider that the distinction favoured in the tribunals below could lead to inappropriate outcomes. One can, for instance, easily conceive of a situation where a "minor or excusable oversight" could cause severe prejudice, and one where a gross breach causes the tenants no prejudice. For instance, where the landlord miscalculates by a day, and places a contract for works a few hours before receiving some very telling criticisms about the proposed works or costings. Or, on the other hand, where the landlord fails to get more than one estimate despite being reminded by the tenants, but there is only one contractor competent to carry out undoubtedly necessary works.

50. In their respective judgments, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of the Requirements, and in that they were right. That is the main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1). And it is fair to the courts below to add that where the landlord is guilty of "a serious failing" it is more likely to result in real prejudice to the tenants than where the landlord has been guilty of "a technical, minor or excusable oversight".

51. It also follows from this analysis that I consider that Daejan is wrong in its contention that the financial consequences to the landlord of not granting a dispensation is a relevant factor when the LVT is considering how to exercise its jurisdiction under sections 20(1)(b) and 20ZA(1). In that, I agree with the views of the courts below (although it can be said that such consequences are often inversely reflective of the relevant prejudice to the tenants, which is, as already mentioned, centrally important). It also seems to me that the nature of the landlord is not a relevant factor either, and I think that was the view of the Court of Appeal as well.

52. As already indicated, I do not agree with the courts below in so far as they support the proposition that sections 20 and 20ZA were included for the purpose of "transparency and accountability", if by that it is intended to add anything to the two purposes identified in section 19(1)(a) and (b). It is true that that proposition may arguably receive some support from Lewison J in *Paddington Basin Developments Ltd v West End Quay Ltd* [2010] EWHC 833 (Ch), [2010] 1 WLR 2735, para 26. However, I consider that there are no grounds for treating the obligations in sections 20 and 20ZA as doing any more than providing practical support for the two purposes identified in section 19(1). The sections are not concerned with public law issues or public duties, so there is no justification for treating consultation or transparency as appropriate ends in themselves.

Is the LVT faced with a binary choice on a section 20ZA(1) application?

53. The respondents contend that, on an application under section 20ZA(1), the LVT has to choose between two simple alternatives: it must either dispense with the Requirements unconditionally or refuse to dispense with the Requirements. If this argument is correct, then as the Upper Tribunal held, and the Court of Appeal thought probable, it would not have been possible for the LVT in this case to grant Daejan's section 20ZA(1) application on the terms offered by Daejan, namely to reduce the aggregate of the sum payable by the respondents in respect of the Works by £50,000.

54. In my view, the LVT is not so constrained when exercising its jurisdiction under section 20ZA(1): it has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect.

55. In the absence of clear words precluding the LVT imposing terms, I consider that one would expect it to have power to impose appropriate terms as a condition of exercising its power of dispensation. The circumstances in which an application could be made are, as already mentioned, potentially almost infinitely various, and, given the purpose of sections 20 and 20ZA, it seems unlikely that the LVT's powers could have been intended to be as limited as the respondents suggest.

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

57. Further, consider a case where a landlord carried out works costing, say, £1m, and failed to comply with the Requirements to a small extent (eg in accidentally not having regard to an observation), and the tenants establish that the works might well have cost, at the most, £25,000 more as a result of the failure. It would seem grossly disproportionate to refuse the landlord a dispensation, but, equally, it would seem rather unfair on the tenants to grant a dispensation without reducing the recoverable sum by £25,000. In some cases, such a reduction could be achieved by the tenants invoking section 19(1)(b), but there is no necessary equivalence between a reduction which might have been achieved if the Requirements had been strictly adhered to and a deduction which would be granted under section 19(1)(b) – see the next section of this judgment.

58. Accordingly, where it is appropriate to do so, it seems clear to me that the LVT can impose conditions on the grant of a dispensation under section 20(1)(b). In effect, the LVT would be concluding that, applying the approach laid down in section 20ZA(1), it would be "reasonable" to grant a dispensation, but only if the landlord accepts certain conditions. In the example just given, the condition would be that the landlord agrees to reduce the recoverable cost of the works from £1m to £975,000.

59. I also consider that the LVT would have power to impose a condition as to costs – eg that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1).

60. It is true that the powers of the LVT to make an actual order for costs are very limited. The effect of para 10 of Schedule 12 to the 2002 Act is that the LVT can only award costs (in a limited amount) (i) where an application is dismissed on the ground that it is frivolous, vexatious or an abuse of process, or (ii) where the applicant has

"acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings".

61. However, in my view, that does not preclude the LVT from imposing, as a condition for dispensing with all or any of the Requirements under section 20(1)(b), a term that the landlord pays the costs incurred by the tenants in resisting the landlord's application for such dispensation. The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a free-standing order for costs, which is what para 10 of Schedule 12 to the 2002 Act is concerned with. To put it another way, the LVT would require the landlord to pay the tenants' costs on the ground that it would not consider it "reasonable" to dispense with the Requirements unless such a term was imposed.

62. The case-law relating to the approach of courts to the grant to tenants of relief from forfeiture of their leases is instructive in this connection. Where a landlord forfeits a lease, a tenant is entitled to seek relief from forfeiture. When the court grants relief from forfeiture, it will often do so on terms that the tenant pays the costs of the landlord in connection with the tenant's application for relief, at least in so far as the landlord has acted reasonably – see eg Egerton v Jones [1939] 2 KB 702, 705-706, 709. However, if and in so far as the landlord opposes the tenant's application for relief unreasonably, it will not recover its costs, and may even find itself paying the tenant's costs, as in Howard v Fanshawe [1895] 2 Ch 581, 592.

63. As Mr Dowding QC, for Daejan, pointed out, in Factors (Sundries) Ltd v Miller [1952] 2 All ER 630, the tenant was legally aided and the court was precluded by statute from making an order for costs against him, but the Court of Appeal held that there was nonetheless jurisdiction to require him to pay the landlord's costs as a condition of being granted relief from forfeiture. As Somervell LJ explained it at 633D-F, the liability under such a condition was "not an order to pay costs in the ordinary sense", but "a payment of a sum equal to the costs as a condition of relief".

64. Like a party seeking a dispensation under section 20(1)(b), a party seeking relief from forfeiture is claiming what can be characterised as an indulgence from a tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence.

The correct approach to prejudice to the tenants

65. Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether, and if so to what extent, the tenants would relevantly suffer if an unconditional dispensation was accorded. (I add the word "relevantly", because the tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could

legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.)

66. It was suggested by Mr Rainey QC and Mr Fieldsend that the determination of such a question would often involve a very difficult exercise (or "an invidious exercise in speculation" as Gross LJ put it at para 73(iv) in the Court of Appeal) and would frequently be unfair on the tenants. It may occasionally involve a difficult exercise, but the fact that an assessment is difficult has never been regarded as a valid reason for the court refusing to carry it out (although in some cases disproportionality may be a good reason for such a refusal). While each case must, inevitably, be decided on its particular facts, I do not think that many cases should give rise to great difficulties.

