FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/16UG/LDC/2019/0015**
Property	**:**	**6 and 8 Gawith Place, Kendal, Cumbria LA9 4EA**
Applicant	**:**	**South Lakes Housing**
Respondents	**:**	**6 Gawith Place – Mrs Monica Telford** **8 Gawith Place – Ms Joanne Williams**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge JM Going** **J Faulkner FRICS**
Determination Date	**:**	**3rd of July 2019**
Date of decision	**:**	**25th of July 2019**

DECISION

The Decision

- **The Tribunal is not satisfied that it was reasonable to dispense with the consultation requirements, and refuses the application for dispensation.**

- **There is no order for costs.**

Preliminary

1. The Applicant applied on 12th April 2019 to the First-Tier Tribunal Property Chamber (Residential Property) "the Tribunal" under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of proposed reroofing works.

2. The Tribunal issued Directions on 26th April 2019.

3. The parties provided written submissions with their statements of case which were copied to the other. None of the parties requested a hearing.

4. The Tribunal inspected the property on 3rd July 2019. None of the parties attended, and the Tribunal's inspection was limited to the outside of the property because, despite knocking at the doors, there was apparently no one present to allow for internal access at the appointed time.

Facts

5. The first Respondent is the owner of 6 Gawith Place which is a ground floor flat, and the second Respondent is the owner of 8 Gawith Place, a maisonette, occupying the first and second floors of the same building ("the Building"). The Lease for each property was granted under the Right to buy legislation introduced by the Housing Acts of the 1980s with an original term of 125 years and a nominal annual ground rent of £10. For the most part, each Respondent's Lease ("each Lease") contains comparable terms.

The relevant terms of each Lease

6. Each Lease includes various covenants for the Landlord to keep in good and tenantable repair and condition the main roof timbers chimney stacks…

7. Each Lease specifies that the Tenant shall pay a proportionate part….. of the expenses and outgoings incurred… in the repair maintenance renewal and provision of all services… that is ("the service charge")…

The Applicant's and the first Respondent's submissions

8. The Applicant referred to its Assets Surveyor having found evidence of penetrating leaks in 3 separate locations, when inspecting the property on 13th March 2019, after a complaint of damp from a leaseholder.
   It was stated "from the external inspection of the roof it seems to be original and there are several displaced tiles locations where there are signs of penetration, the gutters and rainwater goods seem to be leaking in several location's which aren't aligned and leaking which would indicate is a possibility of rotten fascia. The chimney stack looks like its undergone several amounts of work to stop the penetration leak but this has failed and a full intensive work is needed to fully resolve the occurring leak.
   Internally it was apparent there is a leak as on the rear gable wall in the bedroom there is a large water stain and defective plaster which indicates a penetration form the roof/gutters. There was also signs of this in line with the chimney stack and in the roof space of the gable walls."
   In answer to the Tribunal's Directions, to provide an explanation and any documents confirming the urgency of the works, as well as detailed reasons for the urgency (if any) and the consequences upon the lessees of any delay, the Applicant stated that it "will be more cost effective and appropriate to the leaseholders to tot lay re roof the property rather than carrying out a appreciate repair to 3 isolated areas this is mainly due to the extent of scaffolding needed to complete the works" and "if these works are carried out the likelihood of another leak into 8 Gawith Place is likely which will create further disturbance and cost to the leaseholder.."

9. Emails show that Mr Bryson the Applicant's Project Manager asked Butler Roofing Limited on 1st April 2019 "for a price and potential start date for this one please" under the subject title "Gawith Close – PW form"

10. Mr Butler replied the next day. "It's been a rush job, please see attached…". A spreadsheet headed "Gawith Place" with separate estimates in 3 sections was provided. The 1st section was headed "Roof A -Waterside", the 2nd headed "Roof B- Middle Block" and the 3rd "Roof C-8". Mr Bryson in an email to colleagues on 3rd April 2019 stated "Roof C is the cost we will use for the dispensation application… Please can you add the costs for roof C to the planned works form… I have asked Paul to let me know how soon he can start."

