FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LDC/2021/0026**
HMCTS	**:**	**CVP & Face to Face Hearing**
Property	**:**	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Great East Court, Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Landlord)	**:**	**RMB 102 Limited**
Representative	**:**	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Respondent (Tenants):		**The Long Leaseholders identified in the Schedule to the Application**
Representative	**:**	**Dr Frank Gommer**
Type of Application	**:**	**1) To dispense with the consultation Requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA of the Landlord and Tenant Act 1985** **2) To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge J R Morris** **Mr G Smith MRICS FAAV REV**
Date of Application	**:**	**30th June 2021**
Date of Directions	**:**	**27th July 2021 amended 23rd August 2021 and 28th October 2021**
Date of Hearing	**:**	**20th January 2022**
Date of Decision	**:**	**4th March 2022**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing together with the papers submitted by the parties which has been consented to by the parties. The form of remote hearing was Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

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

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

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

Reasons

Application

4. On 30th June 2021 the Applicants applied for a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 that the requirement to comply with all the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) ("the Consultation Requirements") should be dispensed with (the Dispensation Application).

5. The qualifying works are the instruction of a specialist flue contractor, namely Pure Heating and Plumbing Ltd ("PHP"), to attend the Property and carry out the removal of the current flue system and install a new flue system (the “Works").

6. Directions were issued on 27th July 2021 and amended 23rd August 2021.

7. On 28th October 2021, Judge Wayte as the Procedural Judge, consolidated this Dispensation Application and an Application made by the Leaseholders for a determination as to the reasonableness and payability of the Service Charge costs for the Works and Further Works under section 27A of the Landlord and Tenant Act 1985 (“the Section 27A Application”) and listed them for a joint final hearing.

8. The Respondents also requested that Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK) (“the Developer”) be made a party of these proceedings which the Procedural Judge rejected but agreed that the argument that the Developer should have been asked to remedy the defects could be raised with regard to the Dispensation Application and the Secton 27A Application. The Developer was ordered to produce any documents in its possession in respect of the 2019 works to the flues, in particular the recommissioning certificate and any report. A report by AWA Building Services Consultants was provided.

Preliminary Issue

9. The following Preliminary Issue was raised and dealt with at the hearing.

10. The dispensation applied for was originally only for the Works but it was subsequently found that, upon the advice of PHP, further works were required which were the replacement of two of the four boilers and work to the gas pipework in the plant room of the Property (“Further Works”). The Applicant requested that the Dispensation Application in respect of the Works be extended to cover the Further Works required, the extent of which were unknown at the time of lodging the Dispensation Application. A witness statement of Jonathan Coles, Director of Flaxfields, the Landlord’s Managing Agent at the time, dated 30th September 2021 was served setting out details of the Works and Further Works and providing evidence in support of the Dispensation Application.

11. The Applicant submitted that the Respondents have had an opportunity to consider Mr Coles’ witness statement and respond. No prejudice has been suffered by the Respondents in not filing a further formal application for dispensation in respect of the Further Works and in the interests of the overriding objective the Tribunal was invited to deal with the Dispensation Application on the basis that it relates to both the Works and Further Works. The Applicant said it would submit a formal application if either the Tribunal or Respondents requested. There was also another application to be lodged by the Applicant to include Further Additional Works that are in the process of being completed that stem beyond the Works and Further Works.

12. Immediately prior to the hearing the Tribunal was under the impression that the parties had agreed that the Further Works would be included in the Dispensation Application. At the hearing this was disputed by the Respondent. Dr Gommer on

behalf of the Respondents said that the extension of the Dispensation Application had been a unilateral act by the Applicants assuming the Respondents' and Tribunal's silence as acquiescence to the proposal. The Respondents' Representative said that it was not prepared to respond to the inclusion of the extended works and that the Dispensation Application and the secton 27A Application only related to the Works.

Decision on the Preliminary Issue

13. Where parties agree to an extension of an application, for example, an additional year being added to an application made under secton 27A of the Landlord and Tenant Act 1985, if all things are equal, a Tribunal may consent to the addition. However, in the present circumstances the attempt to extend the matters to be considered under the application are a unilateral action by the Applicant and it is improper for a party to impose a condition that a tacit response amounts to a tribunal's consent.

