FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LDC/2023/0067**
Property	**:**	**Various properties in Lambeth**
Applicant	**:**	**London Borough of Lambeth**
Representative	**:**	**Mr Madge-Wyld of counsel**
Respondents	**:**	**The leaseholders listed in appendix 1**
Representative	**:**	**Mr B McGregor for Respondents named in appendix 2** **Mr Russell in person** **Otherwise no appearance**
Type of Application	**:**	**Dispensation from consultation requirements under Landlord and Tenant Act 1985 section 20ZA**
Tribunal Members	**:**	**Judge Professor R Percival** **Mr A Lewicki FRICS**
Date and venue of hearing	**:**	**6 December 2023** **Video hearing (VHS)**
Date of Decision	**:**	**3 April 2024**

DECISION

Decisions of the tribunal

(1) The Tribunal, pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act"), grants dispensation without conditions from the consultation requirements in respect of the qualifying long term agreements entered into by the Applicant with Npower and Corona.

Procedural

1. The landlord submitted an application for dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") and the regulations thereunder, dated 1 April 2023.

2. The Tribunal gave directions, which are dated 31 March 2023 (Judge Addy). Further directions were subsequently given in correspondence by Judge N Carr.

3. The directions provided for the Applicant to set up a webpage providing access to the application, statement of case, supporting documents and the directions, and to write to leaseholders informing them of the application and advising them of the url of the webpage. The directions included a reply form for leaseholders. Leaseholders who objected to the application were required to email the form to the Tribunal and to the Applicant by 19 May 2023.

4. Problems arose with the letters sent by the Applicant. A number of the responses complained about the number of letters that had been received by Respondents, and their confusing content. Mr Checconi and Mr Ross, two of the Respondents who provided witness statements, set out what they received.

5. Both Mr Checconi and Mr Ross received no fewer than eight letters dated 24 April 2023. Four had headings referring to gas supply, three referred to electricity, and one mentioned neither. The letters referred to different service charge years. They also received further letters dated 25 April 2023 and 26 April 2023, referring to energy supplies. The letters all referred to dispensation in respect of contracts which "the Council intend to enter", including those referring to past service charge years. There were other differences between the letters. Enclosed with the letters was a document headed "Dispensation Information and FAQ", but it was not referred to in the letters, and referred to "works". Both men found the content of the letters – aside again from the number – confusing.

6. Mr Ross also explained that the links provided to the application, the Applicant's statement of case and the directions were unhelpful and unexplained. Mr Ross produced a useful guide to the documents and the process for his neighbours.

7. Nonetheless, we did received a very great deal of evidence from a large number of Respondents. In the bundle, the responses from Respondents were divided into two categories. The first category were Respondents who returned the form provided with the directions only. There were 13 such responses. The second category, of Respondents who returned both the form a separate statement, comprised 43 leaseholders. Some of the responses were duplicated among several Respondents, in whole or in part. In addition, we had witness statements from Mr Checconi, Mr Lennard, Mr Ross, Mr Russell and Mr Watson. Mr McGregor, who, as we understand it, is not himself a leaseholder of the Applicant, provided a full statement on behalf of Ms A McGregor, who is a leaseholder. As we indicate above, Mr McGregor went on to represent a substantial number of the leaseholders before us at the hearing.

8. The leaseholders' names were redacted from the forms returned as they were provided in the bundle. We were not told why this was done, and it was anyway pointless, as their names, quite properly, appeared in the index to the bundle.

Introduction: the application

9. The Applicant seeks dispensation from the consultation requirements required by section 20 of the 1985 Act, and in particular those set out in detail in Service Charge (Consultation etc)(England) Regulations 2003, schedule 2 (that is, those relevant to a public sector qualifying long term agreement).

10. The Respondents are leaseholders of the Applicant, to which they are obliged to pay service charges under their leases. The services relevant to the application are the supply of electricity and gas.

11. The supply of electricity is that to blocks and estates and street properties for landlords' lighting, staircase lighting, lifts, estate lighting, boiler rooms and communal services such as door entry systems and fire alarms serving leasehold properties specified in appendix 1 to the Applicant's statement of case.

12. The supply of gas is for the central boiler room on estates, communal block boilers and communal supplies on smaller blocks serving the residential leasehold properties set out in Appendix 2 to the Applicant's statement of case.

13. In this decision, we have not exhaustively summarised the evidence received. Rather, after briefly setting out the law, we have drawn from the evidence to set out the structure of the contracts, as we came to understand it, and the history of how the Applicant came to enter into the relevant contracts. We then refer to evidence of energy bills received since the start of the contracts, set out what we see as the key submissions on both sides, and make our determination. We then make some concluding observations.

14. From the outset, we should make it clear that neither the Tribunal nor the Respondents were clear as to which contracts the dispensation application applied before the hearing. At the hearing, Mr Madge-Wyld made it clear that the view of the Applicant was that the only contracts that were capable of being qualifying long term agreements were those with Npower for electricity and Corona for gas (see below), and that the application related only to them.