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

68. The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

69. Apart from the fact that the LVT should be sympathetic to any points they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord.

Overview of the analysis so far

70. Before turning to the disposition of this appeal, it is worth considering the effect of the conclusions I have reached so far.

71. If a landlord fails to comply with the Requirements in connection with qualifying works, then it must get a dispensation under section 20(1)(b) if it is to recover service charges in respect of those works in a sum greater than the statutory minimum. Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the Requirements have been satisfied, and they will not be getting something of a windfall.

72. On the approach adopted by the courts below, as the Upper Tribunal said at the very end of its judgment, requiring the landlord to limit the recoverable service charge to the statutory minimum in a case such as this "may be thought to be disproportionately damaging to the landlord, and disproportionately advantageous to the lessees". That criticism could not, it seems to me, be fairly made of the conclusion I have reached.

73. However, drilling a little deeper, if matters rested there, the simple conclusion described in para 71 could be too favourable to the landlord. It might fairly be said that it would enable a landlord to buy its way out of having failed to comply with the Requirements. However, that concern is, I believe, answered by the significant disadvantages which a landlord would face if it fails to comply with the Requirements. I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the LVT for a section 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.

74. All in all, it appears to me that the conclusions which I have reached, taken together, will result in (i) the power to dispense with the Requirements being exercised in a proportionate way consistent with their purpose, and (ii) a fair balance between (a) ensuring that tenants do not receive a windfall because the power is exercised too sparingly and (b) ensuring that landlords are not cavalier, or worse, about adhering to the Requirements because the power is exercised too loosely.

The resolution of this appeal

75. Turning now to this case, I consider that the LVT, the Upper Tribunal, and the Court of Appeal adopted the wrong approach to Daejan's section 20ZA(1) application. That is because (i) they took into account the gravity (as they saw it) of the failure to comply with stage 3 of the Requirements, not only in the prejudice it may have caused to the tenants, but as a free-standing matter, (ii) they considered that the mere possibility of prejudice, apparently however speculative, and in the absence of any evidence to support its existence, would be enough to preclude the grant of a dispensation, and (iii) (in the case of the Upper Tribunal and the Court of Appeal) they did not consider (or doubted) that it was open to the LVT to grant a dispensation on terms, and (in the case of the LVT) they did not address the question whether the £50,000 offered by Daejan exceeded any relevant prejudice which the tenants could establish.

76. In adopting their approach, the courts below based themselves in part on the reasoning in the Upper Tribunal's decision in *Camden London Borough Council v Leaseholders of 37 Flats at 30-40 Grafton Way* (LRX/185/2006). That case may have been rightly decided, but, if so, it was for the wrong reasons.

77. As explained above, the correct question which the LVT should have asked itself was, whether the respondents would suffer any relevant prejudice, and, if so, what relevant prejudice, as a result of Daejan's failure, if the section 20(1)(b) dispensation was granted unconditionally. On the basis of the evidence before the LVT, it seems to me, substantially in agreement with the Upper Tribunal, that it is highly questionable whether any such prejudice at all would have been suffered. The only "specific prejudice" identified by the Upper Tribunal was in relation to what the LVT called in para 98 of its decision "a matter of speculation", namely that the respondents lost the opportunity of making out the case for using Rosewood to carry out the Works, rather than Mitre.

78. Mr Rainey QC and Mr Fieldsend make the additional points that (i) the respondents were deprived of their right to be consulted properly, and (ii) it was difficult for the respondents to identify any relevant prejudice that they would suffer if Daejan was entitled to recover a service charge based on the full cost of the Works. I have already dealt with these points in general terms. As to (i), the right to be consulted in accordance with sections 20 and 20ZA is not a free-standing right.

79. As to (ii), difficulty is not a good argument in itself, and the LVT should in any event be sympathetic to the respondents on any credible allegation of relevant prejudice. In any event, it is clear from the first decision of the LVT that, even after Daejan's and the respondents' respective experts had met and agreed a number of items, there were still many items of dispute which were contested by the respondents before the LVT on issue 11: the respondents were therefore well able to identify any complaints they had in relation to the Works.

80. That leaves the issue whether it is possible for this court to conclude that the £50,000 offer by Daejan was sufficient to compensate the tenants for any relevant prejudice they suffered in this case. Given that the LVT did not address this issue properly, there is, at least on the face of it, a strong case for saying that that is an issue which should be remitted, on the ground that we cannot fairly decide it. However, on closer examination of the facts, I am of the view that we can fairly decide the issue, and that we should therefore do so. This view is based on two reasons, which, when taken together, seem to me to establish that it would be pointless to remit the case.

81. First, the tenants do not appear to have identified to the LVT any relevant prejudice which they suffered, or may have suffered, as a result of Daejan's failure to comply with the Requirements. As mentioned, the Upper Tribunal described the evidence of any such prejudice as "weak". In this court, no contention as to the existence of possible relevant prejudice was advanced by Mr Rainey QC or Mr Fieldsend, save that they suggested that (i) Rosewood may have agreed to carry out the Works for some £11,000 less than the contract sum ultimately agreed with Mitre, and (ii) they relied on the fact that Mitre overran the six-month contract substantially. As to (i), I am not sure where the £11,000 comes from, but it is substantially less than the £50,000 offered by Daejan. As to (ii), I would have thought that the prejudice has to be measured as at the date of the breach of the Requirements, and anyway there was no attempt to show that Rosewood would have been any quicker or to quantify any prejudice.

82. Secondly, the tenants had been given a substantial opportunity to comment on the proposed works, and took full advantage of that opportunity. REA's detailed tender report of February 2006 was based on Mitre's detailed tender, and resulted in a very detailed response from Ms Marks in July 2006. I agree with Mr Dowding QC that it is hard to see what further submissions or suggestions the respondents could have presented if Daejan had complied fully with the Requirements. Again, no argument appears to have been advanced at any level of these proceedings on behalf of the tenants that any specific points, which had not been made, would or might have been made if Daejan had fully complied with the Requirements.

83. There appears to have been no evidence called before the LVT, and no suggestion made to the LVT, the Upper Tribunal or the Court of Appeal or indeed this court, to support the contention that the tenants suffered relevant prejudice worth as much as £50,000 as a result of Daejan's failure to comply with the Requirements. If they were to justify resisting the LVT accepting Daejan's proposal, it was, in my

judgment, incumbent on the tenants to advance some credible evidence and some rational argument which established that they had suffered, or at least may well have suffered such relevant prejudice.