11. The estimate for Roof C reads as follows: –

Scaffold	£3,750.00
Reroof	£5,050.00
Ridge	£232.50
Eave	£142.50
Verge	£198.00
Abutment lead work	£0.00
Fascia wood	£270.00
Gutter	£460.00
RWP	£192.00
Chimney lead work	£280.00
Chimney storm seal	£680.00
PC sum S/H slate	£500.00
Skip	£250.00

	£12,005.00

12. Following the Tribunal's Direction to provide any correspondence sent to the leaseholders in relation to the works, the Applicant provided a sheet, under the appropriate heading, marked "N/A"

13. The first Respondent, Mrs Telford, through her solicitors confirmed that her ground floor flat has had no damp issues. She stated that the assertion in the application form that the "Surveyor and Project Manager have notified tenants and leaseholders verbally and by email" was not correct, and confirmed that the first notification that she had of the proposed reroofing was when receiving notice of the application to the Tribunal on 27thApril 2019. She confirmed that scaffolding was erected on 2nd May 2019 – again without notice, work started to the roof on 7th May and was completed on the 16th, when the scaffolding was also removed. She confirmed that she had lived in Gawith Place from 1988 to 2014 and was aware that damp problems had previously been an issue in number 8, having been shown damage by a former owner. She stated that this was not a new issue and something that the Applicant must have been aware of. She recalled that, in 2013, it had commissioned contractors known as Bracken Roofing to reroof the building, replace chimney stacks et cetera and could not therefore understand why the Applicant had referred to the roof "appearing to be original", nor why it was apparently not pursuing a claim against Bracken Roofing before seeking to charge the leaseholders.

14. The first Respondent argued that the "whole purpose of the consultation requirements under section 20 of the Act is to ensure proper consultation, so that the tenant is aware of their potential liability" "this is a long-standing problem and did not have any real urgency" "Because the Applicant did not give notice in accordance with the regulations (she) did not have opportunity to make observations prior to the work being carried out. Those observations would have included observations (referred to in her statement of case) given her knowledge of previous works having been carried out… She would also have instigated the estimate requirements… Instead the work has simply gone ahead and the Respondent still has no indication as the amount which might be liable to pay by way of service charge"

15. Having stated that "the Applicant has not demonstrated (with any supporting evidence) that this was urgent work; there was plenty of opportunity to comply with the consultation requirements… therefore ….dispensation should not be granted…" the first Respondent also requested that the Applicant be ordered to pay her reasonable costs "currently assessed at being £700 plus VAT and £12 plus VAT for land registry office copies (total £854.40)".

16. No submissions have been received from the second Respondent.

The Inspection

17. The Building is located in the heart of Kendal town centre's Conservation Area. It is clearly over 100 years old and built of traditional local lakeland stone with a slate roof. It has various period features, such as a Westmorland window, and historically was probably a commercial building before being converted to housing. It is on the westerly end of a terrace, the other end of which goes down to a walkway adjoining the River Kent.

18. It was apparent from the mortar fixing the ridge tiles, which has yet to be discoloured by the elements, that works have recently been undertaken to the roof. No slipped slates were apparent. This was in contrast to the roofs of the adjoining terrace (which it is thought may also be the responsibility of the Applicant) where the some of the older mortar was missing and some slates had slipped.

The Law

19. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

20. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to: –
    - give written notice of its intention to carry out qualifying works, invite leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought;
    - obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders;
    - make all the estimates available for inspection; invite leaseholders to make observations about them; and then have regard to those observations;
    - give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, if that is not the person who submitted the lowest estimate.

21. Section 20ZA(1) states that: –
    "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… the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

22. The Supreme Court in the case of Daejan Investments Ltd v. Benson and others (2013) UK SC 14 ("Daejan") set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –
    - The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;
    - The purpose of the consultation requirements is to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
    - In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
    - The financial consequences to the landlord of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord;
    - The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
    - The more egregious the landlord's failure, the more readily a tribunal would be likely to accept that tenants had suffered prejudice;

- Once the tenants have shown a credible case for prejudice the tribunal should look to the landlord to rebut it and should be sympathetic to the tenant's case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenant's reasonable costs incurred in connection with the dispensation application;
- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed compensate the tenants fully for that prejudice.

The Tribunal's Reasons and Conclusions

23. Having inspected the property, carefully considered the evidence before it, and using its own knowledge and experience, the Tribunal concluded as follows:-

24. The Applicant has not made out a compelling case that all of the works were appropriate. The Tribunal is not convinced that the discovery of damp patches, which from the scant evidence before it may or may not have been historical, must inevitably lead to a conclusion that the property needed to be wholly reroofed. It is possible for example that there is/or was a problem with the pointing to the stonework. Nor does evidence of some slipped slates necessarily mean that total reroofing is required. Individual slipped slates are often successfully repaired with a small lead strap. Many lakeland roofs provide evidence of this traditional repair.