14. Also, in the present case the Tribunal found that the Respondents' objection on the grounds that they were only prepared for the Dispensation Application made on the 30th June 2021 was reasonable and that a further application to the Tribunal would be needed for any Further Works to be added and Directions issued, which was not the case.

15. In addition, the Tribunal Procedural Judge ordered that the Dispensation Application and the Section 27A Application should be heard together because they both related to the Works and therefore had a nexus. Although the necessity for the Further Works may have become apparent following the carrying out of the Works they are not necessarily so intrinsically linked that dispensation for the Works and Further Works must be considered together.

16. The Tribunal decided that only the Works would be the subject of Dispensation Application.

Description

17. The Tribunal did not inspect the Property due to Government restrictions and sets out the following description based upon the Statements of Case, photographs, the Lease and the Internet.

18. What is referred to in this Decision and Reasons as the "Property" in the Lease is the Block which comprises two buildings, 117 – 131 (Odds) The Cherry Building, containing 28 purpose-built Apartments, and 133-171 (Odds) Addenbrookes Road, containing 8 purpose-built Apartments, which have joint communal facilities including a central heating system. The heating system has a flue which passes from the gas boilers in the plant room to expel any fumes into the atmosphere.

The Law

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

The Leases

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

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

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

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

24. Relevant provisions of the Leases were identified as follows (references to the Property are to the individual Apartment to which the Lease relates):

25. Clause 1 Definitions

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

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

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

'Conduits'
Pipes downpipes sewers (excluding Estate Sewers) drains pumping stations soakaways channels gullies gutters watercourses conduits ducts flues Wires cables and other service conducting media or apparatus for the supply or transmission of water sewerage electricity gas (if any) telephone (if any) and other communications media now or to be constructed in any part of the Estate and serving the Property

but shall not Include any conduits belonging to any local or other Statutory Authorities

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

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

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

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

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

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

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

'Service Charge'
The total cost of providing the Services

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

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

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

4.5 To pay to the Landlord on demand, the Proportion as the case may be of any Additional Contribution that may be levied by the Landlord. Additional

Contribution is defined within the Lease as "any amount which the Landlord shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under Paragraph 2.2 of the Fourth Schedule

Schedule 5 -Services

Part 1 Building Communal Area Services (Part A)

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

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

Part 2 Building Services (Part B)

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

Part 3 Block Communal Area Services (Part C)

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

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

Written Statements and Hearing

27. Both parties provided written statements which were confirmed and developed at the hearing. The cases summarised below include both the written and oral cases presented to the Tribunal. The hearing was attended by:

Ms Rebecca Ackerley Counsel for the Applicant,
Mr Jonathan Coles, Director of Flaxfields, the Applicant's Managing Agents at the time the Works were undertaken,
Mr Ben Hunt, Associate Director (Development) New homes and Communities, Country Side Properties, witness for the Developer, (attended by video)

Mr Daniel Holding, witness for Pure Plumbing and Heating Ltd ("PHP") main contractor for the Works (attended by video).
Mr Paul Tolley and Ms Jessica Stack of Premier the Applicant's current Managing Agents observing.
Other persons were in attendance by video link which included Ms Cheryl Earle of JB Leitch the Applicant's Solicitors,

Dr Frank Gommer, the Respondents' Representative
Ms Fatemah Poorabdian, a Tenant.

Applicant's case

28. The Applicant provided a Statement of Case which stated that the Landlord seeks a determination that the requirement to comply with the Consultation Requirements in respect of the Works carried out in respect of the central heating system at the Property be dispensed with.

29. It was said that in order to fully comply with the Consultation Requirements, the Applicant would have needed to:
    (a) Wait for the specification of the Works to be finalised.
    (b) Serve a Notice of Intention and await the 30-day statutory period.
    (c) Then seek formal tenders from contractors based on the final specification, including from the contractor nominated by a leaseholder.
    (d) Then serve a Notice of Estimates on leaseholders, giving a further statutory 30-day period for observations.
    (e) Only then could a contractor be appointed, with a requirement to serve a further notice if that contractor were not the party to return the lowest tender price.
    (f) The whole above process would have to be repeated in respect of the Further Works upon discovery after completion of the Works.

