FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/26UD/LDC/2019/0010**
Property	**:**	**23 & 25 Burleigh Road, Hertford, SG13 7HA**
Applicant	**:**	**Network Homes Limited** **Represented by Clarke Willmott LLP**
Respondents	**:**	**(1) David Alexander Carr** **Linda Jean Carr** **(2) Tom Alexander Saggers** **Unrepresented**
Date of Application	**:**	**3rd May 2019**
Type of Application	**:**	**Section 20 ZA of the Landlord and Tenant Act 1985** **Dispensation from consultation requirements**
Tribunal	**:**	**Judge J. Oxlade** **M. Wilcox BSc MRICS**
Date of Paper Hearing	**:**	**2nd July 2019**

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DECISION

The Tribunal refuses the application made on 3rd May 2019, pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the Act"), to dispense with the consultation requirements set out in paragraph 3 to Schedule 3 of the Service Charges (Consultation etc.) (England) Regulations 2003 ("the Regulations"), in respect of qualifying works to the premises in relation to (i) the replacement of the roof and rainwater goods, and (iii) repointing of chimney stacks, and (iii) all associated works, the Applicant not having satisfied the Tribunal that it would be reasonable to do so.

REASONS

The Applicant's case

1. An application for dispensation was made on the basis that the 23 & 25 Burleigh Road, Hertford, SG13 7HA ("the premises") had been scheduled for roof replacement in early 2019; a surveyor's report had said that replacement of the roof was required, as patch repairs would not be cost effective or appropriate.

2. Consultation with the Lessees consisted of the single notice procedure (in view of the 2017 Qualifying Long Term Agreement ("QLTA")), which by Schedule 3 of the Regulations, require the landlord to give notice in writing of his intention to carry out qualifying works and which "invite the making in writing of observations in relation to the proposed works or the landlord's estimated expenditure", state when the relevant period for making observations ends, require the landlord to have regard to those observations, and then within 21 days of receipt of observations, send a notice in writing stating his response to the observations.

3. The timetable for consultation in this case was as follows: on 11th February 2019 the notices of intention ("the notices") were sent out to two Lessees ("the Respondents"), on 13th and 18th February 2019 the Respondents made representations, and on 2nd April 2019 the landlord's notice in reply was issued.

4. The Applicant concedes departure from the procedure in two ways: by

   (i) Commencing the works on 13th February 2019 before the observation period was over, ("premature works"), and

   (ii) Not responding to observations ("the observations") within the 21 days ("late consideration and reply").

5. The effect of departure, provided by section 20(1) of the Act is that the Respondents contributions ("relevant contributions") are limited to £250 each, unless dispensation is granted by the Tribunal; hence the application.

6. The Applicant explains the departure from the requirements. The premature works arose for reasons outside the Applicant's control: it was miscommunication with the contractors; once started the works could not be stopped, without risk of damage to the premises. Further, late consideration and reply arose due to unavoidable delay in fully responding to the observations made.

7. As to there being no detriment or prejudice to the Respondents arising from these departures from procedure, the Applicant said that the works were necessary, could not be avoided, would have to have been undertaken anyway, and the Respondents would have to have paid for them irrespective of the failure to comply with the consultation requirements.

The Applicant's Evidence

8. The Applicant relies on a witness statement ("WS") made by the Applicant's Senior Compliance and Home Ownership Officer, Katherine Bond, dated 2nd May 2019, and exhibits, which include (a) a copy of the condition survey ("the survey") of the premises dated 5th March 2019 by Kelly Allen, with photographs (b) the notices, (c) the observations dated 13th February 2019 (from the Second Respondent) and 18th February 2019 (from the First Respondent), (d) the replies to consultation dated 2nd April 2019, and (e) further correspondence with the Tribunal, including a chain of email correspondence and schedule of additional roofs to be added to the works to be done ("the schedule").