25. Particularly in the light of evidence that major reroofing works had been undertaken within the last few years (which surely should have been in the knowledge of the Applicant), the logical first step would be to call for further investigation before being able to decide what further works might be necessary or appropriate. It is for this very reason that the first step in the consultation requirements requires a landlord to invite those who will asked to pay for works to the make observations and call for further estimates.

26. Despite the Tribunal's Directions for the Applicant to provide all quotes estimates and relevant reports, it did little more than copy and paste into its bundle of documents the words used in the initial application and as referred to above. No corroborative photographs or reports were provided. Nor is there any evidence that its contractor was even asked to advise on or report on the appropriateness of the proposals. The evidence is that he was asked simply to provide an estimate, which he referred to as being "a rush job".

27. The Tribunal is not persuaded that all of the works were so urgent that there was no need for any consultation with the first Respondent. The Tribunal has concluded that the first Respondent was given no proper opportunity by the Applicant to raise legitimate questions as to whether its proposals were appropriate. In its application it referred to having "notified tenants and leaseholders verbally and by email" but this is flatly contradicted by the first Respondent. The Tribunal finds that her evidence is the more compelling, particularly having regard to the Applicant's response of "N/A" when directed to provide any correspondence sent to the leaseholders.

28. There was no legitimate excuse for this step in the process of having been totally ignored, particularly as it is evident from the Applicant's bundle that it has details of the first Respondent's correspondence address, email address, and 2 telephone contact numbers.

29. Nor does the Tribunal believe, even if the matter was considered urgent, that a second opinion and second estimate were unnecessary or would have been difficult to obtain. The Applicant was able to obtain its one estimate in one day. It was clearly possible for it to obtain further reports and estimates before deciding to begin the works. As the first Respondent put it "the Applicant has simply gone ahead with the works".

30. The Applicant has shown in its dealings with the first Respondent a wholesale disregard for the purpose of the consultation requirements.

31. The Tribunal has had no difficulty therefore in concluding that the first Respondent has been prejudiced by the Applicant's actions and omissions and put at risk of having to pay for inappropriate works or pay more than would be appropriate.

32. The Applicant was given the opportunity to, but did not request a hearing. It seems to have concluded that, having made its application, nothing further needed to be done and that it could proceed with the works whenever it chose. The evidence, from Mr Bryson's email, is that the decision to proceed was made on 3rd April, and that the works themselves began but 10 days after receipt of the Tribunal's directions and well before such directions could possibly be properly complied with.

33. By proceeding with the works without waiting for the Tribunal's decision the Applicant has effectively denied the Tribunal the ability look to it to rebut the prejudice that has been clearly identified.

34. If the Tribunal had been allowed the opportunity to inspect before the works were done, it could have decided to allow for further reports and evidence to be provided to see if it might be possible to grant dispensation on terms to compensate for the prejudice to the first Respondent. However, because the Applicant decided to proceed with the works before the Tribunal's inspection, the Tribunal simply does not have any adequate evidence, nor can it now call for the further evidence needed, to be able to judge if the works were appropriate or even necessary. In such circumstances Tribunal has to be sympathetic to the first Respondent's case.

35. For these reasons, the Tribunal is not satisfied that it is reasonable to dispense with the consultation requirements.

Costs

36. Daejan confirmed that a tribunal can, when deciding to grant dispensation, include as a condition of that decision that the landlord pay the tenant's reasonable costs in connection with the application. However, Daejan did not decide, nor is it an authority for contending in cases, such as this, where a tribunal decides against granting dispensation, that the tribunal has an ability to award costs, except where it decides to do so in exercise of its otherwise limited powers.

37. Those powers are set out in paragraph 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Procedure Rules") which provide that a tribunal may determine that one party to the proceedings pays the costs incurred by the other party in the limited circumstances set out in that rule, if that party has acted unreasonably in bringing, defending or conducting those proceedings.

38. In making its decision as to costs the Tribunal has had careful regard to the Upper Tribunal case of Willow Court Management Company (1985) Ltd v Alexander and others (2016) UKUT 0290(LC) containing detailed guidance as to how the discretionary power afforded under paragraph 13 should be exercised. The case confirms that a finding of "unreasonable conduct" relating to the conduct of the proceedings is an essential precondition to the exercise of the Tribunal's discretion, and that the threshold as to what is "unreasonable conduct" in this particular context is a high one.

39. The Tribunal has decided that, in all the circumstances of this case, it would not be appropriate to make a costs order.

J M Going
3rd July 2019