30. It was submitted that there was insufficient time to do this for the following reasons:
    a) The Works were urgently required to prevent the Tenants being without hot water and central heating system. Not shutting down the heating system while the consultation requirements were met exposed it to potential deterioration. However, to shut the heating system so the consultation requirements could be carried out meant an alternate heating system would be required, which would have increased the maintenance expenses payable by the Applicants in addition to payment for the Works. Therefore, the Works needed to be completed as soon as possible.
    b) The Works were urgently required for health and safety reasons as the leaks identified, in particular the CO leakage was deemed dangerous. As a number of Applicants let their apartments, gas certificates are required. These would not be available until the Works were completed and would have impacted upon health and safety requirements and income.

31. The Applicant referred to the case of *Daejan Investments Limited v Benson* [2013] UKSC 14 in which it was stated that Sections 19 and 20 of the Landlord and Tenant Act 1985 are intended to ensure that tenants of flats are not required (i) to pay for works which are unnecessary or provided to a defective standard; or (ii) to pay more

than they should for works which are necessary and which are carried out to an acceptable standard.

32. It was submitted that in determining the Dispensation Application, the Tribunal should focus on the extent (if any) to which the Respondents will have been prejudiced by the Applicant's failure to comply with the Consultation Requirements. Where the extent, quality and cost of the Works or Further Works are in no way affected by that failure, there is no reason not to grant dispensation ([44] and [45] of *Daejan Investments Limited v Benson*). Dispensation should not be refused merely because the landlord has seriously breached or departed from the Consultation Requirements; the consultation, the process is a means to an end, not an end in itself ([46] of *Daejan Investments Limited v Benson*) and the burden of establishing any prejudice is upon the Tenant ([67] of *Daejan Investments Limited v Benson*).

33. The Applicant referred to the objections raised by the following Respondents:
    i. Frank Gommer on behalf of a formally recognised tenants association at the Property,
    ii. Linda Skeggs and Glen Skeggs of 135 The Cherry Building,
    iii. Julie Vaughan of 151 The Cherry Building,
    iv. Michael Opel of 127 The Cherry Building,
    v. Roberto Lattuada and Silvana Filipzponi of 137 The Cherry Building.

34. It was submitted that the objections were answered in Mr Coles' witness statement and that they did not show that the Respondents were prejudiced by the lack of consultation.

35. The Respondents retained their ability under the s27A Application to challenge their liability to pay for the Works, to assert that the costs were unreasonably incurred, or to assert that the Works were not carried out to a satisfactory standard.

36. In addition to the individual objections, the Respondents raised further arguments in opposition to the Dispensation Application which the Applicant summarised as follows:
    i. The flue work does not comply with planning or building regulations.
    ii. The Works are covered under the warranty by Countryside when recommissioning works were allegedly completed by Countryside in October 2019.
    iii. The leakage from the flue started in 2018 and was not remedied despite assurances works had been completed.
    iv. The Works were not carried out in a reasonable time which led to increased costs.

37. The Applicant said that these matters related to the section 27A Application and not the Dispensation.

38. The Applicant also submitted that no prejudice had been suffered by the Respondents in the Consultation Requirements not being adhered to concerning their ability to raise the Warranty issue. Dr Gommer had raised the issue of the Warranty in March and April 2021 and this was pursued by Mr Cole at that time.

39. The Applicant submitted that the Respondents had not set adduced and evidence as to how the Works could have been completed differently, nor have they provided quotes to suggest a different contractor could have been chosen at a lesser cost had the Consultation Requirements been complied with.

40. The Applicant stated that it was obliged to carry out the Works under the Lease and the costs incurred are, in principle, recoverable under the Lease and payable by the Tenants.

41. The Applicant submitted that in all the circumstances, it would be reasonable for the Tribunal to dispense with the need for the Applicant to comply with the Consultation Requirements.