The Law

15. What follows is a brief summary. The relevant statutory provisions in full may be consulted here:
https://www.legislation.gov.uk/ukpga/ 1985/70
https://www.legislation.gov.uk/uksi/2003/1987/contents/made

16. Sections 20 and 20ZA make provision for landlords to consult with tenants before entering into what are termed qualifying long term agreements (as well as one-off contracts), where the tenant is liable to pay a "relevant contribution" under his or her lease to costs incurred under the qualifying long term agreement. It is accepted by all parties that two contracts entered into by the Applicant with Npower and with Corona are qualifying long term agreements.

17. Section 20 states that unless the consultation requirements are complied with, or a dispensation granted under section 20ZA (see below), the contribution to be made by a tenant is limited. In respect of qualifying long term agreements, that limit is £100 a year (regulation 4).

18. The details of the consultation required ("the consultation requirements") are set out in the Services Charges (Consultation etc)(England) Regulations 2003. Those regulations make provision for consultation on qualifying long term agreements in schedules 1 and 2. Schedule 1 applies to such agreements which do not require "public notice". section 2 applies to those that do. "Public notice" refers to requirements under the law regulating procurement by public bodies, which in turn derives from EU law.

19. Section 20ZA (1) provides

> Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

20. A dispensation application under section 20ZA can be made retrospectively, as it was in this case.

21. The leading case on dispensation is *Daejan Investments Ltd v Benson and others* [2013] UKSC 14; [2013] 1 WLR 854, a Supreme Court case. In that case, the Court said that the Tribunal should allow a dispensation unless the tenants would suffer financial prejudice were it not to do so. If the tenants would suffer financial prejudice, the Tribunal should allow dispensation, but on such terms as would remove the prejudice suffered. Only in a case in which that was not possible should dispensation be refused. There have been important subsequent cases in the Upper Tribunal in relation to the dispensation approach set out in *Daejan*. The Tribunal is bound as a matter of law to follow precedent in the Upper Tribunal and higher courts.

22. The effect, or otherwise, of *Daejan* in this case is the subject of dispute between the parties.

Overview of the structure of contracts

23. The system that now obtains for the purchase and supply of electricity and gas is as follows.

24. The Applicant has entered into what is known as a framework agreement with LASER, which provides a method of collective energy purchase for a number of public bodies. The terminology relating to the contracts is somewhat opaque. We use "framework agreement" for the agreement between the Applicant and LASER here, but note that in a short "user guide" provided by LASER and made available to the Tribunal, the "framework contract" is expressed as defining the relationship between LASER and the supplier (ie the call off contractors – see below), whereas the term "access agreement" is used for that between a local authority and LASER. We stick with the terminology of "framework" for the LASER/Applicant relationship, as that was how it was expressed in the primary evidence as to the relationships from the Applicant (from Mr De Vela, see below).

25. LASER is sometimes described as a company owned by Kent County Council ("KCC"), but the evidence was that it is a trading name utilised by KCC, with whom the actual contracts lie.

26. LASER negotiates the purchase of quantities of electricity and gas on behalf of its clients, including the Applicant. It does so by a mixture of long term and short term contracts made at different starting times and for different periods. The aim of the system is to secure energy supplies at the cheapest price and to reduce volatility for the consumer in what is a notoriously volatile market. The consumer price paid by the Applicant is a product of this mix of purchasing decisions. These purchasing decisions themselves take place on the basis of prices offered often for a short period, which may have to be entered into quickly. We are not entirely clear as to who contracts with the wholesale energy suppliers – that is, whether the contracts are with LASER, or that LASER (presumably under the framework contract) is empowered to require the call off contractors to enter into the contracts, and Mr De Vela was not able to assist us on the question in his evidence. As far as we can determine, the question does not affect the issues before us.

27. LASER negotiates the purchase of the energy. The administration of the delivery of the energy to buildings and billing requires the Applicant to enter into contracts with providers of those services. In the jargon of the sector, these are called "call off" contracts. The call off contracts entered into by Lambeth under the LASER framework agreement were with Npower Ltd for electricity and Corona Energy for gas. The Npower contract was for four years (with provision for a one year extension). The contract was entered into on 18 November 2019, the supply start date being 1 April 2020. That with Corona was dated 22 November 2019, with the same start date.

28. The call off contractors bill the Applicant for the cost of the energy. Within that invoice is included LASER's fee for its service. LASER's fee is a small percentage of the overall energy spend. So LASER recovers its fees from the call off contractors. As a result, it was the Applicant's case that the framework agreement is therefore not a qualifying long term agreement for the purposes of the consultation requirements, because the Applicant, as the landlord, does not incur costs which it passes on to the leaseholders under the framework agreement. Rather, the framework agreement gives access to the supplier (call off) contracts, under which the costs are incurred. Thus it was the Applicant's case that it was only the call off supplier contracts which were qualifying long term agreements.

