FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AE/LDC/2015/0143**
Property	**:**	**21 Dyne Road, London, NW6 7XG**
Applicant	**:**	**Applecroft Properties Limited**
Representative	**:**	**Moreland Estate Management**
Respondents	**:**	**Ms G Rowley (Flat 21A)** **Ms Y Archibald (Flat 21B)** **Mr I Patterson (Flat 21C)**
Type of application	**:**	**An application for dispensation from the consultation requirements of s.20 Landlord and Tenant Act 1985**
Tribunal member	**:**	**(1) Judge Amran Vance** **(2) Ms M Krisko, FRICS**
Date and venue of hearing	**:**	**N/A**
Date of decision	**:**	**3 April 2019**

DECISION

Decision

1. The tribunal grants the applicant retrospective dispensation from the statutory consultation requirements in respect of works carried out to 21 Dyne Road, London, NW6 7XG ("the Building") in the week commencing 25 October 2015. The costs incurred in respect of the works is said to be £6,850 plus VAT.

2. Dispensation is granted on the condition that the applicant is to bear its own costs of this application, which should not be passed on to leaseholders.

Background

3. On 8 January 2019, we decided to set aside and remake the tribunal's previous decision dated 2 February 2016, as it appeared that Mr Paterson had not been provided with a copy of the appeal bundle by the applicant which, he asserted, and which we accepted, had prevented him from responding in full to the application. The decision of 2 February 2016 was set aside under Rule 51(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

4. Information concerning the procedural history of this application, and the regrettable delay that has occurred following the tribunal's receipt, from the leaseholders, of applications for permission to appeal, and to set aside, the decision of 2 February 2019 is contained in the decision of 8 January 2019, and do not need to be repeated here.

5. Directions in respect of this application were made by the tribunal on 8 January 2019. These provided for the applicant and the leaseholders to liaise with each other and to send to the tribunal an agreed paginated bundle of documents to assist the tribunal in recreating its file, which appears to have been destroyed. The directions also made provision for the applicant to send to the tribunal, and to each leaseholder, a statement of case in support of its application, and in response to the assertions made by the leaseholders: (a) in their letters seeking permission to appeal; and (b) in letters to the tribunal sent in July 2016. The leaseholders had permission to send a short reply to the tribunal in response. The tribunal was then to remake its decision on the basis of the documents provided.

6. A bundle of documents was provided by the respondent leaseholders, for which we are grateful. However, as no statement of case was forthcoming from the applicant, the respondents did not provide one in reply. This decision is therefore reached on consideration of the documents provided by the respondents in their bundle and documents held in the tribunal's electronic case management system. Page numbers in square brackets and in bold below refer to pages in the bundle provided by the leaseholders.

7. Details of the statutory provisions relevant to this application are set out in Appendix 2 to this decision.

8. In its application, received by the tribunal on 18 November 2015, the applicant sought retrospective dispensation from the statutory consultation requirements imposed by s.20 Landlord and Tenant Act 1985 in respect of internal and external works said to have been carried out during the week commencing 26 October 2015, at an cost of £6,850 plus VAT. The works were said to be emergency works required to stop and make good damage caused by water ingress at the Building and comprised:

    (a) external works: repairing and repointing of external brickwork; checking air vents; repairing a rainwater pipe; and reinstating decking; and

    (b) internal works: removing plaster to side wall; making good brickwork; checking beneath floorboards that air vents are clear; fitting a damp proof barrier; forming a false plasterboard wall and plaster, fitting skirting; reinstating the floor and radiator.

9. The respondents are long leaseholders of flats in the Building. Ms Rowley is the leaseholder of the Flat 21A, the flat that was affected by the damp penetration that led to the works carried out in October 2015.

10. From June 2015 onwards, Ms Rowley sent a succession of emails to the managing agents of the Building, Mayfield Asset and Property Management ("Mayfield"). In an email dated 23 June 2015 **[42]** she complains of damp in her spare bedroom and defective rendering to the exterior wall. She received a response stating that the agent would take a look before getting contractors to price up the works.

11. On 30 July 2015, Mayfield instructed Lionhill surveyors to carry out an inspection of Flat 21A. Lionhill subsequently prepared a Defects Report dated 10 August 2015 **[124].** In that report, the surveyor describes the Building as a mid-terraced residential property constructed circa 1900. The surveyor records areas of missing and loose mortar to the masonry wall of Flat 21A, with damp ingress to the external wall and mould staining present internally. The surveyor concludes that rising damp is the most probable cause and recommends damp injection works to the elevation, infilling of a hole to the wall, and repointing of the external brickwork.