42. In support of its submissions a witness statement from Jonathan Coles a Director of Flaxfields which was the Applicant's Managing Agent from 1st February 2019 to 31st August 2021 was provided which is summarised as follows.

43. Flaxfields received two estimates from Pure Heating and Plumbing ("'PHP") and Huttie Building Services Limited ("Huttie") for the service contract for the maintenance of the boilers for the period of January 2020 to December 2020. Copies of the estimates were provided.

44. Mr Coles said that due to the competitive estimate received from PHP, the boilers, pumps and associated media are under the preventative maintenance contract with PHP. A copy of the service contract from January 2020 to December 2020 was provided. No tenders were sought for 2021 as Huttie's original quote was twice the amount of PHP therefore it was felt that PHP was good value and that there was no need to go to tender again.

45. The need to replace the flue system arose when on 7th April 2021, PHP attended the Property to conduct the annual service of the boilers. However, the engineer attending to service the boilers reported that the boilers could not be serviced as the flues were leaking. The flues were found to be leaking in several places. Due to the boilers being unable to be serviced, a gas safety certificate could not be provided. Pictures of the leaking flues were provided.

46. A quote was obtained from PHP to undertake the works to replace the flues. The quote was in the sum of £11,578.08 inclusive of VAT which covered a specialist flue contractor attending the Property and the removing of the current flue system and installing a new flue system (the Works). Once the flue installation and commissioning had been completed PHP would carry out the testing and servicing of the boilers. A copy of the quote from PHP was provided.

47. Enquiries were made with PHP as to why the whole flue system required to be replaced rather than repairing the area where the flues were leaking. PHP advised that the flues needed to comply with existing regulations, and this required their replacement. Copies of the email correspondence with PHP was provided.

48. Due to the nature of the Works and the quoted potential costs a second quotation was obtained from Huttie. Huttie attended the Property on 28th May 2021 and inspected the boilers and the flues. A copy of the report following their visit was

provided. Huttie confirmed that the flues were leaking, and the existing flues required to be removed and replaced. Huttie provided a quote for the Works in the sum of £12,620.40 inclusive of VAT. A copy of the quote was provided.

49. As the second quote from Huttie was higher than the quote by PHP, on 8th June 2021, Flaxfields proceeded with the recommended quote.

50. Flaxfields notified the Respondents that the Works would be carried out by an email to all leaseholders on 25th June 2021. PHP commenced the Works to remove and replace the flues on 29th June 2021. A letter dated 14th July 2021 was then sent to all Leaseholders providing an update following completion of the works. Subsequently, an email was sent on 25th August 2021 attaching the initial Dispensation Application Bundle. A copy of the correspondence was provided.

Objections and Responses to the Dispensation Application

51. Following the Application to the Tribunal, the following objections were received from the Respondents which are followed by the Applicant's responses. These are mostly referring to the Further Works of replacing the boilers but are included here for completeness.
    a. Frank Gommer on behalf of a formally recognised tenants association at the Premises;
    b. Linda Skeggs and Glen Skeggs of 135 The Cherry Building,
    c. Julie Vaughan of 151 The Cherry Building,
    d. Michael Opel of 127 The Cherry Building,
    e. Roberto Lattuada and Silvana Filipponi of 137 The Cherry Building,

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

53. The Applicant's Response:
    1. Qualifying works. under the Landlord and Tenant Act 1985 are defined as "works on a building or any other premises". This includes any repair, replacement and maintenance works. As the Works to the flues and boilers are replacement works on the Property, they therefore fall under the definition of qualifying works.
    2. The Developer confirmed those other parts of the system other than the flue are not under warranty and therefore it was understood that the flue itself is also not under warranty.
    3. Prior to Flaxfields management of the Property the issue of the flues leaking was raised with PHP who were in the process of fixing the leak. After the completion of the works, the flues were still leaking, and probably the leaks had never fully been repaired.