84. Accordingly, although there was an undoubted, albeit partial, failure by Daejan to comply with stage 3 of the Requirements, the relevant prejudice to the respondents of granting the dispensation could not be higher than the £50,000 discount offered by Daejan. The fact that the £50,000 can fairly be said to have been plucked out of the air is irrelevant: the essential point is that it exceeds any possible relevant prejudice which, on the evidence and arguments put before it, the LVT could have concluded that the respondents would suffer if an unqualified dispensation were granted.

85. In those circumstances, as there are no other relevant factors in this case, it seems to me that the LVT ought to have decided that Daejan's application for a dispensation under section 20(1)(b) should be granted on terms that (i) the respondents' aggregate liability to pay for the Works be reduced (presumably on a pro rata basis) by £50,000, and (ii) Daejan pay the reasonable costs of the respondents in so far as they reasonably tested its claim for a dispensation and reasonably canvassed any relevant prejudice which they might suffer.

86. I would accordingly allow this appeal, set aside the orders below, and grant the dispensation under section 20(1)(b) on the terms indicated.

LORD HOPE (dissenting)

87. I am, with respect, unable to agree with the approach that Lord Neuberger has taken to this case. I think that the issues which I wish to raise are sufficiently important to justify taking a second look at what he says. They also affect how I think this appeal should be disposed of.

88. The fundamental point of principle to which I would attach greater importance is that the issues to which section 20ZA(1) of the Landlord and Tenant Act 1985, as amended, directs attention have been entrusted by the statute to an expert tribunal. The leasehold valuation tribunal ("the LVT") amply qualifies for that description, both in respect of the expertise and experience of its members and in respect of its familiarity with the subject matter. Questions such as whether or not a landlord's breach or departure from the consultation requirements was "serious" or was "technical, minor or excusable" (see para 47, above) are questions of fact and degree. Questions of that kind are best left to its judgment. So too are questions as to whether a breach or departure is sufficiently serious to justify refusal of a dispensation or whether an offer to reduce the chargeable amount is acceptable. The wording of section 20ZA(1) adopts this approach. It is open-ended and unqualified. It leaves these matters to the tribunal's determination.

89. This is an area of tribunal law and practice where it has been recognised, out of respect for the tribunal's expertise, that judicial restraint should be exercised: see Lady Hale's observations in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, paras 15-17 and *R (Cart) v Upper Tribunal (Public Law Project Intervening)* [2011] UKSC 28, [2012] 1 AC 663, para 49; *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1; [2012] ICR 389, para 35. The context for the exercise of that restraint is usually a challenge to the lawfulness of the decision on the ground, for example, that it was based on an error of law. In my opinion, however, judicial restraint is just as much in point where, as here, an appellate court is prescribing limits on the way the expert tribunal is to perform the tasks as to issues of fact that have been delegated to it by the statute.

90. I would be reluctant, therefore, to rule out the possibility that a LVT may lawfully refuse dispensation simply on the ground of the seriousness of the breach or departure. It is true that the end to which the consultation requirements are directed is the protection of tenants in relation to service charges. But I do not agree that there is a factual burden on the tenants in every case to identify some element of relevant prejudice (by which I understand Lord Neuberger to mean financial prejudice or other disadvantage that can be quantified) that they would or might suffer if dispensation were to be given before it would be open to the LVT to refuse to dispense: see paras 67-69.

91. I can accept that it would almost always be appropriate for the tribunal to require the tenants to provide some indication of the respects, if any, in which they would be prejudiced. That would, of course, be so if the breach or departure appeared to be technical, minor or excusable. It would be necessary then for some relevant prejudice to be inquired into and identified. So too as cases are encountered on an ascending scale of gravity. But I do not think that it is fanciful to assume that there could be extreme cases where the breach or departure was so serious, or so flagrant, that it would on that ground alone not be "reasonable", as section 20ZA(1) puts it, to dispense with the consultation requirements. In my opinion it should be, and is, open to the tribunal to take that view in the interests of preserving the integrity of the legislation, and to do so without conducting any such inquiry.

92. For these reasons I am unable to agree with the conclusion in para 47 that the LVT, the Upper Tribunal and the Court of Appeal were wrong to hold that it should be open to the LVT to distinguish, in the exercise of its judgment, between breaches or departures according to their level of seriousness, without having first to consider the amount of prejudice they may cause or may have caused. Of course, these two things may run together. But I do not think that it would be right for us in this court, relatively remote as we are from the day to day business of the tribunals, to hold that to separate the two can never be appropriate. It seems to me that this rather more cautious, less prescriptive, approach is consistent with the conclusion that is reached in para 74, that the power to dispense with the consultation requirements should be exercised in a proportionate way that is consistent with their purpose. It is also more consistent with the language of the section, which does not place any limits on the way the tribunal may exercise the power that is given to it to make the determination.

All it says is that the tribunal must be satisfied that it is reasonable to dispense with the requirements.

93. I would hold that judicial restraint has a part to play, too, in an examination of the question whether the LVT was entitled to decline to accept Daejan's offer to reduce the chargeable amount by £50,000. It rejected the proposal on the ground that there was no explanation of how that figure could be regarded as generous or as sufficient compensation for the prejudice suffered. Neither the Upper Tribunal nor the Court of Appeal thought it right to reverse the LVT on this point, holding that it was entitled to reject the proposal. I agree that the essential point is that the figure suggested should exceed, or at least be commensurate with, any possible prejudice which the respondents would suffer if an unqualified dispensation were to be granted: see para 84.

94. The LVT did not express its reasoning in that way. But I am not prepared to assume from this that the proposal was rejected simply because it was a figure plucked out of the air. The question whether or not an explanation was required from Daejan was one for the judgment of the expert tribunal. It was for it, after all, to decide whether or not to accept the proposal. It was for it to determine, as a matter of fact, whether it had been properly quantified. I am not persuaded that its decision to reject the proposal was based on an error of law that would entitle this court to interfere with it. As Lord Wilson says in para 117, it was entitled in its discretion to decline to accept a reduction without knowing the proportion which it bore to the overall cost of the works.

95. For these reasons, and for those given by Lord Wilson with which I am in full agreement, I would dismiss the appeal and affirm the order of the Court of Appeal.

LORD WILSON (dissenting)

96. I respectfully disagree with central aspects of the exposition by Lord Neuberger of the principles to be applied by the LVT in its determination of an application that it should dispense with one or more of the Requirements specified in the Schedules to the 2003 Regulations. I have had greater hesitation about the proper disposal of the actual appeal but I have concluded that this court should dismiss it.

