FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal reference	**:**	**(1) CAM/22UN/LSC/2021/0014** **(2) CAM/22UN/LDC/2021/0031**
HMCTS code (audio, video, paper)	**:**	**F2F**
Property	**:**	**Clearwater Reach, 15 Marine Parade East, Clacton-on-Sea Essex CO15 1UJ**
Applicants	**:**	**(1) The leaseholders named in the Schedule to this decision** **(2) Long Term Reversions (Harrogate) Limited**
Respondents	**:**	**(1) Long Term Reversions (Harrogate) Limited** **(2) All leaseholders of the Property**
Proceedings	**:**	**(1) Liability to pay service charges** **(2) Dispensation with consultation requirements**
Tribunal members	**:**	**Judge David Wyatt** **Mrs M Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**22 December 2021**

DECISION

Covid-19 pandemic: description of hearing

The hearings in this matter have been face to face, as described below. The documents we were referred to are described in paragraphs 2 to 8 below. We have noted the contents.

Decision

(1) The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 (the "**1985 Act**") to dispense with the consultation requirements (to the extent they were not complied with, as explained below) in relation to the window replacement and external decoration works described below.

(2) The following service charges are (or were) payable by each of the Applicant leaseholders (named in the Schedule to this decision) in respect of the service charge year from 1 July 2017 to 30 June 2018:

Disputed cost	**Total cost reasonably incurred (£)**	**Amount (1/16th) payable by each Applicant leaseholder (£)**
Window replacement works*	21,729	1,358.06
External repair and decoration works*	26,713.06	1,669.57
Professional fees	3,892.82	243.30

* In each case, after deduction of £1,000 plus VAT for the relevant interim invoices included in the £3,892.82 for professional fees.

(3) The tribunal orders under section 20C of the 1985 Act that all the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant leaseholders.

Reasons

Procedural history

1. The Applicant leaseholders (of 10 of the 16 flats at the Property) sought determinations under section 27A of the 1985 Act in respect of certain disputed service charges for the two years from 1 July 2017 to 30 June 2019. The Respondent is the freeholder and landlord under the relevant leases. The Applicant leaseholders also sought orders: (a) for the limitation of the Respondent's costs in the proceedings, under section 20C of the 1985 Act; and (b) to reduce or extinguish their liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**").

2. In their application form, the Applicant leaseholders challenged external decoration costs said to be £28,632.24 and window replacement costs said to be £24,757.20 for the 2017/18 year, alleging (amongst other things) the statutory consultation requirements had not been complied with. They also challenged what they described as "*landlord administration charges*" for that year (£3,892.82) and for the 2018/19 year (said to be £3,172). On 28 April 2021, the judge gave case management directions for the service charge and costs applications. These included a direction that: "*Any application by the respondent for dispensation from the consultation requirements should be made, if at all, as soon as possible, so that it could be heard at the same time as these applications*." No such application was made in advance of the hearing of the service charge application. A bundle of the documents relied upon by the parties was prepared by the Respondent (386 pages). Because the Applicants were represented by Mr Crooks, who has a hearing impairment and does not have the equipment to participate in a remote hearing, the tribunal arranged a face to face hearing for 19 August 2021.

3. On 17 August 2021, the tribunal received a request from the Respondent's solicitors for adjournment, saying the Respondent had been unable to arrange representation by the former managing agents and a surveyor who had dealt with the relevant major works (Mr Emmerson) could no longer attend because he needed to attend a funeral. The application was refused, noting that no witness statement had been provided for Mr Emmerson or anyone else on behalf of the Respondent and it appeared likely the Respondent had not done enough to prepare for the hearing. At 4:15pm on 18 August 2021, the Respondent sent further documents on which they relied, including a short witness statement from Mr Emmerson.

4. At the hearing on 19 August 2021 of the service charge application, the Applicants were represented by Mr Crooks, assisted by Christopher Greenslade, a fellow leaseholder. The Respondent was represented by Mr Howard Lederman of Counsel, who had only recently been instructed and that morning produced a skeleton argument, with copies of the decisions in Waaler v Hounslow London Borough Council [2017] EWCA Civ 45 and Daejan Investments Ltd v Benson & Ors [2013] UKSC 14. We decided to proceed with the hearing, but were concerned that it was said the Respondent preferred merely to reserve the right to apply for dispensation in future if we decided the consultation requirements had not been complied with. That seemed an obvious risk of uncertainty and potential waste of time and resources, particularly when any such application could and should have been dealt with together with the other applications, as directed in April 2021. Following discussion about this, Mr Lederman made an oral application on a contingency basis under section 20ZA of the 1985 Act for dispensation from the statutory consultation requirements and made submissions in this respect. Mr Crooks opposed dispensation and made submissions on behalf of the Applicants.