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

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

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

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

57. The Applicant's Response:
    1. The disruption was appreciated but the amount of time to rectify the problems was out of the Applicant's control. The Works were instructed as soon as reasonably practicable and unfortunately, the Further Works were found to be necessary.
    2. PHP had been booked for the gas inspections to take place but when PHP attended, they informed Flaxfields that they could not be carried out due to the leaking flues.

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

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

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

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

Respondents' Case

62. The Respondents provided a Statement of Case in which he raised the following objections to the Dispensation Application.
    1. The Dispensation Application does not concern qualifying work.
    2. The plant room including the flue is still in the defects' liability period of the developer.
    3. The leakage of the flue is known to the landlord since 2018.
    4. The landlord's managing agents have made no attempt to explain the issues and potential costs after the state of the flue became so severe that no further operation could be permitted.

1) The Work is not Qualifying Work

63. The Respondents' Representative said that the works were not qualifying works because the Developer was responsible for the works for the following reasons.

64. Firstly, a report on 22nd November 2018 requested by APT, the then managing agent, from PHP, the servicing contractor, showed that the flues were leaking. It was stated "Following our works to repair the leaking flue in the Cherry Building we found the cause which appears to be from the initial installation, you can clearly see in these pictures that the installers have had a problem with this joint before and

tried to bodge it shut." The flue was in this state only 5 years after it had been installed during the construction of the properties. The Developer, Countryside Properties, acknowledged this and accepted responsibility as stated in the email correspondence between APT, the then managing agent, the Developer and the developer's contractors between the 22nd November 2018 and 24th April 2019 which was provided.

65. Secondly, it was said that the works when they were carried out did not comply with Regulation 5 "Combustion appliances and fuel storage systems", Approved Document J of Building Regulations 2010 which do not allow unprofessional and improvised silicone joints to be installed as had been done.

66. It was stated that this acceptance of liability is in accordance with the Lease which states at Clause 8.11:
"The Landlord (here meaning Countryside Cambridge One Limited and Countryside Cambridge Two Limited) shall remain liable on its covenants contained in Clause 6 (excepting clauses 6.1 and 6.2) only for so long as the Landlord remains the proprietor of the reversionary interest in the Block."
and
Clause 6.1 which states:
"…that the Development will be completed and the curtilage laid out in accordance with the planning permission."

67. The Respondents submitted that therefore the Developers were liable for the Works because they failed to install the flues correctly and in accordance with the planning permission which referred to the Building Regulations. Therefore, it was submitted that the Respondents should not have to pay for the repair or replacement of the flues.

2) The plant room including the flue is within the defects' liability of the Developer

68. The Developer had in accordance with the settlement of claim number E8QZl8CF, which related to excessive energy usage of the heating system, agreed to carry out a full re-commissioning. Under clause 3.4 of the settlement agreement "Party B shall commit to a full re-commissioning of the Communal Heating System serving the Cherry Building and Great Court. These works would include, but not necessarily be limited to Boilers, Pumps, Pressurisation Unit and expansion vessel, BMS, Water Test Results, Heat Interface Units (HIUs), and instances of missing insulation to primary pipework."

69. The Scope of Work documents, dated 21st August 2019, prepared by AWA Building Services Consultants (copy provided) stated under 2.42 that the Defects Liability Period should be for a period of 2 years as follows: "The Defects Liability period shall be a period of twenty-four months from the Date of Practical Completion of the Contract, provided that during such period the Contractor shall have remedied and made good all faults or defects as described below, to the Contract Administrator's satisfaction."

70. The Date of Practical Completion of the Contract was 23rd March 2020 as confirmed in the letter to Flaxfields, the then Managing Agent from the Developer. The

Applicants' Representative said that therefore the Works came within the Defects Liability Period and that all the costs should be absorbed by the freeholder and the Residents should not bear any of these costs.