97. When in 2002 it inserted into the 1985 Act the new section 20 and the additional section 20ZA, and when it accepted the 2003 Regulations made thereunder, Parliament made various provisions about a landlord's consultation with a tenant in relation to proposed works of a specified character for which, through the service charge, the tenant would later be required to pay. On the face of them, the provisions seem to impact severely upon the landlord; and the severity is in my view testament to the importance which Parliament attached to his compliance with the Requirements. Thus dispensation with them is available only if the LVT is satisfied (ie by the

landlord) that it is reasonable to grant it (section 20ZA(1)); even if so satisfied, the LVT has a discretion in that, under that subsection, it then "may" grant the dispensation; and, in the absence of compliance or dispensation, the contribution of the tenant to the cost of such works is limited to £250 irrespective of the size of the cost (section 20(1)(3) and (5) and Regulation 6). Lord Neuberger's conclusion at para 47 that the gravity of the landlord's non-compliance with the Requirements is relevant to dispensation not of itself but only insofar as it causes financial prejudice to the tenant seems to me to subvert Parliament's intention. The concern which he expresses at paras 47 and 48 about the difficulties which would confront the LVT in making reasonably consistent assessments of the gravity of breaches is not one which I share. His conclusion at para 50 that real prejudice to the tenant should normally be the sole consideration for the LVT seems to me to depart from the width of the criterion ("reasonable") which Parliament has specified. His inevitable further conclusion at para 67 that the "factual" burden lies on the tenant to prove such prejudice seems to me, as a matter of reality, to reverse the burden of proof which Parliament has identified. And in my view the hypothetical exercise in which his conclusions require the parties to engage (and upon which they require the LVT to adjudicate) fails to recognise the complications which often attend a comparison of, for example, one estimate with another in terms not just of overall cost but of individual costings, of the proposed starting date for the works, of the period of the works to which the rival contractors will commit themselves and of their perceived capacity to perform the works satisfactorily. Whether the burden which Lord Neuberger casts upon the tenant is one which he can often discharge seems to me to be very doubtful.

98. First, however, I wish in the following respects to amplify the summary of the facts helpfully given by Lord Neuberger at paras 14 to 22:

(a) In August 2005, in response to Daejan's stage 1 notice, four of the five respondents nominated Rosewood as their preferred contractor.

(b) In its report to Daejan dated 30 November 2005, REA, the contract administrator,

(i) analysed the four tenders which Daejan had received and appended a comparative schedule of the individual costings of three of them, including Rosewood;

(ii) noted that Rosewood had offered to reduce its quotation from £454,000 to £432,000, which therefore became only £11,000 higher than that of the contractor, namely Mitre, for which Daejan had at all times indicated a provisional preference;

(iii) observed that the contract period proposed by Rosewood was 24 weeks, whereas that proposed by Mitre was 32 weeks;

(iv) indicated that the choice was between Rosewood and Mitre;

(v) suggested that Rosewood's tender was the most complete and possibly the more realistic;

(vi) said that it could vouch for Rosewood as a quality contractor but that Daejan could presumably vouch analogously for Mitre; and

(vii) concluded that, were it to reduce its contract period to 24 weeks (which indeed it subsequently did), Mitre should be awarded the contract.

(c) In February 2006 Daejan forwarded to the respondents copies of Mitre's tender and of REA's report on the tenders.

(d) But the respondents also wanted to see a copy of Rosewood's tender. Apart from reference to it in the schedule of individual costings, REA's report had made only "general observations" upon its tender over one page.

(e) On five separate occasions between January and July 2006 the respondents in vain asked Daejan for a copy of Rosewood's tender.

(f) Daejan admits that its first stage 3 notice, dated 14 June 2006, did not comply with some of the Requirements. Its main defect was to fail to refer to Rosewood's tender in breach of para 4(8) of Part 2 of Schedule 4.

(g) So Daejan served a second stage 3 notice dated 28 July 2006. In the notice Daejan said (as required by para 4(5)(c)) that Rosewood's tender was available for inspection. Moreover, in accordance with para 4(10)(c)(iii) and regulation 2(1), which require that a tenant be allowed 30 days in which to make observations, it also stated that, subject to any observations made by the respondents, it proposed to award the contract to Mitre but that it would not do so prior to 31 August 2006.

(h) Meanwhile, on 17 July 2006, four of the respondents had applied to the LVT for a determination of their liability to pay service charges to Daejan for each year since 1994. For the then current year, namely 2006, the respondents explained in their application that the issue related to major works costing £600,000 and that one of the questions for determination by the tribunal would be "was the consultation process properly carried out?"

(i) At the LVT's pre-trial review, held on 8 August 2006, there was a remarkable development: for Daejan's solicitor announced that the contract had already been awarded to Mitre. By letter to Daejan, written later that day, the respondents referred to the solicitor's announcement and protested about it.

(j) Daejan wrote two letters to the respondents dated 10 August 2006. It did not deny that its solicitor had made the announcement. On the contrary, in one letter it appeared to confirm that Mitre had been awarded the contract. In the other letter, however, it said only that Mitre would be awarded the contract.

(k) It transpires that Daejan awarded the contract to Mitre only on 11 September 2006. But it had made clear to the respondents on 8 and 10 August

that it had made its decision to do so. Thereafter, and although on 11 August they finally received a copy of Rosewood's 50-page tender, the respondents reasonably concluded (as the LVT found) that it would be futile for them to accede to Daejan's previous invitation to make observations prior to 31 August. Indeed Daejan never suggested otherwise.

99. Thus, to speak plainly, Daejan aborted the stage 3 consultation. Having correctly invited the respondents to make observations by 31 August 2006, it made clear on and after 8 August that the decision had been made. Even more extraordinarily, Daejan made it clear at a hearing before a tribunal which was beginning to investigate whether, among other things, it had consulted the respondents in compliance with the Requirements. In my view the LVT was clearly entitled to conclude that the opportunity for the respondents to make informed observations on the rival tenders prior to 31 August had been central to the consultation process. Notwithstanding positive aspects of the earlier stages of the consultation to which Lord Neuberger refers at para 48, the sudden termination of the process, which Daejan never sought to reverse nor even to explain, represented, as both of the tribunals and the Court of Appeal all concluded, serious non-compliance with the Requirements.

100. In my view therefore this appeal requires the court to consider the LVT's proper treatment of serious non-compliance with the Requirements when invited to dispense with them. What financial prejudice did the respondents suffer from Daejan's termination of their opportunity to make submissions, in particular, of course, submissions in favour of Rosewood? Albeit without access to Rosewood's tender, they had already made extensive submissions. The LVT concluded that the REA report had raised numerous points which might have been clarified by the respondents' access to all the relevant tenders. It was an unsurprising conclusion. Nevertheless the Upper Tribunal was correct to observe that the LVT had not elaborated upon it. Moreover, at all four stages of these proceedings, Daejan has been at pains to make the point that, in their evidence before the LVT, the respondents never identified specific aspects of Rosewood's tender to which, had the consultation not been terminated, they would have referred in their intended observations. In that this is an appeal on a point of law from, originally, the exercise of a discretionary jurisdiction, it is worthwhile to note that, in its conclusions, the LVT expressly addressed the point before concluding that it was speculative. But it remains Daejan's strongest point. If, as Lord Neuberger considers, the respondents are now to be told that, when they opposed the dispensation, the initial burden had been on them to prove that the termination caused significant financial prejudice to them, the conclusion must indeed be that they failed to discharge it.