29. As Mr Madge-Wyld made clear at the outset of the hearing, this application is for the dispensation from the consultation requirements in respect of the two call off contracts alone.

The development of the LASER system in London

30. It is helpful in understanding the way in which the current system has come about, and in particular the decisions made by the Applicant at the point at which it entered into the call off contracts, to set out a narrative of the development of the system. This account is taken principally from the witness statement and oral evidence of Mr De Vela. Mr De Vela's responsibilities for the Applicant include the procurement and management of various central corporate contracts, including those for electricity and gas.

31. The chronology starts in 2007, when a process called the London Energy Project ("LEP") was established, and funded, by 36 London public bodies, including the Applicant. The purpose of the project was to use the combined authorities' energy spending power to deliver better deals by collectively accessing wholesale energy markets. In 2008, LEP endorsed the use of two national public sector Professional Buying Organisations. One was LASER. The other was Crown Commercial Services ("CCS"). LEP's assessment was that these two bodies were able to secure energy procurement on an aggregated, and therefore more economic, basis for LEP's member authorities.

32. It was Mr De Vela's evidence that these arrangements did deliver concrete advantages for the Applicant, as it did for the other LEP members. The Applicant used the CCS framework.

33. The next stage was that LEP sought to develop a London-specific buying structure, to serve various ends considered desirable by the London authorities, rather than remain within a national system. Mr De Vela summarised these as including greater transactional efficiency, various improved customer facing tools, and what he described as wider strategic objectives, which including social value and green energy requirements. LEP developed a service level agreement around these requirements.

34. A tender exercise for a new, separate, London framework based on this service level agreement failed. An open contract notice was issued on 29 April 2019, but no satisfactory bid was received.

35. After that, LEP continued with attempts to set up an arrangement using the enhanced service level agreement. Rather than set up a new framework, the new approach was to use the service level agreement for procurement within an existing framework. That framework could only be provided by LASER, because CCS were not able to deliver a start date of 1 April 2020, as required by LEP.

36. As a result, on 5 November 2019, the Applicant entered into a framework agreement with LASER.

37. As to the two call off contracts, LASER undertook a process to identify possible suppliers specifically for LEP members. The only electricity supplier that came forward was Npower. What Mr De Vale described as a "mini-competition" took place for the preferred gas supplier, which was won by Corona. There was one other contractor in the competition.

38. The bills paid by the Respondent, and passed on through the service charge to leaseholders where relevant, are comprised of commodity costs – that is, the gas or electricity – and other, non-commodity costs. These include the costs and charges of the call off contractors and the (small) fees of LASER.

Evidence of costs since 2020

39. We received evidence from Respondents that the bills they faced had increased very substantially in the time since the contracts came into force.

40. The most systematic evidence came from Mr Lennard, and was recorded in his witness statement. Mr Lennard had accessed a great volume of data on electricity prices through a series of Freedom of Information requests to the Applicant. He produced a short table that reflected this data, which compared (among other things) the price given as that secured by LASER, taken from Mr De Vela's witness statement and its attachments, with the most common tariff, as charged to leaseholders. The figures are for the tariff per kilowatt hour for the category of electricity called non-half hour. The figures are as follows:

Period	**LASER tariff**	**Most common Leaseholder tariff**
2020/21	4p	12.453p
2021/22	5p	13.007p
2022/24	12p	21.164p

41. Thus, in Mr De Vela's terms, it appears that between 68% and 43% of the total cost to (most) leaseholders comprised non-commodity costs, that is, those additional costs attributable to the call off supplier and LASER's fees rather than the wholesale cost negotiated by LASER.

42. This evidence was uncontested by the Applicant. In the light of the more anecdotal evidence from other Respondents, we accept that the account shown by Mr Lennard's figures would be very broadly replicated in respect of other electricity categories and gas.

Submissions

43. Mr McGregor's principal submission related to the possibility of evidence of prejudice to the leaseholders, the importance of which is apparent from *Daejan*. He argued that, before the leaseholders (and by

extension, the Tribunal) could assess whether they had suffered prejudice from a failure to consult, they must be provided with sufficient information to enable them to make that assessment, and that had not happened.

44. Mr McGregor said that it was not disputed that some form of framework agreement could be the most efficient way to purchase gas and electricity. But what was open to criticism was the way in which the Applicant had gone about securing the current arrangements. He said it was not clear why the preceding arrangement with CCS could not have continued, that it appeared that the Applicant had not engaged with CCS in time for CCS to be able to start by the April 2020 deadline, and that there was nothing to show that LASER was to be preferred. Similarly, the grant of the call off contracts to Npower and Corona was not properly explained. It was necessary that the leaseholders should be able to understand why there was such a narrow choice in respect of both contracts. There was no material available relating to investigation into the performance of Npower and Corona. Given the lack of information on any and all of these matters, the leaseholders could not possibly specify what prejudice they had suffered.