5. In view of the lateness of the application for dispensation, we gave additional time for any submissions and evidence in relation to dispensation and noted any dispensation would also affect the other leaseholders. Accordingly, on 20 August 2021, explanatory directions were issued. These required the Respondent to serve those directions on all leaseholders to notify them of the dispensation application, together with copies of any additional submissions and evidence relied on in support of it. On 10 September 2021, the Respondent confirmed they had done so. The directions assumed the Applicants opposed the application for the reasons already given by Mr Crooks, but allowed all leaseholders until 1 October 2021 to respond if they opposed the dispensation application. Ultimately, the leaseholders of the other six flats did not object, or otherwise respond, to the dispensation application.

6. The directions provided for both applications to be decided together, based on the hearing on 19 August 2021 and any further written representations, unless by 1 October 2021 any party requested an oral hearing of the dispensation application. The Respondent requested a hearing. Mr Crooks asked that any such hearing be face to face (for the same reasons as before) and a statement of case was produced on behalf of the Applicants (approved by Mr Crooks and sent for him by Mr Greenslade while Mr Crooks was unwell). A further face to face hearing was directed and the Respondent prepared a further bundle (of 555 pages) for use at that hearing. On 18 November 2021, while responding to queries from Mr Crooks, the tribunal sent a copy of the recent decision of the Upper Tribunal in Wynne v Yates & Anor [2021] UKUT 0278 (LC) to the parties in case any party might wish to make submissions about this at the hearing. On 23 November 2021, the Respondent produced a skeleton argument from Mr Richard Alford of Counsel.

7. At the hearing on 25 November 2021, the Applicants were again represented by Mr Crooks, assisted by Richard McMillan, a fellow leaseholder. The Respondent was represented by Mr Alford. Roy Emmerson of Emmerson Barnett Chartered Surveyors gave evidence, confirming the relevant statements in the Respondent's statement of case for the dispensation application. Neil O'Connor (property manager from Remus) and Sarah Willis (from the asset managers, Pier Management) also attended the hearing. There was no inspection. The tribunal had directed that it considered an inspection was not required but photographic evidence would be considered. Photographs were produced in the bundles and we are satisfied that an inspection is not necessary to decide the issues in this case.

8. Even at the second hearing, the Respondent was unable to confirm the final figures charged for the costs in dispute. They said they could do so by the end of that day. We agreed they could do so and gave the Applicants the following day to make any representations. In the event, the Respondent was unable to write until the following day and then

confirmed only one of the figures, but not the rest. On 26 November 2021, we wrote to give the Respondent a final opportunity to confirm the relevant sums by 30 November 2021, failing which we would proceed on the basis that the only potentially recoverable sums were as set out in paragraph 42 below. We gave the Applicants until 2 December 2021 to comment on any such further information. On 29 November 2021, Mr Crooks sent an e-mail with initial comments. On 30 November 2021, the Respondent's solicitors sent an e-mail with further information. On 2 December 2021, Mr Crooks responded with his comments on this.

9. In this decision, unless otherwise indicated, the "Applicants" are the applicant leaseholders in the service charge application (as named in the Schedule to this decision) and the "Respondent" is the landlord, whether we are referring to the service charge application or the dispensation application.

The Property and Leases

10. Clearwater Reach is near the sea front at Clacton-on-Sea. It has 16 flats over four floors, with two entrance ways. The entrance way to Nos 9-16 has a substantial decorative stairwell window and it is this window which was replaced.

11. In their leases, the Applicants covenant to pay a: "*…proper proportion of the costs expenses outgoings and other matters mentioned in the Third Schedule hereto and if required by the Landlord to make an advance payment or payments in respect of the same or on account thereof.*" The proportion charged by the Respondent, 1/16th, was not disputed and it was not disputed that the relevant costs fell within the Third Schedule. Nor was it disputed that the relevant service charges were properly demanded.

Consultation process and the works

12. From 26 June 2017, the Respondent carried out parallel consultation exercises under Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (the "**Regulations**") for procurement of qualifying works for which public notice was not required. The notices of intention were both dated 26 June 2007, for: "*external repairs and redecorations of both blocks and grounds*" and: "*replacement of the large window to the front elevation of block 9-16*". On 10 July 2017, the Respondent's then managing agents sent out the service charge budget for the year ending 30 June 2018. This included £53,800 as the estimated cost of the major works.

13. On 19 October 2017, the Respondent issued their statement of estimates for the window replacement work, reporting that the lowest

estimate was from "*Danson Construction*", at £17,940 (£24,757.20 including fees and VAT). On 23 January 2018, the Respondent issued their statement of estimates for the external repairs and redecoration, reporting that the lowest estimate was from "*Dansons Contractors Ltd*", at £20,748 (£28,632.24 including fees and VAT).