3) The leakage of the flue was known to the landlord since 2018

71. The Respondents' Representative said that there had been three attempts to remedy the leaking flues.

72. Firstly, the leakage was observed by the managing agent APT in 2018. The flue was found to be rusty in a utility cupboard and appointed PHP to investigate. This issue was then raised with the Developer in November 2018 who ultimately agreed that this was a fault by their contractor and agreed to resolve this issue at their cost. The work was handed over to Flaxfields from APT in January 2019. Mr Coles of Flaxfields liaised with the Developer to attend to this work and Mr Coles confirmed on 29th April 2019 that the works had been completed and sent a photograph to the Respondents' Representative of the top section of the flue and not the leaking bottom section. The Respondents' Representative submitted that the leak had not been remedied and questioned whether the work had ever been carried out, noting the statement made by Mr Coles as item 3 in his response to the objections raised by Dr Gommer.

73. Secondly, it was submitted that the recommissioning, referred to above, should have dealt with any leaks in the flue.

74. Thirdly, the Works are the third occasion when the leaks in the flue has been addressed and by reason of the previous two occasions when work to repair the flue had supposedly been undertaken by the Developer to remedy the defects the Respondents should not have to pay for the Works now. As the Works were the Developer's responsibility the Dispensation Application was otiose and should be dismissed.

4) Lack of Explanation

75. The Respondents' Representative stated that the leaking issues seemed to have worsened in 2021 as can be seen from photographs of the plant room provided by the Applicant. He said the service contract for the plant room was terminated between December 2020 and 30th March 2021 and the issue that there was a problem with the flues only came to light when residents requested safety certificates for the plant room in March 2021. PHP were then requested to supply these but could not do so because the boilers could not be tested due to the defects in the flues. PHP therefore obtained expert advice by a flue specialist, which is dated 8th April 2021.

76. This was urgent work which was not authorised by Flaxfields until 9th June 2021. There has been poor communication for the works required and the estimated costs were only provided to residents as part of the court dispensation application. This 2-month delay was accompanied by several breakdowns of the plant room causing additional costs, call outs to Huttie, another contractor not familiar with the system, as PHP refused to attend due to the severe health and safety issues. The system was shut down several times unannounced at weekends and causing severe disruptions.

77. The Respondents' Representative submitted the consultation period could certainly have been complied with if Flaxfields had acted promptly. He questioned whether the health and safety issues were as serious as stated if it took two months to take action.

Conclusion

78. In conclusion the Respondents' Representative submitted that the Respondents were prejudiced by not being able to put forward their case. If the consultation period had taken place, then the above points referred to would have been taken into account and it would have been realised that the Respondents were not liable to pay for the Works. These proceedings would then have been unnecessary.

Decision

79. The Tribunal considered all the evidence adduced and submissions made in the written and oral representations.

80. Copies of the emails from the Leaseholders to Flaxfields in March 2021, showed that the Leaseholders were pressing for gas certificates for their Apartments. The flues were scheduled to be tested on 7th April 2021 by PHP and it was found that the test could not take place due to the leaking flues and this was confirmed to Flaxfields in an email dated 12th April 2021 with a fuller explanation of the situation based on a flue expert's advice in an email of 13th April 2021.

81. It was apparent from the email of 13th April 2021 from PHP to Flaxfields that if the installation was tested then the system would fail due to the leaking flues and would have to be shut down so that the occupiers of the Apartments would have no heating or hot water. It was therefore decided not to test the installation but to keep it running until a new flue was installed. The gas certificates would therefore remain outstanding until the new flue was installed and the system could be tested with a prospect of passing.

82. The Tribunal found that, irrespective of any alleged past failings to maintain or replace parts of the installation, in April 2021 the flues were leaking. It was necessary for the flues to be replaced because if they were not the installation would be defective and would continue to deteriorate. The replacement was urgent for two reasons. Firstly, while the system was running it was not up to the required standard and that would carry with it not only a risk that the installation would fail but also that there was a health and safety risk as carbon monoxide was being emitted. Secondly, if it was shut down or the installation failed the occupants would not have heating or hot water.

83. Having determined that the work was necessary and urgent the Tribunal then considered what steps the Applicants had taken to comply with the consultation provisions. The main stages of a consultation are: a Notice of Intention to carry out qualifying works served on all the Leaseholders with a 30-day period to nominate contractors, the obtaining of Estimates from contractors identified by the landlord and any contractors nominated by the Tenants, a Notice of the Landlord's Proposals

served on all Leaseholders with a 30-day opportunity to view the estimates and make observations, and a Notice of Works if the lowest estimate is not selected.