45. As to the proper approach to be adopted to dispensation by the Tribunal, Mr McGregor submitted that *Daejan* was to be distinguished. The test under section 20ZA was one of reasonableness. The Applicant's case was that *Daejan* set down a general test requiring financial prejudice in all cases. But, Mr McGregor argued, *Daejan* was a very different case. In paragraph [38], the Supreme Court set out the questions it was answering, the third of which was "the approach to be adopted when prejudice is alleged by tenants owing to the landlord's failure to comply with the requirements". In this case, Mr McGregor said, there was no such complaint. Rather, in this case, the Respondents were complaining about their inability to assess whether they had suffered prejudice.

46. The facts of *Daejan* were different. It did not concern a qualifying long term agreement. There had been extensive consultation, which made it easy for the Court to say that the tenants must show prejudice, because the tenants knew everything that there was to know about the relevant issues (works, rather than a long term contract). In this case, there was no consultation at all, and the tenants had no idea what they would need to know in order to establish prejudice.

47. In connection with the question of the availability of the requisite information, Mr MrGregor argued that the only piece of evidence provided by the Applicant to show that the call off contracts secured better value for money were the charts appended to Mr De Vela's witness statement, which plotted the price secured by the framework agreement against the front month market price of the two

commodities. Mr McGregor made various criticisms of the provenance and relevance of the charts.

48. Mr McGregor also referred us to his written representations, in which he draws attention to the statement in *Daejan* at paragraph [41] that refers to it being inappropriate to impose fetters on the Tribunal's exercise of the jurisdiction, and, given the "almost infinitely various" circumstances in which dispensation may arise, that the principles set down by the Supreme Court "should not be regarded as representing rigid rules".

49. In respect of the passage (from paragraph [67]) in which the Supreme Court says that, while legal proof remains with the Applicant, there was a factual burden on the tenants to identify some relevant prejudice, Mr McGregor argued that that was no doubt straightforward where the relevant material was available (as in *Daejan*), but was not at all practicable when the Applicant itself had not made available the basic information that would enable the Respondents to discharge a factual burden.

50. Mr McGregor argued that, had there been a consultation, the Respondents would have asked for a list of additional information, specified in Mr McGregor's written submission. This included copies of the framework agreement, access agreements and the call off contracts, including documents included by reference in those agreements, justification for any redactions in the agreements, evidence as to the Applicant's process in relation to the agreements, including specifically why it contracted with Npower and Corona, and an explanation of the basis of their non-commodity pricing, specifically in relation to LASER's costs. In his submissions, Mr McGregor added that, once such information had been provided, there may have been further supplementary requests for information.

51. Mr McGregor also argued that both *Aster Communities v Chapman* [2020] UKUT 177 (LC) and *Lambeth London Borough Council v Kelly* [2022] UKUT 290 (LC), cited by Mr Madge-Wyld, were to be distinguished. In the former, the Upper Tribunal found that the landlord had undertaken a good-faith consultation process that amounted to more extensive consultation than required by section 20. In the latter, the information needed by the Respondent had been eventually provided, and the Respondent had not indicated the need for further information, so the finding as to the tenants' inability to demonstrate prejudice was fair.

52. Mr McGregor referred to the multiple and misleading letters sent out by the Applicant in attempted satisfaction of the Tribunal's directions. The chaotic way in which this had been done, he argued, was sufficient on its own for us to find that allowing dispensation would be unreasonable.

53. Mr McGregor also contested Mr Madge-Wyld's assertion that it was the very restrictive schedule 2 of the 2003 regulations that was engaged. He argued that it was inconsistent with regulation 33(8) of the Public Contracts Regulations 2015, regulation 33(8) that a single contractor had been nominated for the electricity contract, but a mini-competition organised in respect of the gas contract. As we understood him, this he saw as an argument to the effect that a public notice was not necessary, and that therefore schedule 1 applied.

54. A number of the written responses (for instance, that from S Cordon and a number of other respondents, and that from A Salgueiro), referred to paragraph 11 of the Applicant's statement of case. That asserts that "Lambeth did not give public notice for the contracts it enters into because it will rely on the public notices served by LASER when they set up the framework agreements which Lambeth used to obtain their own contracts". Some respondents merely claimed this in aid of the assertion that it was unclear which contracts the dispensation application related to. But others suggested that it indicated that a proper public notice had not been made, and that that in turn meant that the consultation was governed by schedule 1.

55. Mr Russell made further submissions on his own account.

56. He argued, first, that at the point of drafting the statement of case, the Applicant was treating the framework agreement with LASER as being a qualifying long term agreement. He noted the passage in which the statement of case argues that "it would not be practical for leaseholders to be consulted on every occasion that LASER instructs the supplier to forward buy energy on Lambeth's behalf, as by the time the consultation process has been concluded, the price would no longer be available." (see paragraph [94] below).