14. On 23 January 2018, the Respondent gave notice of their intention to enter into a contract with "*Danson Construction*" for the window replacement work, because this contractor had "*offered the lowest price*". The notice said the works would commence when "*all monies are received*". On 23 April 2018, the Respondent gave notice of their intention to enter into a contract with "*Danson Contractors Ltd*" for the external repair and redecoration work, for the same reason.

15. The parties referred to two related determinations by tribunals in this jurisdiction involving the Respondent. The former (CAM/22UN/LAC/2018/0003) involved Mr Crooks and determined that certain administration charges (relating to demands for major works charges) were not payable by him. The latter (CAM/22UN/LSC/2018/0019) was issued in August 2018. It involved only Mr Greenslade of No.16, and determined that on-account demands for the estimated costs of the proposed repair work for the stairwell window by replacing it (5 July 2017 for £773.66 and 1 January 2018 for £773.66) were payable by him. In those proceedings, Mr Greenslade had been concerned about whether replacement was appropriate. The survey evidence available by the time of the hearing of that matter confirmed it was.

16. On 21 May 2019, the Respondent's then agents wrote to leaseholders advising they had been informed both sets of works would start on 28 May 2019. It appears works started on site the following month. We do not propose to describe the consultation process in more detail because it is set out in the previous decision mentioned above. The Applicants accepted that, except as described below, the consultation requirements had been complied with. The Applicants had been informed the works would take six, or no more than eight, weeks. In the event, they continued over the summer and autumn of 2019 and, it appears, were largely complete by November 2019.

17. The Applicants were surprised to discover when they inspected invoices in November 2019 that they were all from Hepburn Contractors Limited, not Danson. The failure to communicate with leaseholders about the involvement of Hepburn at the time and thereafter seems to be one of the main causes of their concerns about the works and the way they were carried out. Hepburn took a long time to deal with snagging items (with much chasing from Mr Emmerson, who communicated with the leaseholders in detail about the snagging works), with a completion certificate ultimately issued in April 2020. The parties agreed a retention of £516.83 had been made from the final account price for the external repair and decoration work because the

contractor had not remedied water damage to a staircase. The parties agreed this was the only snagging item not ultimately completed.

The issues

18. Mr Crooks confirmed the only way in which the Applicants said the Respondent had not complied with the statutory consultation requirements was that the contractor had been Hepburn Contractors Limited, not the contractor (Danson) recommended at the end of the consultation exercises. The consultation notices had been compliant in relation to Danson, but in this respect the Respondent had not followed the outcome of the consultation process. Mr Crooks said (in essence) that accordingly, by section 20 of the 1985 Act, the Respondent could only recover £250 from each leaseholder towards the relevant major works costs. In any event, he contended the costs had not been reasonably incurred and the works were not of a reasonable standard.

19. We consider those issues below, but we should first deal with the other questions described in the application form. As noted above, the Applicants had queried what they described as "*landlord administration charges*" for the 2017/18 year of £3,892.82 and for the 2018/19 year said to be £3,172. The Applicants had miscalculated their share of the former, but Mr Crooks confirmed they had each intended to challenge their 1/16th share of these sums.

20. The £3,892.82 is the figure in the accounts for 2017/18 for professional fees. The Respondent said £2,400 of this was for initial fees from Mr Emmerson for preparing the two specifications of works. It produced copies of the relevant interim invoices (1788 and 1799, each for £1,000 plus VAT). It also produced a copy invoice from an independent surveyor for £660 for work which the parties agreed had involved reporting on whether the relevant window needed to be replaced (something which had been questioned by leaseholders, as noted above). Mr Crooks contended Mr Emmerson's fees should have been included in the figures for the consultation notices and major works. From the invoices belatedly provided by the Respondent on 30 November 2021, it is now clear these initial fees were not additional charges. They were treated as interim invoices and deducted from the balance payable under the final invoices for the fees payable to Mr Emmerson's firm of 10% plus VAT of the contract price (explained below). Mr Crooks said the £660 for the fees of the independent surveyor should have been included in the general service charge. It appears they were, under the professional fees heading.

21. Deducting £2,400 and £660 from the professional fees figure of £3,892.82 leaves a balance of £832.82 for which no breakdown had been provided. The Respondent had produced copies of various other invoices, but apart from an annual fee of £60 from asset managers (which was not disputed) it is not clear whether any (or which) of these

had been included in the professional fees figure. Mr Crooks, who had been troubled by provisions in the leases for the landlord to charge administration fees for works, suspected such fees had been included here. We are not satisfied they were; we consider it more likely these were other reasonably incurred professional costs. The accounts were prepared by accountants and include their audit certificate, confirming they present a fair summary and are sufficiently supported by accounts, receipts and other documents.