Witness statement

9. In her WS, Ms Bond explains that a LTQA was established in 2017 for various possible works across the Applicants housing stock, which included window/door/roof replacement/external structural repairs and decoration, and in respect of which the Respondents were consulted. There was a rolling programme, and the intention was that once the contractors reached as specific area, works would be identified and investigated.

10. She said that an inspection of the subject block took place on 3rd May 2018 and identified that the roof was "in serious need of repair", but in a letter dated 4th June 2019 to the Tribunal it is accepted by the Applicant to be inaccurate. Rather it is said that an inspection took place during the period 26th September to 31st October 2018, though a report is not available, as the surveyor then employed by the Applicant is no longer employed by them and they cannot obtain a statement from him. The Applicant says that the Planned Works Surveyor identified the "roof as needing repairs", and relies on an email chain, though in fact in an email from him (Samson Bemba-Sempa) dated 26th September he says that he "inspected these and confirm these can be included"; he attached a schedule of premises to which his email refers – but, the subject premises are not included on that list.

11. Ms. Bond says that a further visit took place on 6th February 2019 which identified "the same and concluded replacement was necessary due to severe weathering to the roof and external structures".

12. So, on 11th February 2019 notices were sent out to the Respondents, but there was a miscommunication (not detailed) with the building contractor, who understood that he could start work, and so started to strip the roof on 13th February 2019. When this came to the attention of the Applicant on 14th February, attempts were made to halt the work, but it would have exposed the roof and building to the risk of damage, so instructions were given to continue. The works were completed on 5th March 2019, which was also the date of the survey report.

13. Further, it was acknowledged that the Respondents made observations on 13th and 18th February and replies were sent on 2nd April 2019 – which was after the works were completed - and outside the statutory period, and says that this was because a considered reply had to be made after investigations were conducted.

14. The Applicant says that they are aware that there were "technical failings" in compliance with the statutory consultation requirements – but that under the one-notice procedure the Respondents would not have been able to put forward their own contractor and were not entitled to have a list of estimates. The witness says that there was no prejudice.

Condition Survey

15. The Applicant relies on the survey of Kelly Allen, a building surveyor, who compiled a short condition survey on 5th March 2019 following an inspection on 6th February 2019, along with other properties on that road.

16. She inspected the roof from the road level on a dry day, noting it was a steep pitched roof, with concrete interlocking tiles, which had suffered "extreme delamination" due to weather which had "*caused* the tiles to begin to absorb water". There was an excessive amount of moss which she explained absorbed water like a sponge, which results in a roof being constantly wet, will travel below tiles, and rot wooden components. She said the roof was "in poor condition" and "nearing the end of its life". She pointed out that no internal inspection had taken place and no water ingress was confirmed. There was no mention of any complaints recorded about this roof. As to chimneys, the mortar was in poor condition and required re-pointing. There were several stepped cracks which required closer inspection. She said (having not inspected internally) that the insulation was not to the required depth and was only 100m to 150mm, not 270mm, so needed an upgrade; she did not say how she observed that to be so, but said that it was inspected subsequently, but did not say who by.

17. She opined that the roof was "nearing the end of its life", but did not give prognosis as to how long it would last. She opined on the quality of the resident's level of comfort, but did not say how she knew that was the case. She said that it could be predicted that inevitably water ingress would inevitably find its way in, did not say when, but that it could cause costly repairs.

18. There were un-dated photographs as Appendix A to the report, they are not specifically referred to by the Surveyor in the body of the report, and it is not clear who took them. The presence of scaffolding is not seen, which may suggest that some or all were taken prior to 31st January 2019. The copies of the photographs provided to the Tribunal were of poor quality; two of which (photographs 5 to 7) were taken of the same aspect and were annotated with comments pertaining to moss; a further photograph was of a gutter which required cleaning out.