57. Secondly, he argued that the Applicant's position at that time was right, in that the framework agreement *was* a qualifying long term agreement, and that we should so find. The core of the argument was that, because LASER's fee was passed on to leaseholders via the call off contractors' invoices, that fee was, indirectly, a "relevant contribution" paid by the leaseholders.

58. Thirdly, Mr Russell also addressed us as to distinguishing *Daejan*, relevantly covering similar points to those raised by Mr McGregor (albeit he also quoted the dissenting judgments).

59. Fourth, he also echoed Mr McGregor on the lack of the information that the Respondents would need to demonstrate prejudice, making the particular point that, insofar as the Applicant did provide some information on pricing, it was on the basis of the LASER framework versus no framework at all. It was therefore impossible for the Respondents to construct a counter factual comparison between this

framework, and a realistic alternative framework that might have been available.

60. Mr Russell's final point was that there were a number of serious issues with the Applicant's performance of its functions, and it would conduce to its proper accountability as a public body were we to decline this application. Otherwise, we would be endorsing its bad behaviour.

61. Mr Madge-Wyld responded.

62. The application was for dispensation in respect of the call off contracts. The status of the framework contract was not before us. Whether it is a qualifying long term agreement or not would be a matter for a challenge under section 27A of the 1985 Act.

63. Mr Madge-Wyld was not, he said, fully instructed as to the situation with the letters, but observed that a large number of responses had in fact been received, and that their nature did not mean that the directions had not been adhered to.

64. *Daejan* could not be distinguished. It clearly set out how we should approach dispensation, and was further reinforced by additional authorities. He referred to *Aster* in the Upper Tribunal, noting that the approach to dispensation was not overturned in the Court of Appeal. In the most recent case, *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC), at paragraph [61] Edwin Johnson J expressly referred to paragraph [17] in *Aster*: "[t]he exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice."

65. In respect of paragraph [41] of *Daejan*, it was to be seen in the context of paragraph [42], in which Lord Neuberger considered section 20ZA in its statutory context. He came to the conclusion (in paragraph [44]) that the purpose of the provisions was to avoid the financial consequences of tenants paying for inappropriate work or paying too much for them, that is, in this case, paying for an inappropriate long term contract, or paying too much for it. The purpose could only be properly reflected in terms of financial prejudice.

66. The factual burden is on the tenants to identify prejudice. As to the point that that was impossible because insufficient material had been provided, the Respondents had, now, more information than they would have had had consultation taken place, and could not identify prejudice.

67. The requirements were those in schedule 2 of the regulations. Mr Madge-Wyld said that it was hard to think of a contract that is more obviously subject to the public procurement requirement for a pubic

notice. Mr Madge-Wyld interpreted some of the objections to the terms of the statement of case as essentially an objection to public notice being given in advance of the consultation. He argued that the fact that a public notice had already been given was unexceptional – it would usually be the case that a public sector landlord would not engage on a schedule 2 consultation without having first given public notice. It is because public consultation is necessarily constrained when a contract is subject to public procurement regulation that schedule 2 was much more limited than schedule 1. It was not open to a consultee to suggest another provider, which was why the consultation issue was only as to the services to be provided. Since those services were gas and electricity, it is not conceivable that the position taken over a long process of years involving LEP and other boroughs would have been reversed.

68. As to the next stage of the schedule 2 requirements, the landlord's proposal, it would not have been possible to provide financial details on the basis of future rates for the commodities, but even if that *had* been possible, given the inability to go to another contractor, it was difficult to see what responses could have achieved.

69. No Respondent had said what they would have said if there had been consultation. In any event, the main element to the bills was the cost of the energy, which had no bearing on the call off contract in that it was set by the LASER negotiators. LASER's own costs would be the same, irrespective of call off contractor, so the only possible difference would be whether Npower or Corona's administrative costs would be higher than others. But the evidence was that Npower was the only electricity provider that was interested, and it was Corona who won the mini-competition.

Determination

70. The Tribunal is concerned solely with the application under section 20ZA of the 1985 Act to dispense with the consultation requirements under section 20 and the regulations.

71. First, we are satisfied that the relevant schedule in the regulations is schedule 2. We did not receive extended submissions on the application of the law relating to public procurement, and it is not immediately apparent to us what the statement in the Applicant's statement of case means. However, it must be that a public sector contract of this significance is subject to the obligation for a public notice, as Mr Madge-Wyld submitted. Our preliminary task is to decide which of schedules 1 and 2 apply. In deciding that, it is not ultimately relevant whether a valid public notice has been given or not. What matters is whether a public notice is *required*, and clearly it must be. Accordingly, it is the requirements in schedule 2 that apply.