101. But is the gravity of non-compliance relevant to whether dispensation is reasonable irrespective of consequential financial prejudice?

102. In giving a negative answer to this question Lord Neuberger refers to what one might call the basic jurisdiction, conferred on the LVT by sections 19 and 27A of the 1985 Act, to determine the limit of a service charge by reference to whether the

underlying costs were reasonably incurred by the landlord and whether the services thereby provided, or the works thereby carried out, were of a reasonable standard. He suggests at paras 42 and 52 that the Requirements set out in section 20 and in the 2003 Regulations are intended only to reinforce the purposes behind sections 19 and 27A and to give practical support to them; and he proceeds to suggest at para 44 that the LVT should therefore focus upon whether non-compliance with the Requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words upon whether the non-compliance has in that sense caused prejudice to the tenant.

103. With great respect, I consider that the legislative history of the Requirements for consultation runs counter to the above suggestion. What I have described as the basic jurisdiction, now exercised under sections 19 and 27A of the 1985 Act, originated in section 124(1) of the Housing Act 1974 through its insertion of section 91A into the Housing Finance Act 1972. The jurisdiction was then conferred only on the High Court or the county court; it applied only to flats and to certain types of tenancy; but otherwise it was described in terminology quite similar to the present (section 91A(3)). It was by the same insertion that Parliament introduced an embryonic requirement for consultation (section 91A(1)). That subsection provided that, in case of any dispute about the recoverability of a service charge thereunder, evidence of the views of the tenant obtained during the requisite consultation should be admitted. There was no express provision about the effect of a landlord's failure to conduct the consultation; but it was clearly intended that a tenant could also deploy such a failure in a dispute with the landlord before a court which was exercising the basic jurisdiction to determine whether an amount or a standard was reasonable. In other words the section inserted in 1974 into the 1972 Act made the link which Lord Neuberger perceives in the current legislation.

104. But Parliament replaced section 91A of the 1972 Act by provisions contained in Schedule 19 to the Housing Act 1980. By paragraphs 2 and 3, it reiterated the basic jurisdiction. By paragraph 5, it amplified the Requirements for consultation. By paragraph 4, it provided that, unless the Requirements had been complied with or dispensed with, the excess of a landlord's costs above a prescribed amount should not be recoverable through the service charge. And, by paragraph 6, it provided that, if satisfied that "the landlord acted reasonably", the court had power to dispense with a Requirement.

105. The pattern of provisions contained in paras 1 to 6 of schedule 19 to the 1980 Act has broadly been maintained to date. Those paragraphs were replaced by sections 18 to 20 of the Landlord and Tenant Act 1985. The basic jurisdiction was then placed into section 19. The consultation jurisdiction was then placed into section 20; and, by subsection (5), the threshold criterion for exercise of the power to grant dispensation with the Requirements, namely that "the landlord acted reasonably", was retained. By section 151 of the Commonhold and Leasehold Reform Act 2002, the consultation jurisdiction was changed into its present form by the substitution of section 20, the insertion of section 20ZA and the making thereunder of the 2003 Regulations. In

order to underline the distinction between the basic jurisdiction in section 19 and the consultation jurisdiction in section 20, the headnote of the former referred to "reasonableness" whereas that of the latter referred to "consultation requirements".

106. The pattern of provisions introduced by the 1980 Act and maintained to date is important for present purposes. For the link which Lord Neuberger perceives in the current legislation seems to me to have been broken by that Act. Non-compliance with a Requirement for consultation was no longer simply a factor to be weighed in the exercise of the basic jurisdiction. An independent sanction was attached to it, namely that, unless the Requirement was dispensed with, the costs incurred by the landlord in the specified circumstances and above the statutory limit were irrecoverable through the service charge. They were irrecoverable even if they had been reasonably incurred and had been incurred in the provision of services, or in the carrying out of works, to a reasonable standard, ie even if there was no scope for them to be disallowed in the exercise of the basic jurisdiction. Even if, in that respect, the tenant had suffered no prejudice, they were irrecoverable. Such was the free-standing importance which Parliament has for 33 years attached to compliance with the Requirements.

107. I therefore agree with the analysis of Lewison J in *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] EWHC 833 (Ch), [2010] 1 WLR 2735, at para 26 as follows:

> "[T] here are two separate strands to the policy underlying the regulation of service charges. Parliament gave two types of protection to tenants. First, they are protected by section 19 from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Second, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a qualifying long term agreement and the consultation process has not been complied with or dispensed with. It follows that the consultation provisions are imposed for an additional reason; namely, to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement. As Robert Walker LJ observed in *Martin & Seale v Maryland Estates Ltd* (1999) 32 HLR 116, 125 in relation to a previous version of the consultation requirements: 'Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants, that tenants may not know what is going on, what is being done, ultimately at their expense.'"

108. The statutory changes wrought by the 2002 Act, which, together with the Regulations, came into force in 2003, not only enabled the LVT to exercise each of the service charge jurisdictions but altered the threshold criterion for exercise of the power to grant dispensation with the Requirements. The criterion was no longer

whether the landlord had acted reasonably but whether it was reasonable to dispense with the requirements (section 20ZA(1), as inserted into the 1985 Act). The new criterion was therefore wider and, no doubt, more favourable to the landlord. It certainly included appraisal of any financial prejudice suffered by the tenant as a result of the non-compliance, being an aspect which could be said only with great difficulty, if at all, to have been embraced in the old criterion. On any view the focus of the old criterion had been the gravity of the landlord's non-compliance. What, however, I find impossible to conclude is that the change in effect banished consideration of what had previously been the focus: the words of the new criterion are inapt to yield such a conclusion.

109. In August 2002, just after the 2002 Act had received royal assent, the Office of the Deputy Prime Minister published a consultation paper in relation to a draft of the Regulations, entitled "Revised Procedures for Consulting Service Charge Payers about Service Charges". In Chapter 4 it explained:

> "3. The dispensation procedure is intended to cover situations where consultation was not practicable (eg for emergency works) and to avoid penalising landlords for *minor* breaches of procedure which do not adversely effect service charge payers' interests." [Emphasis supplied]

The paragraph tends to confirm my view that substantial non-compliance with the Requirements is, without more, intended to entitle the LVT, in the exercise of its discretion, to refuse to dispense with them in order, in Lord Hope's phrase at para 91, to preserve the integrity of the legislation. Lord Neuberger points out at para 46 that the Requirements leave untouched the fact that it is the landlord who decides what works should be done and what amount should be paid for them. What, however, the Requirements recognise is surely the more significant fact that most if not all of that amount is likely to be recoverable from the tenant.