12. On 1 September 2015, Ms Rowley sent a further email to Mayfield **[44],** asking for an update following the surveyor's visit. She expresses concern about the condition of the wall, which she states is in a bad state of repair and which needs to be made good internally and externally. She also states that she is unable to use her spare room, that the issue was serious, and that action was needed before the weather became worse. Attached

to that email was two photographs that clearly show large areas of severe decay to the brick render of what she states was her exterior wall.

13. Ms Rowley emailed Mayfield again on 11 September 2015, this time asking for an update on progress with the costing and scheduling of the works to the wall of her flat, and stating that she needed her spare bedroom to be available in time to accommodate guests staying from 19 October 2015.

14. In email in response, on 16 September 2015 **[56]**, Mr Normington at Mayfield stated that contractors had been instructed to quote for remedial works and said that "We may find that the cost of the damp proofing works will be such that the other two leaseholders will need to be consulted, but we will do everything possible to ensure that the room is usable again by mid-October.

15. On 25 September 2015, Mayfield obtained two quotes for the intended repair work. LPC Maintenance Limited provided a quote for works needed to address water ingress **[122]** in the sum of £8600 plus VAT. A second quote was provided by Montagu Property Services ("Montagu) on the same day **[123]** in the sum of £6850 plus VAT.

16. In an email from Mayfield to Montagu dated 29 September 2015, to which Ms Rowley was copied in, Montagu were instructed to carry out the repair work. Ms Rowley responded the following day **[59]** indicating that she had agreed a start date for the works of 26 October 2015.

The leaseholders' case

17. Ms Rowley, accepts that the works carried out to her flat 21A and the exterior of the Building were required, but asserts that the reason why the works became urgent was because of the applicant's four-month delay in carrying out the required repairs.

18. She states that before the repairs commenced, the exterior wall to her flat was visibly damp. This she contends was due of previous works that were carried out to a negligent standard. She also refers to a downpipe from the gutter discharging onto the wall of her flat, as well as holes in the render of the exterior wall, leading to damp and decay to the brick exterior of the Building.

19. She acknowledges that exterior repair work was carried out in the week commencing 25 October 2015, during which holes in the render and brickwork were repaired and a damp proof membrane was installed. However, apart from shoring up the wall and re-plastering, she did not think any other internal work, including redecoration, was carried out.

20. It is her case that given that the delay caused by the applicant, this application for dispensation should be refused, because "in the absence of consultation there is no ability for the leaseholders to legitimately challenge the proposal to impose an extraordinary service charge".

21. She also argues that:

    (a) the cost of the works should have been claimed under the buildings insurance policy;

    (b) monies should already have been available in the service charge accounts to pay for the costs of these works; and

    (c) the cost of the work should be paid for by the applicant because the costs were incurred as a result of breaches of its repairing obligations under the lease

22. The other leaseholders broadly agree with the points made by Ms Rowley, summarised at points (a) and (b) in the previous paragraph, but also contend that:

    (a) the tribunal's application was the first notification they received about the works having been carried out. No information was provided by applicant before, or after, the works commenced;

    (b) the applicant was aware of the problems since June 2015. In light of the delay in commencement, they could not be regarded as urgent and full statutory consultation should have taken place

    (c) the applicant has not explained why some of the works could not have been carried out over a longer period of time;

    (d) the applicant has not explained the cause of damage;

    (e) it is unclear if they are being asked to contribute towards costs of internal works to Flat A;

    (f) no clear breakdown of the costs incurred, or the sum payable by them as been provided

Reasons for Decision

23. The leading authority in relation to s.20ZA dispensation requests is *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 ("Benson") in which the Supreme Court set out guidance as to the approach to be taken by a tribunal when considering such applications. This was to focus on the extent, if any, to which the lessees were prejudiced in either paying for inappropriate works or paying more than would be appropriate, because of the failure of the landlord to comply with the consultation requirements. In his judgment, Lord Neuberger said as follows;

    > 44. Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section

> 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
>
> 45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with.

24. None of the leaseholders suggest that the works carried out were inappropriate or unnecessary. In fact, Ms Rowley contends that they were very much needed. Nor is there any evidence that the leaseholders are, or were, asked to pay more than is appropriate for the cost of the works.

25. The factual burden of identifying some relevant prejudice is on the leaseholders. They need to show that they have been prejudiced by the failure of the landlord to comply with the statutory consultation procedure. If a credible case of prejudice is established, then the burden is on the landlord to rebut that case

26. In directions issued on 7 July 2016, after the requests for permission to appeal were made, the leaseholders were invited to provide evidence of what they might have done differently if consultation had taken place and whether dispensation should be granted on terms. In response, it is suggested that they would have been able to review quotes and suggested alternative contractors and dispute the costs of the works.