84. Due to the urgency, Flaxfields had not sought nominations from the Leaseholders of alternative contractors. It also had not sought observations on the Works from the Leaseholders although this was done belatedly on the Works following the Dispensation Application.

85. The Tribunal noted that the installation was of an industrial size and was of the view that there were a limited number of contractors who could be called upon to do the Works. The Tribunal found that the Leaseholders were not prejudiced by the failure to give them an opportunity to nominate a contractor.

86. The Leaseholders' observations following the Dispensation Application Directions, summarised above, indicated that the Leaseholders were mostly concerned with the Works being carried out promptly to ensure continued heating and hot water to the Apartments and that the system would be certified so that the legislative requirements with regard to lettings were met. It also appeared that the Leaseholders were aware that there had been problems with the heating system for some time and that in their view this was due, at least to some extent, to the lack of past maintenance which could be dealt with in the secton 27A Application. The Tribunal found that the Leaseholders were not prejudiced by the failure to give them an opportunity to make observations in respect of the Works.

87. The Tribunal then considered the representations made by the Respondents.

88. Firstly, the Respondents submitted that the Works were not "qualifying works". The Tribunal found that under section 20 of the Landlord and Tenant Act 1985 "qualifying works" are defined as "works on a building or any other premises". Notwithstanding that it may subsequently be found that the cost of the works might be payable by someone other than the Leaseholders does not mean that they are not "qualifying works".

89. The Respondents submitted that the Developer should be responsible for the cost of the works under Clause 6 of the Lease. It was stated that under 8.11 the Developer ceases to have liability on its covenants under Clause 6 once it transfers its reversionary interest in the Block with the exception of Clauses 6.1 and 6.2. Under these provisions the Developer is responsible for completing the Development in accordance with the planning permission which the Respondents contended included building regulations in respect of the Block. Therefore, if the heating was not compliant with the Building Regulations the developer was liable.

90. The Tribunal found that 6.1 requires the Developer to complete the Development in accordance with the layout as approved by the Planning Permission and 6.2 requires the Developer to ensure that the estate roads and sewers are completed to a satisfactory standard to be adopted by the local authority. Neither provision relates to the heating installation and does not prevent the Works being "qualifying works".

91. Secondly, the Respondents submitted that because the Developer carried out a recommissioning of the boiler under which it was alleged that there was a two-year warranty from 23rd March 2020 until 22nd March 2022 the Works were a matter for

the Developer to carry out and pay for therefore the Dispensation Application was otiose and should be struck out.

92. The Tribunal found that whether or not there is a warranty in respect of the Works is a matter to be determined under the Section 27A Application. Notwithstanding that it may subsequently be found that the cost of the works might be payable by someone other than the Leaseholders does not preclude a determination being made for dispensation on the basis that the Leaseholders may subsequently be found to be liable under the Service Charge.

93. Thirdly, the Respondents submitted that the Works were the third attempt to remedy the defective flues and that if the flues had been installed correctly and maintained and repaired properly the Works would not be necessary and therefore the Dispensation Application was otiose and should be struck out.

94. The Tribunal found that the argument as to whether the Works were due to a failure at installation and that they should be paid for by the Developer or that it was due to historic neglect on behalf of the Applicant Landlord was a matter to be determined under the section 27A Application. Notwithstanding that it may subsequently be found that the cost of the works might be payable by someone other than the Leaseholders does not preclude a determination for dispensation being made on the basis that the Leaseholders may subsequently be found to be liable under the Service Charge.

95. Fourthly, the Respondents submitted the consultation period could have been complied with if Flaxfields had acted promptly and they doubted that the health and safety issues were as serious as stated if it took two months to take action.

96. The Tribunal was satisfied that the Works were urgent as stated above.

97. The Tribunal found that the Leaseholders were not prejudiced by the lack of consultation. Therefore, the Tribunal determines that it is reasonable to dispense with all the consultation requirements in relation to qualifying works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required).