22. We asked Mr Crooks about the £3,172 said to be disputed for 2018/19, because the accounts for that year showed only £60 for professional fees (an asset management charge, as in the previous year, which again was not disputed), and no other such charges. Mr Crooks agreed the Applicants had probably taken this figure from the budget for 2018/19, where it appears in a "*current YTD*" column. As we explained, it seemed likely that £3,172 was the running total for the professional fees in 2017/18 at the time the 2018/19 budget was prepared. Mr Crooks did not dispute this. We understand why the Applicants were confused by this column in the budget, but it appears the figure they were concerned about was not charged to them for 2018/18. It was only charged as part of the total of £3,892.82 reasonably incurred for 2017/18, as explained above. Accordingly, there are no charges for 2018/19 in dispute in these proceedings.

Consultation requirements

23. At the first hearing, Mr Lederman confirmed it was the Respondent's primary position that the consultation requirements had been complied with. He acknowledged the Applicants' arguments could not be dismissed, in that another contractor had carried out work, but submitted any such breach as alleged would be a technical one. The Respondent had contended (in summary) that the involvement of Hepburn complied with the consultation requirements because Danson had "*merged*" with Hepburn. Mr Lederman pointed out Danson appear to have been a "*one-man band*" (Daniel Jordan) and the fact they might have arrangements with other contractors is not surprising; subcontracting is normal in the construction industry. Mr Crooks said that, had Danson entered into the contract and subcontracted work to Hepburn, that would have been normal and in accordance with the consultation requirements. At the second hearing, Mr Alford made detailed submissions expanding those made by Mr Lederman, fortified by the decision in Wynne (a decision made after the first hearing and only shortly before the second).

24. The Respondent produced no evidence of any merger or other corporate restructuring, only company searches showing that: (a) Danson Contractors Limited, previously known as D Jordan Carpenters Ltd, had Daniel Jordan as its sole director and was dissolved in March 2020; and (b) Hepburn Contractors Limited is a separate company,

whose director is Glen Hepburn and whose secretary is Paul Hepburn. All valuation certificates and invoices in the bundle were in respect of Hepburn Contractors Limited. The bundle for the dispensation application includes an instruction letter dated 22 March 2019 addressed to Daniel Jordan, Danson Contractors Ltd, instructing them to proceed with the external repair and redecoration work in accordance with the specification which had been used for the tender exercise. The parties agreed a similar letter had been issued in respect of the window replacement work. The letter refers to an additional cost being offset because the contractors could undertake the window replacement work at the same time.

25. At what had been described (perhaps wrongly) as a "*pre-contract*" meeting on 17 May 2019, Mr Jordan explained to Mr Emmerson and Mr Dodd (from HLM, the former managing agents) that he had "*merged*" "*Hepburn's*" (apparently meaning Danson) with Hepburn Contractors and they would be undertaking the project. Mr Emmerson's note of the meeting describes Mr Jordan as the contract manager for Hepburn and no other representative of Hepburn attended the meeting. The note records Mr Dodd was to check with HLM that the change did not "*cause any complications*" and to confirm if formal contracts, rather than the letters of intent which had already been issued, were required. Mr Emmerson told us works of this size were commonly arranged without entering into JCT small works contracts, or the like, beyond simply issuing instruction letters based on the specification. He did not hear back from HLM, who knew works were due to start on 28 May 2019, so took it the "*merger*" was not a problem and formal contract documents were not required. He did not know whether Danson had formally transferred any contract created by the instruction letter to Hepburn.

26. Mr Emmerson had not been concerned about the practical implications of the change. He had worked with Danson (dealing with Mr Jordan) on three other projects and Hepburn had been subcontractors to Danson on one of them. He had been satisfied with the work Hepburn had done on that job and they were if anything larger than Danson, with up to five people working for them. He acknowledged Mr Jordan had only been involved with the works for this Property before works started on site (at the initial meeting and preparing a method statement). Thereafter, Mr Emmerson had dealt with Glen Hepburn directly. He had given Hepburn a hard copy of the specification, to ensure they had it on site. The e-mail sent by the Respondent the day before the hearing on 19 August 2021 included a copy e-mail from "Dan Jordan" on 1 August 2021 stating: "*Hepburn Contractors and Danson worked alongside each [sic]. Hepburn Contractors and Danson Contractors merged together to undertake the Clearwater Reach maintenance contract.*"

27. On the evidence produced, we are satisfied that contracts were probably formed with Danson and assigned (transferred) to Hepburn,

and that is what Mr Jordan meant when he talked about "*merger*", having secured the instruction and started preparation, then handed over to Hepburn. If so, following Wynne, there would have been no breach of the consultation requirements. Mr Crooks sought to distinguish Wynne, pointing out in that case the contractor had started work on site but been unable to finish the job, so a new contractor had to be appointed. He said the situation here was completely different. However, given our finding above, the circumstances are not so dissimilar from those in Wynne. It appears we are bound by the reasons for the decision in Wynne, which suggest [at 39 and 50] that the consultation requirements apply to the relevant set of works, so assignment to a different contractor working within the same price, when Danson were unable or unwilling to carry out the work on site themselves, is not a failure to comply. Continuing to follow the reasoning in Wynne, we bear in mind the prices obtained through consultation may only be estimates (even apart from the fact that in this case the final costs were less than those estimates).

