FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/16UF/LDC/2019/0026**
Property	**:**	**19-28 Waterside, Kendal, Cumbria LA9 4EU**
Applicant	**:**	**South Lakes Housing**
Respondents	**:**	**Ms Schwaller -20 Waterside** **Messrs A&G and Miss A Ducksbury - 21 Waterside** **Mr&Mrs Stirzaker-23 Waterside** **Mr Carr & Ms Jennings -26 Waterside** **Mrs D Campbell -27 Waterside**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge JM Going** **ID Jefferson TD BA BSc FRICS**
Date of inspection	**:**	**16th of December 2019**
Date of decision	**:**	**20th of December 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.

Preliminary

1. By an application dated 30th May 2019 the Applicant applied 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 works ("the works") relating to the installation of a waterproof surface, lifting and relaying paving stones, trimming some slates and clearing out ceiling gutters to the first floor of 19 – 28 Waterside Kendal ("the Building").

2. The Tribunal issued Directions on 22nd July 2019.

3. The Applicant provided written submissions with its statement of case which were copied to the Respondents. None of the parties requested a hearing.

4. The Tribunal inspected the Building on 16th December 2019. Representatives from the Applicant, being Mr Bibby and Ms Dann, were in attendance. Mrs Stirzaker's nephew kindly allowed the Tribunal and the Applicant's representatives to inspect the inside of number 23 Waterside.

Facts

5. It is understood that each of the Respondents is the owner of a maisonette within the Building, purchased 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, and that, 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 (inter-alia) " the … gutters pipes and other things for conveying rainwater from the Building and the main walls timbers and foundations of the Building… and boundary structures party or otherwise and any other structure giving

constructed to give benefit to the demised premises or any part thereof."

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 to the Premises... that is ("the service charge")..."

The Applicant's submissions

8. The Applicant explained in its application that the works were required "to improve the diversion of rainwater away from the flats, at least one of which has suffered severe penetrating damp. The communal area has also been affected with plaster damage to the stairwell roof and walls, as well as the plinth under the upper entrance door having almost completely rotted away, before being replaced in early 2019 with a concrete alternative".The urgency was explained as being the "potential for a leak into the property of 23 Waterside". It was explained that the replacement of the door plinth and plasterwork had not solved the problem of water penetrating into number 23 Waterside and that "following further investigations the cause has been identified as water pooling underneath the flag stones and overbearing the guttering and downpipes. Therefore in addition to the replacement of the door plinth and plasterwork, it was recommended that further works take place" being "the raising of the flag stones, and a new sealed membrane being installed along with the flushing of the rainwater goods so that they can cope better with the large volume of water. This will be aided with the reduction in length of the roof tiles overhanging the gutters to allow more inflow. The flag stones to be relayed with a slight fall so they carry excess water away from the properties into the wider guttering at the front of the upper walkway." It was decided that it was "necessary to carry out (the works) as soon as possible to ensure that no further damage occurred"

9. The papers show that the Applicant obtained an estimate/quotation from Ultra Care Property Management Ltd ("UPM") dated 26th April 2019 putting the cost of the works at £2872 plus VAT i.e. a total of £3446.40

10. UPM's subsequent invoice refers to the works having been completed on 31st May 2019.

11. The Applicant's application to the Tribunal was dated 30th May 2019 and received at the Tribunal's Manchester office on 3rd June 2019.

12. The Applicant has confirmed that there was no consultation with leaseholders, apart from the owner of number 23. The first notice that the other Respondents had of the works was when they were notified by the Tribunal of the application, by which time the works had been completed.

13. No submissions have been received from any of the Respondents, but it is understood from comments at the inspection that at least one of the Respondents questioned the Applicant as to the likely cost of the works, after receiving paperwork relating to the application.

The Inspection

14. Waterside is a located in the heart of Kendal town centre and, as the name suggests, is next to the walkway adjoining the River Kent.

15. The Building is a purpose-built block of 10 flats, understood to have been built in the 1970s, and comprising five three-bedroom maisonettes on the ground and first floors and five two-bedroom maisonettes on the second and third floors. The upper maisonettes are accessed from the ground floor via a staircase to an open terraced balcony.

16. It was apparent from the inspection that works have relatively recently been undertaken to the stairwell and its entrance onto the second floor. Parts of the stairwell ceilings have been re-plastered.

17. Sadly it was also evident that number 23 Waterside continues to be adversely affected by penetrating damp. Dampness was evident in the main bedroom in two areas. First to the double glazed window reveal, and second and more dramatic at the junction of the side wall and ceiling for a distance of about 8 feet. Mrs Stirzaker's nephew confirmed that these wall/ceiling damp patches had recently worsened.

18. The rainwater downspout, through which all of the water from one half of the building's roof discharges, goes into an open hopper immediately above the bedroom of number 23.

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 necessarily appropriate or urgent, and has confirmed that there was no consultation with the Respondents (other than the owners of number 23 Waterside) prior to their completion.

25. 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. The Tribunal is not persuaded that all of the works were so urgent that there was no need for any consultation with the Respondents. It is clear the Respondents were given no proper opportunity by the Applicant to raise legitimate questions as to whether its proposals were appropriate.

27. There was no legitimate excuse for this step in the process of having been ignored, particularly as it is evident from the Applicant's bundle there was a was a period of between four and five weeks from the date of UPM's quote dated 26th April 2019 and the works being completed on 31st May 2019.

28. 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. It was clearly possible for it to obtain further reports and estimates before deciding to begin the works.

29. The Tribunal has concluded that the Applicant whether by design or otherwise decided to bypass altogether any consultation with the Respondents.

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

31. The Tribunal has had no difficulty therefore in concluding that the Respondents have 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. By proceeding with the works without waiting for the Tribunal's decision (the evidence being that the works were completed even

before the application had been received at the Tribunal's office) the Applicant has effectively denied the Tribunal the ability look to it to rebut the prejudice that has been clearly identified.

33. 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 Respondents. 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, or specification, were appropriate or even necessary.

34. The fact that number 23 continues to suffer from penetrating damp patches is evidence that the works have not properly cured the problem which they were attempting to address. The Tribunal suspects that an inadequate system for discharging the roof water is at least a contributing factor to the continuing problems.

35. In the circumstances Tribunal has to be sympathetic to the Respondents being asked or expected to pay for works which have not been effective.

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