98. However, the Tribunal found that Flaxfields, the Applicant's managing agent, knew from the inspection by PHP as part of the maintenance contract on 7th April 2020 what Works were required. It had also obtained quotations from two independent contractors, namely PHP on 8th April 2020 and Huttie on 29th April 2020 and had decided to select PHP because it was the lowest estimate, was the selected maintenance contractor and had had experience of maintaining the heating installation previously.

99. Therefore, by the end of April or the beginning of May, Flaxfields was in a position to inform the Leaseholders of the Works to be carried out, their necessity and urgency, the estimates that had been obtained, the contractor that had been selected and why, and the cost of the Works which were to be carried out. This would have fulfilled many of the requirements of the Notice of Intent, the Obtaining of Estimates and the Landlord's Proposals. Instead, it was left until the eleventh hour

on 25th June 2020 to tell the Leaseholders that the work was to commence on 29th June 2020.

100. The Tribunal found that the information that was available should have been shared with the Leaseholders in early May. Notwithstanding Mr Coles's response to the observations that Flaxfields had tried to update leaseholders throughout the process and there has been no lack of communication, the Tribunal found no evidence of it. The Tribunal finds that too often it is believed that disparate emails to a few people are sufficient to keep all informed. In the present case a formal communication to all leaseholders containing the information referred to above would probably have ensured that the Dispensation Application would have been unchallenged.

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

Rule 13 Costs Application

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

103. It was submitted that the Applicant had been grossly negligent in that:
- The Managing agent had said that 30 properties are affected whereas there are only 28 and the Applicant provided the court with 40 addresses so it was not clear who was affected by the Application. The file containing the property owners was incorrect when being submitted and some units had changes of ownership which had not been updated.
- Some Leaseholders had not been sent the court directions and bundle.
- The Dispensation Application was made before the work was completed and the final invoice amount was clear.
- The amount invoiced is £498.36 for each property which is clearly not calculated according to the correct schedule of the lease.
- The additional costs for which another dispensation notice will be filed are still not known to residents.
- The Managing Agent wrongfully claimed that it was not known the flue was leaking before they took over the management.
- Flaxfields ceased their management of the estate on 31 August 2021 and did not comply with the court directions or accept copies of the responses after that date.

104. Counsel for the Applicant submitted that the Applicant complied with Directions and that Mr Coles was available at the hearing to represent Flaxfields and answer any questions relating to the time they were Managing agents. Other matters raised by the Respondents did not relate to the proceedings. Counsel referred the tribunal to *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015

Rule 13 Decision

105. The Tribunal considered the submissions of the Respondents in respect of an application for costs under Rule 13 of the Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

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

107. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application "*should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right".*

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

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

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

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

111. In respect to each of the matters raised:

- The Tribunal did not find that the Applicant had acted unreasonably in respect of the schedule of Leaseholders provided in respect of the Application.
- The Tribunal was not aware that any Leaseholders had not been sent the copies of the Application and Directions in compliance with the Directions. If there had been any omissions it had not affected the presentation of the case by the Respondents.
- Applications for Dispensation from the consultation requirements of Section 20 of the Landlord and Tenant Act 1985 may be made at any time in anticipation of works or retrospectively.
- The amount of the invoice for the Works is not part of the proceedings for dispensation.
- Any subsequent dispensation application for works yet to be carried out or costs incurred, are not part of these proceedings.
- Whether or not the flues were leaking before Flaxfields took over the management is not relevant to the reasonableness of the Applicant's conduct in respect of these proceedings.
- No evidence was adduced to show that Flaxfields acted unreasonably in complying with Directions.

112. The Respondents had not shown the Applicant had acted unreasonably in bringing or conducting proceedings under secton 20ZA for dispensation of the consultant requirements under section 20 of the Landlord and Tenant Act 1985.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

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

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

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

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

APPENDIX 2 – THE LAW

The Law

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

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

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

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

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

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

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

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

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

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

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

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

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,
c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

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

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

Rule 13 (1) states that:
The Tribunal may make an order in respect of costs only-
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-
(ii) a residential property case