28. However, we are not sure how Wynne (where neither party was represented) fits with other Upper Tribunal decisions about non-compliance with the consultation requirements. Further, it may be that our finding is wrong and there was a failure to comply, since the letters to Danson in March 2019 were merely instruction letters. In view of the way they were expressed, they or the response from Mr Jordan at the "*pre-contract*" meeting could have been offers or counteroffers which were not accepted until ultimately new contracts were entered into by conduct or otherwise between the Respondent's representatives and Hepburn. We simply do not have any evidence of the communications (written or oral) at the relevant time to suggest this possibility is more likely.

29. If the contract was entered into with Hepburn rather than Danson, it is at least arguable that Wynne is distinguishable and entering into the contract with Hepburn was a breach of:

    a. the consultation requirements in relation to the statement of estimates under paragraph 11 of Part 2 of Schedule 4 to the Regulations; and/or

    b. the consultation requirements under paragraph 13 of that Part where the person "*…with whom the contract is made…*" is not a nominated person and did not submit the lowest estimate.

30. Accordingly, in case our finding of fact is wrong, or we are not bound by Wynne to decide there was no breach of the consultation requirements, we consider below whether it is reasonable to dispense with the relevant consultation requirements. Keeping in mind they are not necessarily the same things, we also consider the remaining issues of whether the costs were reasonably incurred and whether the works were of a reasonable standard.

Dispensation and reasonableness

31. We cannot accept the submissions made by Mr Crooks to the effect that Daejan does not apply or that we can circumvent it. We understand his concerns that the decision in Daejan limited the importance of compliance with the consultation requirements, but we are bound by the decision. Similarly, it is wrong to say the consultation requirements are pointless if a consultation exercise can be run only for the landlord to change to a different contractor who agrees the same price. The risk of that situation does seem unfortunate, not least because suppliers might be discouraged from tendering if they think something of that nature might happen. However, as Mr Alford pointed out, Daejan tells us [at 14] that the purpose of the consultation requirements is to: "*…ensure that tenants are protected from: (i) paying for inappropriate works; or (ii) paying more than would be appropriate.*" The consultation requirements provide for leaseholders to comment on the proposed works and nominate prospective contractors, and require the landlord to test the market and report on the results.

32. Daejan gave guidance about types of prejudice which might show dispensation should not be granted, or should only be granted on conditions addressing that prejudice. In Wynne, Judge Cooke suggested [at 39], for example, that leaseholders may need to produce evidence: "*…that there was a possibility that they could have suggested a way to get the work done more efficiently or more quickly or more economically*".

33. Even apart from the consultation requirements, leaseholders have the protection of section 19 of the 1985 Act. Relevant costs are to be taken into account in determining the amount of a service charge payable: (a) only to the extent they are reasonably incurred; and (b) where they are incurred on the provision of services or the carrying out of works, only if those services or works are of a reasonable standard. In Waaler, on the issue of whether costs were reasonably incurred, the Court of Appeal referred at [32] to established authorities confirming the question is not whether a cost was necessarily the cheapest available, but whether it is a reasonable market cost.

34. Mr Crooks said Mr Emmerson had been professional, but had been let down by the contractors. He said the prejudice caused by the work being carried out by Hepburn (rather than Danson) was that the working requirements in the specification were not complied with and work had to be repeated, inconveniencing the leaseholders and putting them and their visitors at risk, with the works taking several times longer than expected to complete. He said more safety measures should have been taken and alleged there were security risks, describing the location of the Property and nearby areas. Mr Jordan had never been on site. The site work had been organised by two men, one the brother of Glen Hepburn. Mr Crooks said the contractor had

not spent what they should have on carrying the works out properly in the first place, on welfare facilities, or on PPE, and the whole thing had been "*…done on the cheap*". He criticised the on-site management of work, with leaseholders noting workers had not been provided with the access keys they needed, needing an electricity supply, and many other issues. He said leaseholders had been told they would be consulted about a pre-contract meeting, but (although they had other meetings with Mr Emmerson) they had not been invited to that meeting. He saw from the meeting note that the (then) managing agents had been asked to check the Danson/Hepburn change did not cause "*complications*". He argued that if leaseholders had been informed they would have wanted a new consultation exercise. He said the scaffolding had been erected twice, with no over-boarding or protective fan or alarm as expected.

35. Mr Crooks accepted there was no prejudice in immediate cost terms, because the work was ultimately done for the estimated prices (or less). The Applicants accepted the building had generally benefited from the works, but Mr Crooks alleged the quality expected had not been delivered. An example was given in the documents for the first hearing, alleging that a bin store door had been wrongly fitted and been damaged. In their statement of case for the second hearing, the Applicants described their concerns about how the works had been carried out and added to their earlier allegations that the work had not been of a reasonable standard. In particular, they said the ceiling in the staircase for flats 9-16 was still stained and sagging, tiles still had paint stains which were not cleaned off and said again that the doors to the bin area had "*deteriorated to unusable in a mere three weeks*".