110. In *Camden London Borough Council v The Leaseholders of 37 Flats at 30-40 Grafton Way* LRX/185/2006 30 June 2008, the Lands Tribunal (George Bartlett QC, President, and NJ Rose FRICS) dismissed Camden's appeal against the LVT's refusal to dispense with the stage 3 Requirements. Camden had prepared the requisite statement, including the offer to afford inspection of the tenders, but had failed to send it to the tenants and had proceeded to enter into the contract. The Lands Tribunal, at para 35, described Camden's error as gross. I agree; and I do not perceive much difference between a landlord's total failure to send the statement and its sending a statement which, after 11 days, it deprives of all further significance. The Lands Tribunal concluded:

> "The extent to which, had [the tenants] been told of the estimates, [they] would have wished to examine them and make observations upon them can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice."

111. The above analysis by the Lands Tribunal in the *Grafton Way* case, namely that a substantial failure of a landlord to consult in compliance with the Requirements could, in itself, amount to significant prejudice to a tenant, was adopted by the Court of Appeal in the present case (Gross LJ [2011] 1 WLR 2330, para 73 (iii)). For reasons already given, I am not persuaded that a failure of that gravity needs to be described as amounting to "prejudice" to the tenant. I consider, with respect, that it is reasonable for Lord Neuberger to adopt a narrower definition of the word "prejudice", to be calculated only in monetary terms and by reference to the likely ultimate outcome of a duly conducted consultation. But the semantics are unimportant. I believe that, along with any prejudice in that narrower sense (which I accept will often be a matter of prime importance), the LVT should weigh the gravity of the non-compliance with a Requirement in determining whether to dispense with it.

112. In the present case the LVT did so.

113. The LVT also proceeded to reject Daejan's contention that it was relevant for it to consider the size of the difference between the amounts recoverable from the respondents in the event of dispensation on the one hand and of its refusal on the other. Here too the LVT made no error. In this respect I agree with Lord Neuberger at para 51 that the size of the difference is irrelevant.

114. It remains only to consider whether the LVT fell into error in its rejection of Daejan's offer to accept the attachment to a grant of dispensation of a condition that it should reduce the cost of the works to be charged to the respondents by £50,000.

115. I agree with Lord Neuberger that it is open to the LVT to attach a condition of that character; and I regard it as valuable for the LVT that this court should so rule. In making provision for the consequences of non-compliance with the Requirements, Parliament will have had in mind the established ability of a court or tribunal to attach conditions to its exercise of a discretion: for example a condition that undertakings be given by an applicant before it grants a freezing order; or a condition which (so this court was told) the LVT itself already sometimes attaches to the grant of an adjournment, namely that the applicant for it, whom the tribunal has no power actually to order to pay the costs thrown away, should nevertheless do so. Lord Neuberger also explains at para 56 that urgent applications for dispensation in advance of carrying out the works may be particularly suited to be granted on conditions.

116. Nevertheless I regard the exercise of the jurisdiction to attach a condition to the grant of dispensation with a Requirement as not being without difficulty. Consequential prejudice to the respondents in the narrow sense of that word will sometimes arise not from works which might have been done more cheaply but, for example, from works which, for good reason, should have been conducted at somewhat greater expense or which were conducted over an unreasonably long period or which did not extend to everything that was reasonably required to be done; prejudice of that sort may be hard to quantify in monetary terms. My own view, namely that the gravity of the non-compliance remains relevant

independently of prejudice, makes the identification of an appropriate figure harder still. So it seems to me that, as Lord Hope suggests in paras 88 and 93, considerable latitude is to be afforded to the LVT, as the specialist decision-maker, in relation to its determination whether to accept a landlord's offer or to reject it outright or, in rejecting it, to identify some higher figure which, if offered, it would accept as a condition of a grant of dispensation. Appeals from these aspects of the exercise of the LVT's discretion should not lightly be permitted to proceed.

117. Had the LVT in the present case concluded that it had no jurisdiction to incorporate Daejan's offer into a condition attached to a grant of dispensation, it would have made an error of law which would have required re-exercise of its discretion at an appellate level. But it did not so conclude. It was the Upper Tribunal which, at para 40, wrongly concluded that the LVT had no such jurisdiction; and it was the Court of Appeal which, at para 76(i), overcautiously doubted whether the jurisdiction existed. Before the LVT, by contrast, the parties agreed that it existed and the LVT proceeded on that basis. It is important to note that, having embarked on the works in October 2007, Mitre was still engaged upon them at the time of the LVT's hearing of Daejan's application for dispensation in March 2008 and probably at the time of its decision in August 2008. The evidence does not permit a conclusion to be drawn about the reasons for the overrun. At all events the LVT's expressed reason for rejecting Daejan's offer of a reduction of £50,000 was that it was impossible to assess it in the light of the cost of the works already undertaken and of the estimated cost of the works still to be undertaken, as to neither of which had Daejan adduced evidence. The gravity of Daejan's non-compliance with the Requirements made the LVT's appraisal of any offer extremely difficult. But it was in any event entitled, in its discretion, to decline to accept the offered reduction without knowing the proportion which it bore to the overall cost of the works.

118. I conclude that the LVT made no error of law in refusing Daejan's application for dispensation with the Requirements; that the Upper Tribunal and the Court of Appeal were correct in determining not to set its refusal aside; and that this court should determine likewise.

After receiving the parties' submissions as to the form of order and costs, Lord Neuberger gave the following judgment with which Lord Hope, Lord Clarke, Lord Wilson and Lord Sumption agreed.

Trinity Term
[2013] UKSC 54
On appeal from: [2011] EWCA Civ 38

JUDGMENT

Daejan Investments Limited (Appellant) *v* Benson and others (Respondents) (No. 2)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lord Clarke
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

24 July 2013

Heard on 4 December 2012

Appellant
Nicholas Dowding QC
Stephen Jourdan QC
(Instructed by GSC Solicitors LLP)

1st-4th Respondents
Philip Rainey QC
Jonathan Upton
(Instructed by Excello Law Limited)

5th Respondent
James Fieldsend

(Instructed by Jaffe Porter Crossick LLP)

LORD NEUBERGER (with whom Lord Hope, Lord Clarke, Lord Wilson and Lord Sumption agree)

1. On 6 March 2013, by a majority of three to two, this Court allowed an appeal brought by Daejan Investments Ltd ("Daejan") against the decision of the Court of Appeal, which had unanimously upheld a decision of the Upper Tribunal (Lands Chamber) ("the UT"), which had in turn upheld a decision of the Leasehold Valuation Tribunal ("the LVT"). The effect of the decisions below was that Daejan was not entitled to a dispensation under section 20ZA(1) of the Landlord and Tenant Act 1985 ("the 1985 Act"), as amended, which it had sought from the LVT, to enable it to recover any payment by way of service charges from the respondent tenants, in respect of the cost of certain works of repair ("the works") which it had carried out to a block of flats.