72. We reject the attempts by Mr McGregor and Mr Russell to distinguish *Daejan*. We accept Mr Madge-Wyld's submission that the inherent logic of *Daejan* is that only financial prejudice enters into the calculation. That follows, in our view, from the Supreme Court's identification of the (only) objects of that part of the 1985 Act as being those spelled out in section 19, which is to say the avoidance of unfair prejudice being imposed on tenants; combined with the Court's approach of *directly applying* those objects to the terms of section 20 and 20ZA. Neither of those conclusions, particularly the second, was inevitable, but that is what the Court said, and it is binding upon us.

73. It *might* have been possible at one time to argue that paragraph [41] provided a crack through which Mr McGregor and Mr Russell's key point – the need for information sufficient to allow a prejudice assessment as a precondition for the factual burden on the tenants of identifying prejudice – might slip (Mr McGregor optimistically described it as a cavern). However, we accept that the Upper Tribunal cases cited by Mr Madge-Wyld close that gap, if ever it was available. *Aster* and the other cases are as binding upon us as is the decision of the Supreme Court. Prejudice, and the initial demonstration thereof by the tenants, is now what a derogation application is all about.

74. In a sense, that is sufficient to decide the application, as the Respondents did not (as of necessity, they argued) put a positive case in respect of prejudice. Nonetheless, we accept Mr Madge-Wyld's invitation to consider what would have happened, had there been a schedule 2 consultation. In doing so, we take a realistic attitude to the information that would have been provided and the approach that the Applicant would have taken.

75. The matters that would have been set out in the notice of intention would have been a description of the services to be provided ("the relevant matters") under regulation 1(2)(a) and the landlord's reasons for considering it necessary (regulation 1(2)(b)). The rest of the requirements in regulation 1(2) are either not relevant, or the invitation to respond etc.

76. The description of the services would be in terms of the general operating approach of LASER. The reasons would have been a justification of the advantages of this approach, in general terms, similar to those provided in the statement of case. No one really contests at a general level the advantages of the sort of framework agreement entered into by the Applicant, for the reasons advanced. Mr McGregor expressly accepted the point. Mr Russell's argument was as to possible alternative frameworks, not a challenge to the basic concept. The same, or similar, appears to be the views of those respondents who provided substantive responses.

77. The landlord's proposal published to the leaseholders (regulations 4 and 5) would include nothing more than the identities of the parties, the length of the agreement, and the explanation as to why no costings were available (which they would not be). As Mr Madge-Wyld observes, the Respondents have now, as a result of this application, had much more detail than that, and cannot identify prejudice. They could not have done so then, so as to persuade the Applicant to adopt another course.

78. If a respondent were to ask for the long list of materials in the list in Mr McGregor's written submission, the Applicant might well have declined, on the basis that it was not obliged to provide it.

79. But if it had, then the main thrust of the response, as it applies to the questions as to the process taken and the reasons for contracting with Npower and Corona, would have been broadly the explanation as set out in the statement of case, or merely what we have set out in this decision at paragraphs [30] to 938]. Any request for a comparison with the previous CSS arrangement would be entirely speculative and general in respect of financial outcomes, and would have meant that the advantages of the London-centred service level agreement endorsed by the Applicant would not be realised. No doubt the agreements themselves would have been almost wholly redacted as commercially sensitive, as was the case in the one agreement disclosed in these proceedings.

80. None of that would have allowed the Respondents to seriously contest the proposal.

81. The history related above appears to us to amount to a situation in which the LEP-enhanced service agreement, which inevitably meant a framework agreement with LASER (only) was the only game in town. That required call off contracts for electricity and gas. The only option in respect of electricity was Npower. In respect of gas, there had been one other contractor in play before the mini-competition organised by LEP, but that had been rejected in favour of Corona. Even if other call off contractors might have been available (and there was some suggestion that a small minority of authorities had contracted with others), there is nothing in what would have been disclosed in the consultation process that would have meant that the leaseholders could have persuaded the Applicant to abandon Npower and Corona. And as it is clear that a large majority of LEP authorities did contract with Npower and Corona, it could hardly be said that that was an unreasonable or inappropriate choice. Where an authority had decided to follow the LEP recommendations, there was no alternative to Npower, and Corona won the mini-competition.

82. Further, we think it likely that the prime mover in the Respondents' discontent is the level of charges they face for electricity and gas. Mr

Madge-Wyld suggested that the main components of these higher bills was the electricity and gas, and of what remained, LASER's fee, which would not have been different had there been different call off contractors. We doubt this. Mr Lennard's figures suggest that for half of the period, the commodity price was substantially less than half of the total cost (in relation to the most common tariff), and for the other two years, it was not far off half. We do not have a calculation, but is seems likely that LASER's fees are a relatively small proportion of the non-commodity cost. It is true that Mr Lennard's figures only related to one element of electricity, but as we note above, they are borne out by the admittedly anecdotal evidence of other leaseholders.