19. In light of the Second Respondent's submissions in these proceedings, the Tribunal made further Directions, and the Applicant filed further evidence, in the form of letters dated 22nd May and 4th June 2019, and the email chain from the Planned works surveyor, together with schedule. In these letters the issue of when the first survey took place and absence of supporting report were addressed: photographs and notes were taken of the condition of the various properties together with the surveyor's recommendations and findings which led to the works commencing on the basis of the findings; the report of 5th March 2019 of Kelly Allen was obtained to support the current application, and to support the application for dispensation, and the "information and findings contained within the report were based on historical findings". Further, as to chronology it was said that a progress meeting was held on 15th January 2019, the scaffolding was erected on 31st

January 2019 (as the Applicant knew that works were required to the entire portfolio), the notices were sent out on 11th February 2019, and the roof was stripped on 13th February 2019. Finally, that the photographs at Appendix A to the report of Kelly Allen were taken on 10th and 25th January, and 20th February 2019; the contractor's estimates for the Burleigh Road portfolio were provided which suggests that the estimate for the premises was issued on 11th January 2019.

The Respondent's Case

20. The Second Respondent has filed a response to the application on behalf of himself and the First Respondent.

21. Objection to the application is set out in an email dated 13th June 2019, together with observations on the schedule of initial estimates of work, a comparable quote from LWS Roofing Limited for 45 Burleigh Road dated 20th February 2019, and part report from GC Burton BA MRICS dated 8th April 2019, headed Pridemore Cox opining on a roof which is not the roof of the subject premises.

22. The Second Respondent made the point that the works were carried out without any prior notice or consultation; that denied him any opportunity to undertake a survey to verify the condition of the roof, and so to evidence an argument that the works were an improvement rather than a repair.

23. He was concerned over the credibility of the claim that there was a need for an upgrade at all, as on the Applicant's own case, the property was inspected from the outside - not internally - and so recommendations made and action taken on the basis of assumptions and limited evidence. He provided a survey of a neighbouring property (13-19) of a similar age, which made it clear that the roof was not near the end of its life; the Second Respondent pointed out that 13-19 had been a roof which the Applicant had wanted to replace - the only reason that it did not take place was because a lessee of those premises "sent away" the scaffolding company when they turned up to work. He considered that the works to his premises were an improvement not a repair.

24. He questioned the Applicant's motive by reference to chronology: the estimated quote for the work was drawn up on 9th January 2019, yet the condition survey post-dated the quote - dated 5th March 2019 and undertaken on 6th February 2019. This suggested that the Applicant intended to do the work - and the survey was merely to justify it. He said that virtually all of his neighbours had received an almost identical survey – which would suggest a mass instruction based on an initial template, as opposed to a diligent survey of each property having taken place.

25. He disputed the conclusion of the Applicant's survey – namely, that "the residents were not enjoying the level of human comfort and warmth that is possible for a property such as this". It is not evidenced, no one had asked the residents, and in fact no one had any concerns about this.

26. He wished to point out that the detailed estimates should not be paid as asked for various reasons: some of the estimated calculations were wrong (i.e. size of the roof, number of rainwater goods, removal of ariels/satellite dishes, making gas flue safe), some work was not done (i.e. raking out and re-pointing of the stack, replacement of insulation, replacement of felt), some was double work (i.e. asbestos survey had already been done

and paid for). He provided a schedule of comments. Further, he pointed out the independent quote for other premises (41-47), which came in at £19,500.

27. He wished to ventilate his frustration with the Applicant's approach to this matter, and considered that this was an unreasonable burden on lessees; acknowledging if works were needed (and if they represented good value for money) then they had to be paid for.

28. In early representations dated 13th February 2019 the Second Respondent had said that he had received the notice that week, was shocked to see the costs sought from him, that the work had already begun, but he was not consulted over whether work was needed. The first that he was aware of any interest in the building, was when scaffolding was erected the previous week; if such costs were to be incurred, he would have expected much more warning, and he considered it to be extortionate. He would have sought a detailed breakdown and would rely on the £250 limitation.