2. In our decision, we decided that Daejan was entitled to such a dispensation (a "dispensation"), albeit on terms. The effect of our decision is that, notwithstanding its failure to comply with some of the procedural steps set out in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations"), Daejan is entitled to recover service charges in respect of the cost of the works from the respondents, subject to (i) a deduction of £50,000 and (ii) terms as to costs.

3. The issues which now arise between the parties concern the details of the consequential order ("the Order") which the Court should make as a result. In order to deal with those issues, it is unnecessary to set out the factual history, the relevant law, the procedural background, or the reasons for the decision, as they are fully set out in our earlier judgment ("the main judgment") – [2013] UKSC 14, [2013] 1 WLR 854.

4. The parties are agreed that the Order should contain the following provisions:

i. A statement that Daejan's appeal is allowed;
ii. A statement that the decisions of the LVT, the UT and the Court of Appeal are set aside;
iii. A direction that, as a condition of the dispensation, Daejan is to pay "the reasonable costs" of the respondents:
    (a) already incurred in the proceedings in the LVT, albeit that the scope of this direction is in dispute;

(b) which may be incurred in their being determined by the LVT "if and to the extent that the [LVT] determines that the costs of that application were reasonably incurred";

iv. A direction (subject to the wording) that, as a condition of the dispensation, Daejan's costs of applying for a dispensation (or of any appeal in that connection) cannot be claimed back through service charges;

v. A direction that, subject to an argument in relation to part of those costs, there be no order for costs in this Court and in the Court of Appeal (save that Daejan does not seek to recover £3,000 it was ordered to pay to the Access to Justice Foundation);

vi. A direction that, if the dispensation is effective and Daejan is able to recover the cost of the works, the liability of each respondent to pay by way of service charge is reduced by an agreed sum, to reflect the £50,000 deduction;

vii. A direction that the proceedings be restored before the LVT for the costs issues under sub-para (iii) to be determined.

5. The parties are not agreed about a number of other terms of the Order, and the purpose of this judgment is to deal with those disputed terms. In their written submissions, the respondents suggest that our decision on some of the points which divide the parties may be relied on in future cases where a landlord seeks a dispensation. Partly for that reason, and partly because the submissions raise a number of issues, some of which are not straightforward, it is right not merely to give our decision on the terms of the Order, but also our reasons, in the form of this brief judgment, for that decision.

6. To get one point out of the way, there is an arid argument as to whether the provisions which Daejan must comply with in order to obtain the dispensation (i.e. under paras 4(iii), (iv) and (vi) above) are "terms" or "conditions". Nothing hangs on this, although it is probably preferable to call them conditions, which is the description which I shall adopt. The important point is that, unless and until Daejan has complied with the conditions in so far as they require compliance, it is not entitled to give effect to the dispensation and to recover the service charges the subject of these proceedings.

7. The first issue concerns the point touched on in para 4(iii)(a) above. It has three aspects.

(i) Daejan contends that the respondents are only entitled to their costs in the LVT "insofar as those costs were incurred in reasonably testing [Daejan's] claim for dispensation or in reasonably canvassing any prejudice which [the respondents] might suffer", whereas the respondents

contend that their costs should be recoverable from Daejan insofar as they were incurred "in reasonably investigating and establishing non-compliance with the Regulations, investigating or seeking to establish prejudice, and investigating and challenging [Daejan's] application for dispensation."

(ii) The respondents also contend that the Order should provide that these costs are not limited to those incurred after the issue of Daejan's application for a dispensation.

(iii) The respondents further contend that the Order should state that these costs can include costs incurred in connection with the hearing which resulted in the earlier determination referred to in para 24 of the main judgment.

8. On analysis, there is, in truth, little, if any, difference between the two formulations, but that of the respondents is to be preferred. As to (i), the respondents' wording spells things out more fully and leaves less room for argument. It is true that Daejan's wording follows para 85 of the main judgment, but the meaning of the respondents' wording is quite consistent with what is said in that paragraph. So far as (ii) is concerned, the only objection to the respondents' proposal is that it amounts to surplusage: an order for costs in relation to proceedings is not limited to costs incurred after the proceedings start. However, as Daejan opposes the respondents' proposal, it should be adopted to ensure there can be no dispute. As to (iii), at first sight it may appear surprising that the respondents can claim as costs in relation to the issue decided in a later determination (viz. that mentioned in para 26 of the main judgment) expenditure incurred on issues decided in an earlier determination. However, as Daejan appears to accept, although there were two determinations, at least some of the evidence and the arguments in relation to the first were important and relevant in relation to the second determination.

9. The second issue between the parties is touched on in para 4(v) above. Daejan says that there should be no order for costs in the UT, in the Court of Appeal and in this Court, whereas the respondents contend that they should be able to recover their costs from Daejan in all three tribunals insofar as they fall within the scope of the form of order they have proposed as quoted in point (i) in para 7 above (and which is accepted in relation to the LVT costs – see para 8 above).

10. It is not open to Daejan to seek any costs in the Court of Appeal or in this Court, as it was granted permission to appeal to each court on terms that it did not seek its costs (see paras 33 and 37 of the main judgment). That was for the very good reason that Daejan, as a large landlord, had a significant interest in the issue in this case being conclusively determined, whereas the respondents had no such

interest. When one adds to that point the fact that it was Daejan's default which ultimately caused these appeals to be necessary, and the fact that the decision of this Court can be said to have represented a change in what the law was perceived to be, it seems right that Daejan should not claim its costs in the UT any more than in the Court of Appeal or in this Court.

11. However, although one must have some sympathy for the respondents, it would not be appropriate to go further by making any order in their favour so far as the costs in the UT, the Court of Appeal or the Supreme Court are concerned. In the absence of special circumstances, Daejan can fairly say that the normal order for costs in a case where the ultimate appeal court decides in favour of one party ("the successful party") is that that party recovers all its costs from the opposing party. In this case, there are undoubtedly two special factors, namely (i) the successful party only succeeded on the basis that it should have succeeded at first instance on terms that it paid some of the opposing party's costs (see paras 59-64, 73(ii) and 85(ii) of the main judgment, and paras 7 and 8 above), and (ii) the successful party is precluded from seeking its costs in this Court and the Court of Appeal (see paras 33 and 37 of the main judgment).

12. In these circumstances, to deprive Daejan of its costs of the hearing before the UT (in addition to the Court of Appeal and this Court) could be said to be generous to the respondents, although, for the reasons briefly given in para 10, it is appropriate in this case. However, it would not be right to make an order for costs in the UT or higher courts which was more favourable to the respondents than no order for costs.

13. It is said by the respondents that they acted reasonably in resisting Daejan's successive appeals. That is true, but Daejan also acted reasonably in pursuing the appeals, and, unlike the respondents, Daejan was ultimately successful.