83. There may, in other words, be a real concern about the level of fees being charged now for gas and electricity to the Applicants' leaseholders. But that cannot be relevant to what would have happened if there had been a schedule 2 consultation in 2019. No-one knew that that was what the fees would be then. While this is, no doubt, partly because of the volatility of the market (or its recent inflation), it appears that it may also be something to do with the non-commodity charges. We are, however, in no position to know what that is, even now, so there is no possibility that it is something that could have been uncovered in 2019, and used to persuade the Applicant to contract in a way that would be more advantageous.

84. We add that it seems to us that a significant contribution to the Respondents' submissions has, in reality, been a dissatisfaction with, or critique of, the policy and commercial decisions made by the Applicant over a period of years, but particularly in the run up to the events of 2019, and the failure of the first tender, for the wholly London-specific framework, in that year.

85. But these are not the right proceedings for those criticisms to be deployed. First, we are obliged to focus on a limited decision at one point in that process – the entering into of the call off contracts; and to do so through the narrow perspective of tenant prejudice.

86. Secondly, and more broadly, the Tribunal's jurisdiction under section 20ZA is simply neither appropriate for, nor equipped to conduct, a judicial review-type investigation of the rationality of the Applicant's decision making to join the LEP process, and to stick with it, rather than, for instance, to abandon the enhanced service level agreement and contract with CCS, or whatever other options could be shown to have been available to it.

87. We now consider subordinate submissions made by the Respondents.

88. We reject Mr Russell's submission that we should decide that the framework agreement is a qualifying long term agreement. We agree with Mr Madge-Wyld that we are only concerned with the application

under section 20ZA in respect of the call off contracts. We would be acting outwith our jurisdiction were we to consider the status of the framework agreement.

89. We reject Mr Russell's submission that the accountability of the Applicant as a public body is relevant to our decision in relation to dispensation. The 1985 Act regulates landlords qua landlords, and is indifferent to the legal or indeed constitutional status of a landlord. It is as a landlord, not as a public body, that the Applicant appears before us.

90. We also reject Mr McGregor's submission that the chaotic way in which the Applicant sought to communicate at required by the directions was such that that alone justified refusing dispensation. There is nothing in *Daejan* or any of the other case law that is now relevant that would justify refusing dispensation to punish a party for poor conduct of the litigation. Given the inability to marry the point to any prejudice, it would presumably mean refusing the application outright. To do so would be grossly disproportionate. Limiting the annual costs of electricity and gas to £100 for each leaseholder would involve the Applicant in absorbing millions of pounds worth of losses.

91. We also note one small inaccuracy in Mr McGregor's submissions. He stated that the Applicant had failed to engage with CCS in time for them to be able to offer a framework agreement that would satisfy the Applicant in time for the April 2020 start date. It was in fact Mr De Vela's evidence that CCS had been fully aware of the process throughout. It may be (we do not know) that the constricted time scale created by the failure of the original London-only framework proposal is the reason why CCS was unable to be prepared in time to the offer an equivalent adapted framework to that provided by LASER, but that is a different point.

92. We accordingly allow the application to dispense with the consultation requirements under section 20ZA of the 1985 Act. In the absence of identified prejudice to the Respondents, we do so unconditionally.

Some closing observations

93. We have rejected Mr McGregor's submission that we refuse the application because of the letters produced by the Applicant. That does not mean that we regard what happened as being in any way acceptable. It is difficult to understand how the decision to behave in such a chaotic and unhelpful way could have been made – someone actually wrote the letters, and in respect of eight of them, presumably instructed them to be sent on the same day. The Tribunal, and above all the Applicant's leaseholders, are entitled to better.

94. Mr Russell, in his submissions, referred to the statement in the statement of case noted at paragraph [56] above. Mr Russell referred to it in pursuance of his argument that the framework agreement was a qualifying long term agreement. But he also criticises it as not relevant to (even) the framework contract. We agree with Mr Russell's criticism. Quite apart from the question of whether the framework agreement required consultation, that passage is seriously misleading. Even if the Applicant thought at the time that the framework agreement counted as a qualifying long term agreement, the argument was specious. The prices negotiated on a short time frame by LASER do not constitute the framework agreement between the Applicant and LASER (whatever the actual contractual relations). Rather, they relate to the mechanism used by LASER to do its job of negotiating prices on the wholesale market in such a way as to reduce risk and maintain overall price stability in a volatile market. It is an easy argument to make (and we think it has been used in other LASER cases involving London boroughs), but it ignores the basic structure of contracts as they have been explained to us, most clearly in Mr De Vela's oral evidence. The use of this argument by the Applicant (and other London Boroughs) seems to us either to indicate that the people responsible for its statement of case do not understand the nature of the contracts involved; or that the argument is being deployed dishonestly. Neither is an attractive prospect.