36. The Respondent contended the leaseholders had suffered no prejudice due to the alleged change of contractor. They said dispensation, if needed, should be granted unconditionally. As to reasonableness, Mr Lederman accepted things had gone wrong with the performance of the contract, but the matters complained of did not relate to the reasonableness of the costs or the final standard of work. The previous tribunal decision had suggested the works be done together if possible to minimise disruption and possibly cost, but the window replacement work had been completed within the estimated price that tribunal had determined as reasonable. The matters alleged in relation to health and safety were regulatory matters and neither they nor the delay had caused any additional cost in this case. No damages claim had been expressed or quantified in relation to any inconvenience or any other losses. The problems alleged in relation to the way the works were carried out might be unfortunate, but again there was no evidence of any additional costs caused. The Applicants' allegations about poor quality work were inconsistent with the correspondence when the snagging items were ultimately completed.

37. Mr Emmerson said that if Hepburn had tendered for the work at the same price as Danson, he would have recommended they be engaged

just as he had recommended Danson. Their standard of workmanship on another job (as outlined above) had been good and there was no reason to exclude them. He accepted people working on site had not always worn PPE, but said the importance of PPE varied depending on the type of site, with some people simply painting the exterior of a building. He recognised it would have been better if leaseholders could immediately have seen from corporate PPE or the like that people were working for the contractor. Mr Emmerson acknowledged that the method statement (which he had accepted as the construction phase plan and other pre-commencement documents required from the contractor) named the wrong contractor and the wrong client. However, in relation to all of these matters he considered the documents and they way the contractor had worked were proportionate to the jobs they were required to do. He said that documents for such works were often reasonably generic, as they were in this case, because they involved similar types of work.

38. Mr Crooks put it to him that Hepburn had not been "*on the ball*"; Mr Emmerson said he considered they had worked to the best of their ability. Mr Crooks appeared to accept that the leaseholders had not always communicated every single problem to Mr Emmerson, because there had been so many and other matters to focus on, but said the leaseholders had been in regular contact about problems. Mr Emmerson did not accept that more formal contracts, or anything else which could sensibly have been done, would have put the contractors under more pressure to get things right the first time or put problems right with less delay. They were small contractors doing small works for the lowest price and all that could cost-effectively be done was to supervise and press them.

39. Mr Emmerson confirmed the ceiling in the staircase for flats 9-16, which was said still to be stained and sagging, was the ceiling for which a retention was made (because it was the one item the contractors did not eventually remedy, as noted above). The Applicants had not produced any photographic evidence of the paint stains they said were still on tiles. Mr Emmerson said if this had been brought to his attention it would have been pursued during the snagging process, where he asked leaseholders to raise any such problems. We can see from the correspondence that some such paint stains were identified and remedied during that process. As for the references to the bin store doors, Mr Emmerson confirmed that (as indicated in the correspondence) the contractors had initially fitted internal-quality doors, which naturally deteriorated very quickly and were replaced with exterior doors during the snagging process.

Review

40. We accept Mr Alford's submission that the problems experienced by the leaseholders were no less likely to have occurred if Danson had

been and remained the contractor. Mr Crooks accepted they could have subcontracted to Hepburn (as they did with the other contract Mr Emmerson mentioned). Mr Crooks noted the window replacement works had been subcontracted to Reliance Home Improvements, who replaced the window and used a separate scaffolding company, running those works themselves. Mr Emmerson confirmed he would have recommended Hepburn just as he recommended Danson, for the reasons summarised above. If anything, they were larger than Danson. There is nothing to suggest what Hepburn did was any worse than what Danson would have done - it seems likely the result would have been the same. We gave the Applicants the benefit of any doubt about this, recognising the poor communication will have created stress and it can be difficult to prove prejudice. However, the Applicants have not demonstrated any real prejudice or explained what if the consultation process had begun again they would have said which might have avoided the matters they said had prejudiced them.

41. Daejan tells us the consultation requirements are a means to an end, as outlined above. There is no suggestion the leaseholders paid for inappropriate work. As Mr Alford pointed out, they had already (as a result of Mr Greenslade's application) examined the question in relation to the window and accepted replacement was appropriate. There is no suggestion they paid more than was appropriate; the consultation process served the purpose of testing the market prices for prospective contractors to carry out the works. The contractor nominated by leaseholders was not willing to tender for the works and the leaseholders made no substantive representations during the consultation processes. Danson gave the lowest prices by a significant margin, at (exclusive of professional fees and VAT):

    a. £17,940 for the window replacement works, compared to £23,877 and £24,747 from the other prospective contractors; and

    b. £20,748 for the external repair and decoration works, compared to £25,372 and £25,600 from the other prospective contractors.