14. It is also true that Daejan has to pay a large proportion of the respondents' costs before the LVT, even though it obtained the dispensation it was seeking, but that is because it was asking for an indulgence from the LVT (as explained in paras 58-64 of the main judgment). However, the appeals concerned a point of law, namely the correct approach to a dispensation application by a landlord who had failed to comply with the Regulations, and it was a point on which, ultimately, Daejan won and the respondents lost. Prima facie, therefore, Daejan should have its costs of the appeals, but, as explained in para 10, the correct order in respect of the appeal costs is that there be no order.

15. It is also argued by the respondents that, as Daejan raised the argument at all levels of appeal that the financial consequences to it of refusing a dispensation

represented a relevant factor when deciding whether to grant it a dispensation, the fact that this argument failed should be reflected in any order for costs on the appeals. In arguments about costs, it is normally inappropriate to single out a particular strand of argument (in this instance, prejudice to the landlord) in connection with what is in reality a single point (the principles applicable to granting a dispensation), particularly on an appeal, where no question of the cost of particular evidence arises. This case is no exception. Furthermore, while prejudice to the landlord was rejected as a relevant factor, it does represent the windfall to the tenants which is relevant (see para 51 and 71 of the main judgment).

16. This leads to the third issue. As a result of the conclusion on the second issue, Daejan is entitled to recover any costs which it has paid to the respondents in respect of the UT or Court of Appeal hearings. However, the respondents should be entitled, despite Daejan's objection to the contrary, to a direction for a stay on any order that they repay these costs, while the parties await the decision of the LVT as to the sums which Daejan should be required to pay to them pursuant to the order referred to in para 4(iii) above, with a view to setting off any such costs liabilities against each other. However, if the respondents unreasonably delay matters being determined by the LVT, Daejan has the right to apply to the LVT to lift this stay.

17. The fourth issue arises from an argument about the wording of the provision which gives effect to the term described in para 4(iv) above. Daejan suggests that it "is not to include in the service charge costs its costs of applying for dispensation in the [LVT] or its costs of appealing from a refusal of that dispensation". The respondents' proposal is that it should be the costs which Daejan incurred in "resisting a determination that it had failed to comply with the Regulations or in respect of its application for dispensation". Daejan's formulation is arguably too narrow, and the respondents' formulation could apply to any application in the future. The appropriate form of words is that Daejan must not "include in the service charge costs its costs of (i) resisting the respondents' application for a determination that it had failed to comply with the Regulations, (ii) supporting its application for dispensation (including any costs it has to pay to the respondents), or (iii) appealing from a refusal of that dispensation".

18. The fifth issue arises from the respondents' request for a direction under section 20C(1) of the 1985 Act ("section 20C") in connection with the costs incurred by Daejan in relation to its application for a dispensation. Section 20C permits a tenant to apply "for an order that all or any of the costs incurred … by the landlord in connection with proceedings before a court, … [LVT], or [UT], … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge …". At first sight, there seems little point in including such a direction, given the agreement to the provision set out in para

4(iv), and discussed in para 17 above. However, as the respondents point out, the agreed provision in para 4(iv) is, strictly speaking at least, no more than a condition imposed on Daejan as a term of granting it the dispensation it seeks. In theory, Daejan might not take up the dispensation. Accordingly, as it would be wrong for Daejan to seek to include the costs involved in a future service charge demand, the order sought by the respondents under section 20C should be granted.

19. Sixthly, the respondents wish the Order to record that any dispensation will take effect on the date on which Daejan complies with the conditions set out in para 4(iii). At first sight, the question of when the dispensation takes effect may well not matter, and, if it does, it should be determined as and when the reason for which it matters is identified. This point appears to be linked to another issue.

20. That is the seventh issue which divides the parties. It arises from the fact that the lease under which each respondent holds his or its flat from Daejan provides for interest on late payments of money due under the lease at the rate of 14% per annum. The respondents seek to be released from liability for this interest in relation to the service charges which Daejan anticipates recovering in the light of the main judgment.

21. There is no need for the respondents to seek a release of this liability to pay contractual interest. It seems clear from the wording of section 20(1)(b) of the 1985 Act (which applies in this case and limits the service charge contribution as explained in para 10 of the main judgment "unless the consultation requirements have been .,. complied with") that, where that provision applies, the date on which any service charge would fall due ("the due date") must be the later of (i) the date when the service charge would fall contractually due in the absence of any statutory restriction, and (ii) the date when any dispensation becomes effective. And, in this case, the due date must be the day on which the conditions imposed on Daejan for the grant of the dispensation are complied with.

22. This means that interest will only start to run on the service charges the subject of these proceedings once the costs payable by Daejan in accordance with para 4(iii) above have been determined and, if appropriate, paid (within fourteen days of the determination). It may well be that the costs will be less than the costs already paid to the respondents in relation to the orders for costs made on the appeals in the courts below (see para 16 above), and therefore no payment will be due from Daejan to the respondents. However, that would not undermine the point made in para 21 above: until the conditions on which the dispensation is granted are known and quantified, there is no operative dispensation, and time does not begin to run for interest.

23. If the respondents were to delay paying Daejan the service charges assessed in accordance with the Order (beyond fourteen days, to allow time to organise payment) once the dispensation becomes operative, there would (at least in the absence of special facts which have not so far arisen) be no basis for depriving Daejan of its contractual right to claim interest at 14% per annum.

24. Accordingly, the Order should include a provision to deal with the sixth and seventh issues. That provision should state that the dispensation will take effect once all conditions subject to which the dispensation is granted have been determined (and, where appropriate, satisfied), and that interest pursuant to the terms of the respondents' leases can only run from a date fourteen days after the dispensation takes effect.

25. The eighth issue relates to the agreed remission of the matter to the LVT, referred to in para 4(vii) above. The respondents wish the remission to be to the same panel as heard the proceedings and gave the decisions referred to in paras 23-28 of the main judgment ("the original panel"), whereas Daejan argues for a different panel. There is possible advantages in having the original panel, given that it heard this matter, including evidence and arguments, over more than eight days, but the benefit is likely to be slight as that hearing was some time ago, and a different panel would have the benefit of two very full decisions of the original panel. There is nothing in Daejan's argument that the original panel would be, or would appear to be, inappropriate because its decision has been reversed. The reversal was based on an issue of law, and does not cast doubt on the panel's ability to determine the issues which are now to be determined, if they cannot be agreed.

26. The correct direction to give in this connection is simply to remit the issues, which remain to be determined as a result of the Order, to the LVT, on the basis that it can be, but need not be, the same panel who heard the proceedings in 2007 and 2008. This is on the basis that there may be some value in the original panel hearing the matter, but it is unlikely to be very advantageous, and that there may be difficulties in getting the original panel to reconvene.

27. The parties can no doubt now agree a form of order which reflects what they have agreed as augmented by what we have decided in this further judgment.