29. The First Appellant said in a letter of 18th February 2019 that works had commenced before the section 20 notices were sent out, there was no survey report identifying what roofing problems require fixing, asking whether catastrophic failure had been identified in many other blocks in Burleigh Road, that £45,000 per block is in excess of local quotes, and asked how this was consistent with the charitable aims of the association.

The Law

30. Section 20(1) of the 1985 Act provides that " Where this section applies to any qualifying works or qualifying long term agreement ("QLTA"), the relevant contributions of tenants are limited in accordance with subsection (6) or (7) unless the consultation requirements have been either –

    (a) Complied with in relation to the works or agreement, or

    (b) Dispensed with in relation to the works or agreement by (Or on appeal from) the appropriate Tribunal"

31. 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 ("QLTA"), the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".

32. The leading case on how a Tribunal should approach an application for dispensation of the consultation requirements, is Daejan v Benson [2011] UKSC 14, which makes it clear that the Tribunal should not focus on the label "substantial breach" (or, as suggested by the Applicant in this case "technical breach"), but to look to what prejudice (if any) arose from the failure to execute the consultation requirements. If prejudice is found, then to assess how it affects the rights of the lessee in respect of his service charge liability arising from the relevant works. Further, whether this can be ameliorated by conditions being attached to any dispensation granted.

Findings

Breach of the consultation requirements

33. In considering this application we have had firmly in mind the approach set in Daejan v Benson [2011] UKSC 14.

34. Firstly, we find that there has been a failure to comply with the consultation requirements.

35. The Applicant rightly concedes a departure from the consultation requirements, in that the works were undertaken prematurely - though from the timetable now clear to the Tribunal, the Applicant not only started the works before the observation period was over, but on the very day that the notices were actually received by the Respondents.

36. The Applicant rightly conceded a second failure to respond to representations within 21 days of receipt, which was well after the works had concluded.

37. We find that the failures to comply are not well-explained by the Applicant. It is said that the premature works came about due to a "mis-communication with the contractor", yet there has been no detail as to how this came about, and no attribution of responsibility at all between them at all.

38. Nor does the evidence filed support a finding that the Applicant had *obtained* a surveyor's report prior to the works being started, which identified the roof as being in need of works of repair in respect of which repair was ruled out as an alternative, and which demanded urgency:

    (i) The Applicant does not have a condition report from September to October 2018 saying that the roof was "in serious need of repair", does not have a witness statement from the Planned Works surveyor as to condition, and the chain of email correspondence only states that certain premises can be added to the list, of which the subject premises are not included,

    (ii) The earliest documentation relating to these premises is a contractor's detailed estimate and schedule of works dated 9th January 2019, which is well-before the inspection by Kelly Allen on 6th February 2019,

    (iii) The scaffolding was erected from 31st January 2019, prior to Kelly Allen's inspection which took place on 6th February 2019; scaffolding is costly to erect and (where – as here – not necessary for inspection) we infer is only likely to be done where the paying party intends to proceed with work.

39. Whilst the Applicant relies on the report of Kelly Allen, the Applicant accepts that her report is by way of validation to support the dispensation application; it reduces the weight which can be placed on it as an independence assessment. The timing does not support the Applicant's argument that this was a surveyor lead process. Be that as it may, the report falls short of being adequate evidence to support the case for total replacement because the roof was at the end of its useful life – there having been no internal inspection, no reference to the evidence she relied on to conclude that the weather "caused" tiles to absorb water, no complaint of water ingress or poor quality of habitation for the lessees, and no visual inspection of inadequate insulation until after the event,

and then not by the writer of the report. There is no suggestion of pricing for repair as opposed to replacement, to show that one was preferable to another.

40. So, we reject the Applicant's assertion of a mis-communication between the Applicant and Contractor, leading to the first breach.

41. It is said that the Tribunal would no doubt understand that proper investigations had to be undertaken to give a considered response to the representations - hence the delay – but that did not explain why it took over 6 weeks to do so, because at that stage the Applicant should have evidenced what was needed and why, but from the above it is clear that it had not done so.