42. The 2017/18 accounts record that £53,389.44 was spent on the major works, but it was accepted this was more than actually spent; the Respondent said it had applied credits to account for this in later years. As noted above, on 26 November 2021, we said that unless details were confirmed by 30 November 2021 we would proceed on the basis that the final amounts paid were: (a) for the window replacement works, £16,940 plus Mr Emmerson's fees (at 10%, the rate used in the examples in the statements of estimates) and VAT; and (b) for the external repair and decoration works, £20,156.18 (the final value certified by Mr Emmerson, £20,673, less the retention of £516.83 for the unremedied ceiling) plus Mr Emmerson's fees at 10% and VAT.

43. In his comments on 29 November 2021, Mr Crooks helpfully pointed out that 5% needed to be added for the former managing agent (HLM)'s fees, calculated on the estimated cost of the major works, referring to the invoices for these from the first bundle. This fee of 5% plus VAT was set out in the statements of estimates. The invoices for it are dated July 2019: £897 for the window works and £1,037.40 for the external decorations, each plus VAT. Mr Crooks also made other comments which we have dealt with so far as possible in this decision.

44. In their comments on 30 November 2021, the Respondent provided information and copy invoices from Mr Emmerson which confirm the final figures certified for payment and his firm's fees were:

a. for the window replacement works, £16,516.50 (the value of the work certified by Mr Emmerson, £16,940, less a retention) plus Mr Emmerson's fees (at 10% of £16,940, less £1,000 for interim invoice 1789, described above) and VAT; and

b. for the external repair and decoration works, £20,156.18 (the final value certified by Mr Emmerson, £20,673, less the retention of £516.83 for the unremedied ceiling) plus Mr Emmerson's fees (at 10% of £20,673, less £1,000 for interim invoice 1788, described above) and VAT.

45. The remaining comments made by Mr Crooks on 2 December 2021 (principally in relation to the balancing credits to be made following our decision) are matters to be dealt with between the leaseholders and the Respondent. We are satisfied the total relevant sums potentially payable by the Applicants were:

Item	**Window works (£)**		**Exterior works (£)**	
	Ex VAT	**Inc VAT**	**Ex VAT**	**Inc VAT**
Contract sum paid	16,516.50	19,819.80	20,156.18	24,187.42
Emmerson fees	1,694	2,032.80	2,067.30	2,480.76
Less interim invoices	(1,000)	(1,200)	(1,000)	(1,200)
HLM fees	897	1,076.40	1,037.40	1,244.88
Balance	18,107.50	**21,729**	22,260.88	**26,713.06**

Conclusion

46. In the circumstances, we consider that it is reasonable to dispense with the relevant consultation requirements without conditions. We do not consider that any failure to comply with the consultation requirements in this case caused prejudice. Further, in our assessment, the final costs were reasonably incurred and the standard of work was reasonable for the price that was paid.

47. The final costs were less than the estimates, which were themselves substantially less than the estimates given by other prospective contractors. As Mr Lederman pointed out, it can be difficult to choose contractors, since a cheaper price may risk delays or other issues which might be less likely where a contractor is being paid a higher market price. It was obvious the estimates from Danson were substantially lower than those from other prospective contractors but the leaseholders did not make any substantive representations during the consultation process, let alone say they would prefer price to have a lower priority. The other matters complained of by the Applicants were matters of good practice on building sites and compliance with important health and safety requirements. However, we had no evidence of serious failings or any loss, only the general impression that these were small builders working cheaply. We are satisfied that, ultimately, the works were completed to a reasonable standard save for the ceiling damage which was adequately dealt with by the retention made by Mr Emmerson. As Mr Lederman pointed out at the first hearing, Mr Greenslade had naturally been unhappy about the snagging problems and time taken to resolve then, but in the end he had (very fairly) written in September 2020 to say that the snagging items had then been resolved in a: "*…very professional, efficient and amicable manner…*".

48. We understand why the Applicants and particularly Mr Crooks were dissatisfied with the way the contractors worked, but we have the impression Mr Crooks is accustomed to working on very substantial high-value construction projects where a completely different approach might be expected and proportionate. If there were more serious problems, the Applicants failed to provide sufficient evidence of them, relying on criticism in correspondence, cross-examination and submissions without doing enough to prove the case they wished to make. We are satisfied that the professional fees were also reasonably incurred and the standard of the relevant work was reasonable. In all the circumstances, particularly when most of the works had been completed (albeit later than estimated) within a reasonable time given a reasonable allowance for weather conditions and the types of delay which might ordinarily be expected, it would not have been proportionate to seek damages from these contractors for delay or otherwise threaten litigation to chase or seek money from them.