95. Finally, this determination is concerned solely with the granting of dispensation from the consultation requirements in relation to the two contracts. If the Respondents, or other leaseholders, consider that the non-commodity elements of their electricity and gas bills are not reasonably incurred by them, they have the option of making applications under section 27A of the 1985 Act.

Rights of appeal

96. 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 London regional office.

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

98. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

99. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Judge Prof Richard Percival **Date:** 3 April 2024

Appendix 1: Respondents

Arawole, M 57 Ebenezer House, SE11 4HN
Atkinson, G Flat 2, 50 Streatham Common North, SW16 3HS
Barclay, K Flat 78, Wimborne House SW8 1AJ
Beardsley, S 75 Ebenezer House, SE11 4HN
Calladine, D 88B Bedford Road, SW4 7HD
Charman, C 84 Teversham Lane, SW8 2DP
Chegwin, P 30 Witchwood Hse, SW9 7NN
Longair, S 19 Deauville Court, SW4 8QH
Mcgregor, A 39 Calais Gate, SE5 9RQ
Nye, J 12 Constantine House, SW2 3BN
Parrott, M 7 David Close, SW8 2SR
Rogers, B Flat 1 Poullet House, 175 Tulse Hill, SW2 3DB
Shah, S 34 Deauville Court, SW4 8QH
Warner, A Flat 4, Wynyard House, SW11 5BT
Bayley, M 71 Fairford House, SE11 4HR
Caseley, L 301 Southwyck House, SW9 8TS
Chahed, Y 38 Mead Row, SE1 7JG
Checconi, A 18 Falmouth House, SE11 5 JT
Chilvers, V 12 Deauville Court, SW4 8QH
Cordon, S 56 Fairford House, SE11 4HR
Costa, M 7 Edgar House, SW8 2SS
Danvers-Russell, D Flat 5, 333 Clapham Road, SW9 9BS
Davies, S Flat 30, Despard House, SW2 3EW
Degan, R 17 Dowes House, SW16 2TL
Duff, F 73 St Matthews Road, SW2 1NE
Edewor, K Flat 39, Bloomsbury House, SW4 8HZ
Elam, A Flat 9, 1 Lanercost Close, SW2 3BS
Forbes, L D 37 Baddeley House, SE11 5NJ
Foxwell, I 8 Seymour House, SW8 2AA
Garside, J 364 Southwyck House, SW9 8TT
Hadfield, R 26 Aveline Street, SE11 5DQ
Henderson, S 30 Calais Gate, SE5 9RQ
Inniss, H 92 Hope Park, BR1 3RQ
Keelson, J 113 Hope Park, BR1 3RG
Ligato, M 305 Southwyck House, SW9 8TS
Mahoney-Phillips, J 127D Brixton Road, SW9 6ED
Maybank, R Flat 5, Seymour House, SW8 2AA
McGregor, A 39 Calais Gate, Cormont Road, SE5 9RQ
Moppett, D Flat 2, Myatt House, SE5 9JD
Morris, I G 3 Metcalfe House, SW8 2AW
Patrick, I 6 Ebenezer House, SE11 4HL
Pratt, L Flat 41, Calais Gate, SE5 9RQ
Puddifier, E 40 Deauville Court, SW4 8QH
Punjani, R 30 Farnley House, SW8 2RT
Retsinas, C Flat 4, Stambourne House, SW8 2DH
Ross, A 353 Southwyck House, SW9 8TT
Russell, M 16 Basil House, SW8 2SW
Salgueiro, A 28 Ebenezer House, SE11 4HL
Serres, I 74B Wiltshire Road, SW9 7NH

Seymour, G 37 Deauville Court, SW4 8QH
Simpson, M 25 St Matthews Road, SW2 1NE
Todd, B 29 Deauville Court, SW4 8QH
Whitehead, E Flat C, 355 Brixton Road, SW9 7DA
Wilde, S Flat 28, 1 Lanercost Close, SW2 3DS
Williams, A Flat 3, 43 Telford Avenue, SW2 4XL
Wynn, A 12A Harcourt House, SW8 2AB
Zara, C 78 Hope Park, BR1 3RQ

Appendix 2: Respondents represented by Mr McGregor

Anna McGregor
Judith Nye
Alexandra Elam
Robert Hadfield
Steve Wilde
Antony Wynn
Elizabeth Whitehead
Robert Punjani
Ivy Serres
Maureen Simpson
Sophie Henderson
Frances Duff-Executor for
Margaret Sinclair Duff
Emily Puddifer
Kevwe Edewor
Victoria Chilvers
Stuart Davies
Dorette Danvers-Russell
Louisa Pratt
Isabella Foxwell
George Seymour
Adrian Salgueiro
Sarah Longair
Sarayu Shah
Bruce Todd
Alessio Checconi
Benjamin Rogers
Angella Williams
Dan Calladine
Catherine Charman
Karen Barclay
Glenise Atkinson
Pauline Chegwin
Monica Parrott