27. We are satisfied that no relevant prejudice has been identified. Whilst compliance with the consultation procedure would have enabled the leaseholders to suggest alternative contractors and make observations on quotes received, there is no evidence to suggest that failure to comply with the consultation requirements has led to the applicant incurring costs in an unreasonable sum, or led to works being carried out that fall below a reasonable standard. No alternative quotes have been provided that would support such a contention.

28. That that these works were urgently required is clearly evidenced from the contents of the emails from Ms Rowley to the managing agents, in which she complained of damp in her spare bedroom and defective rendering to the exterior wall. Her first email appears to be the one dated 23 June 2015 **[42]** in which she complains of damp in her spare bedroom. In an email dated 1 September 2015 she informs the agents that the wall is in a bad state of repair and needs to be made good internally and externally **[44]**. Attached to that email were two photographs that clearly show large areas of severe decay to the brick

render of what she states was her exterior wall. She also states that she was unable to use her spare room, that the situation was serious, and that action was needed before the weather worsened. In an email to Ms Rowley dated 25 September 2015 **[54]**, the agents responded that they would progress the works as soon as possible.

29. Whilst there is some merit in the suggestion that there was an unreasonable delay by the applicant in commencing these repairs, if the statutory consultation process had been carried out this would have led to a delay in the works commencing until at least the beginning of September 2015, and quite possibly, a delay of similar length to the one that actually occurred. There is, in our view, no evidence that this delay led to the need for works that would not have been required if works had been carried out promptly, or that that the cost of the works has increased because of the delay. In short, no relevant prejudice is evident because of the failure to consult.

30. Ms Rowley is wrong to suggest that the consultation procedure is the only opportunity for leaseholders to challenge the landlord's ability to recover the costs of this work from them through the service charge. As referred to in paragraph 5 of the original tribunal's decision dated 2 February 2016, the leaseholders were, and probably still are, entitled to make an application to this tribunal under s.27A Landlord & Tenant Act 1985, seeking to challenge their liability to pay the costs in question. If their concern is that the costs were not reasonably incurred, including whether they were unreasonable in amount, or whether the standard of works was reasonable, then their remedy lies with a s.27A application.

31. The same is true if they wish to contend that the cost of the works has not been reasonably incurred because the landlord's delay, and alleged breaches of its repairing obligations under the lease, exacerbated the problem and led to the cost of repairs being more expensive than would otherwise be the case (see *Continental Property Ventures Inc v White* [2007] L & TR 4 Lands Tribunal.

32. It is unlikely, in our view, that the applicant would have been able to claim for the cost of the works under the buildings insurance policy but, in any event, that question is not relevant to whether dispensation from the consultation requirements should be granted. It may be relevant to any application under s.27A as to whether the costs were reasonably incurred.

33. Similarly, the argument that funds should already have been available in the leaseholders' service charge accounts to pay for the costs of these works is not relevant to this application, but might be relevant to a s.27A application if the lease makes provision for a sinking or reserve fund. That is also the case in respect of the points made by the leaseholders at paragraph 21(a)–(f) above, which concern the question of whether the costs were reasonably incurred, having regard to: the alleged failure to provide advance notification of the intended works; the possibility that the cost of the works could have been spread out over a period of time by

carrying out the essential works first, and leaving other works for later; the question of whether all leaseholders should have to contribute towards the cost of works to Flat A; and, the alleged lack of breakdown of the costs incurred.

34. As to the suggestion that the applicant has not explained the cause of damage, the conclusion reached in the Defects Report commissioned by the applicant is that the most probable cause was rising dampness.

35. We are satisfied that nothing turns on the leaseholders' complaint that the statement of truth in the application form is dated 5 September 2015. This may have been a typographical error or it may have been that the applicant was considering making a dispensation application earlier than it did. It was entitled to make an application at a time of its choosing. Whether such an application is granted is a matter for this tribunal, based on the evidence put before us.

36. We grant the application for dispensation. However, we consider this application should have been made earlier than it was, given that the applicant was aware of the damp problem by the end of June 2015, and given that the Defects Report dated 10 August 2015 identified the work required. It should have been obvious shortly after the report was received, or at the latest, once the quotes from contractors were obtained on 25 September 2015, that an application for dispensation would be necessary. Instead there was undue delay in making the application which was not received until 18 November 2015. We therefore make it a condition of such dispensation that the applicant is to bear its own costs of this application, which should not be passed on to leaseholders.

Amran Vance

3 April 2019

APPENDIX 1
RIGHTS OF APPEAL

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

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
RELEVANT LEGISLATION

Landlord and Tenant Act 1985

20ZA. Consultation requirements: supplementary

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

Service Charges (Consultation Requirements) (England) Regulations 2003.

Part 2 - consultation requirements for qualifying works for which public notice is not required

Notice of intention

1. (1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord’s reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2. (1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

4. (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a

recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6. (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of

proposed works made available for inspection under that paragraph.