42. It is now clear that the notices – which arrived on the day that the work started – were the first that the Lessees had heard about it. There had been no prior correspondence between the parties, and no complaints made by occupants that there were problems with the roof itself. Though the Applicant had entered into a QLTA in 2017, which forecast nominating and then engaging named contractors to undertake a series of major works across the housing stock, otherwise there had been no notice to the Respondents that there were proposals to renew this roof/rainwater goods/repoint the chimney stack at all, nor the approximate costs. The effect of this was that the Lessees were taken by surprise as to the need for the works and the costs; indeed they said so in their representations, and were sufficiently alarmed to do so (virtually) "by return". It is apparent from the speed and nature of the Respondents responses that they questioned the need for the works at all, the extent of them, and the estimated costs.

43. One reasons for complying with a consultation procedure is that Lessees can make observations, which may alert the Lessor to issues, over which the Lessor "shall have regard" – though he is not obliged to agree. It is mistake to treat it as a "given" that there is nothing which the Lessee can say that could not inform or shape the Lessor's decision, and perhaps could have done in this case, had the procedure been followed. In this case had there been compliance with the consultation requirement, the Applicant may have seen that there was in place no condition report setting out the problems and alternative solutions, and obtained one, rather than securing one as the Lessor now accepts was a validation process.

Prejudice

44. The real issue is whether there has been prejudice to the Lessees, and for the following reasons, we find that there has been substantial prejudice to the Lessees.

45. By failing to give notice of the proposed works before the roof was stripped, the Lessees were unaware of the Lessors plans and costs, and so were denied the opportunity to obtain evidence in the form of their own report as to condition, which could consider no work/works of an alternative nature (repair as a total to total replacement)/ alternative costs. Ultimately the Lessees will be concerned with liability to pay service charges, and by (in effect) side-stepping the requirements, the lessees – not otherwise being on notice - were deprived of any chance to have any voice, to take advice, to obtain evidence, so that they could be protected in their right to challenge the service charges as to payablity and reasonableness, which is a guaranteed right under section 19 of the Act. So, we find that bypassing the consultation procedure deprived the Lessees of an effective procedure

and protection under the 1985 Act to be liable to pay service charges limited to those which were reasonably incurred and where the works were to a reasonable standard.

46. We find that there has been prejudice, of the very kind referred to as being relevant in paragraph 44 of Daejan v Benson; by breaching the consultations requirements in combination with expeditiously executing the work without any warning, left the Respondents at a material disadvantage in challenging the liability and reasonableness of the service charges.

Is the prejudice remediable ?

47. In accordance with Daejan v Benson, we consider what alterative conditions could be attached to any dispensation to remedy the prejudice suffered, being that it is not a binary choice. On the papers we find that there are not. As this case was listed for a hearing on the papers, we were not in a position to invite the parties to discuss, or to explore what alternatives might reasonably be available.

48. The Applicant offered that it would not charge the Lessees for the dispensation application but as it was necessitated by the Applicant's failures - and so would have to pay the costs of the application anyway - this is not a concession which meets the prejudice arising from the Applicant's failures.

49. The Applicant has not (for example) suggested that it reduce or extinguish (i) the management fees of 10% added to the overall costs, on the basis of less than adequate management of the project, nor (ii) the individual liability of each lessee, in line with the alternative quotes obtained for roof replacement for a broadly similar project, as provided in the Respondents' responses.

Conclusion

50. Accordingly, we find that there were breaches of the consultation requirements, which in light of the absence of any forewarning of the works to come, totally took the Lessees by surprise, causing prejudice as to their section 19 rights, and which cannot be remedied by the Applicants meeting of the conditions offered.

51. We therefore refuse the application, the effect of which is that the Applicant is limited to recovering £250 per lessee.

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Judge J. Oxlade

17th July 2019