49. We have considered whether the Applicants have done enough to show claims to damages for loss of amenity or any similar claims which might be set off against any service charges otherwise payable. We bear in mind that Mr Crooks said they were distressed about security and health and safety risks, some with balconies, with scaffolding up for longer than might have been necessary, and the other matters outlined above. They also had to put up with the obvious inconvenience of building works continuing for a long time, far longer than anticipated. However, they have not done enough to give details of the actual timings and impact of such matters, let alone suggested any realistic value for damages. None of them produced witness statements. None other than Mr Crooks, Mr Greenslade and Mr McMillan attended the hearings. Even at the second hearing, Mr Crooks was unable to suggest figures for any such damages (Mr Lederman having at the first hearing pointed out the lack of any, as noted above). Mr Crooks was wary of suggesting something too low when he thought that, as he put it, the prejudice (or value of the problems and failure to deliver what he considered had been promised in the specification, or not giving leaseholders the contractor they expected) was "*100%*".

50. In the circumstances, we do not consider that we should make any deduction for any such potential damages claim. Our view might have been different if the prices paid for the works had been higher and sufficient evidence had been provided by the Applicants, but even then it seems any damages and so any set-off would probably have been very modest. If the Applicants have any claim for damages for any such or other matters, they will need to take independent legal advice on whether to pursue this in the county court.

Section 20C/para 5A

51. It is doubtful that the Respondent could recover its costs of these proceedings through the service charge under the terms of the relevant leases, although we make no finding about that. Mr Lederman submitted we should not make an order under section 20C of the 1985 Act in relation to the service charge proceedings because (in view of the lease terms) previous tribunals had decided not to do so, not all leaseholders were party to the service charge application, and unless the Applicants were successful such an order should not be made. In relation to the dispensation application, the Respondent accepted in its statement of case that it must bear its own costs of and occasioned by dispensation. Mr Alford submitted we should interpret that narrowly; he had been instructed to oppose the application for an order under section 20C. He said that if we found dispensation was unnecessary we should not make such an order, since the dispensation application had been made only on a contingency basis. If we found dispensation was necessary and gave it without conditions, we should not make such an order because it had been unreasonable of the Applicants to oppose dispensation.

52. We are satisfied that it is just and equitable to make an order under section 20C of the 1985 Act; each party should bear their own costs of these proceedings. The Applicants have ultimately been unsuccessful, but in the unusual circumstances of this case it was reasonable for them to pursue their service charge application and oppose the application for dispensation. It was not disputed that they had all paid the service charges demanded from them for the major works and other relevant costs. The Respondent (or its then managing agents) simply failed to communicate adequately with them at the time, creating an unfortunate and suspicious relationship which we suggest they now can and should put behind them.

53. Even during the proceedings and at the hearing(s), the Respondent tended to produce generalised responses and failed to explain the relevant charges. The change of contractor was plainly an arguable failure to comply with the consultation requirements, at least before the decision in Wynne. The Respondent should (as directed) have made any dispensation application, whether or not on a contingency basis, in good time so that it could be heard at the same time as the service charge application, but did not and gave no explanation for this. They appear not to have prepared adequately for the first hearing; the requisite information simply was not provided in the document bundle they had been directed to produce. Even at the second hearing and when given more time, the Respondent's representatives could not confirm the breakdown of the final figures charged for the major works until given the following week to do so. At least some of the Applicants' concerns could have been disposed of simply by answering them. For example, it was not until 30 November 2021 that the Applicants and the tribunal discovered (only from examining the final invoices disclosed for the first time that day) that the initial invoices from Mr Emmerson's firm were not charged in addition to the major works fees, but as interim invoices for those fees.

54. We bear in mind that this section 20C order will not apply to the other six leaseholders, but they are not precluded from making their own applications to the tribunal under section 20C for the same reasons. Previous tribunals have not made such orders, but we consider it just and equitable to make an order under section 20C to ensure there is no possibility of dispute about the costs of these proceedings. We hope the parties will put these matters behind them and take a more open, clear and constructive approach to their communications and relationship in future.

55. We are not satisfied that we should make an order under paragraph 5A of Schedule 11 to the 2002 Act, not least because the parties could not point us to any administration charge made or proposed in relation to the costs of these proceedings.

Name: Judge David Wyatt **Date:** 22 December 2021

Schedule

Leaseholders represented by Mr Crooks

John Patrick Kelly (No. 4)

Brian Anthony Crooks (No. 5)

Carol Ann Bolton (No. 6)

Abigail McCluskey (No. 8)

Maxine Jayne McMillan and Richard Harold McMillan (No. 9)

Stephen John Carruthers (No. 12)

Rumana Kabir and Mohammad Jahangir Kabir (No. 13)

John Burke (No. 14)

Mary Patricia McIntyre (No. 15)

Christopher John Thurston Greenslade (No. 16)

Rights of appeal

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

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

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

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

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

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