FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LDC/2020/0027**
HMCTS code (paper, video, audio)	**;**	**P: PAPER REMOTE**
Property	**:**	**6, 7 and 12 Kenbury Mansions Kenbury Street London SE5 9BU**
Applicant	**:**	**London Borough of Lambeth**
Representative	**:**	**Harsha Kara Litigation Officer**
Respondent	**:**	**The several lessees named in the application**
Representative	**:**	**N/A**
Type of application	**:**	**To dispense with the requirement to consult lessees about major works**
Tribunal members	**:**	**Judge Carr** **Ms Krisko FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**21st August 2020**

DECISION

Decision of the tribunal

1. The Tribunal determines to exercise its discretion to dispense with the consultation requirements contained in Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003.

The application

2. The London Borough of Lambeth, the freeholder of the premises, applied on 22nd January 2020 under s.20ZA of the Landlord and Tenant Act 1985, for dispensation from the consultation requirements contained in Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003.

3. The application is limited to dispensation from the requirement that the Landlord shall have regard to observations received and state his response in writing within 21 days of receiving the observations.

Covid-19 pandemic: description of hearing

4. This has been a remote hearing on the papers which has been consented to/not objected to by the parties. The form of remote hearing was P:PAPERREMOTE, A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that the tribunal was referred to are in 3 bundles totalling 564 pages, together with a supplementary statement provided by the Respondents on 19th July 2020,the contents of which the tribunal has noted. The order made is described at the end of these reasons.

Procedure

5. The Tribunal held a case management review of this matter on 6th February 2020 and issued directions on the same date.

6. Further directions were issued on 19th March 2020. These directions required the Applicant to provide further information in connection with the Application. That information was supplied late due to the problems caused by Covid-19.

7. On 12th June 2020 the Tribunal determined that the matter be determined remotely on the basis of the papers provided.

8. The Directions gave an opportunity for any party to request a virtual hearing. No-one requested a hearing and therefore the matter is being determined on the basis of the documents provided.

9. In the hearing bundle the Applicant certified that it had carried out the instructions in the directions relating to the dispensation application.

Determination

The Evidence

10. The evidence before the Tribunal indicates as follows:

(i) The property – Kenbury Mansions - is a block of three storey, divided into twelve purpose built flats, of traditional construction, with solid brick walls, under a slate covered, main pitched and felt covered flat roofs. The property is thought to have been constructed around 1900.

(ii) It is a mixed tenure building . the Application relates to 3 leasehold flats within the building.

(iii) The Applicant commenced major works to the building as part of its contractual obligations as landlords. The Applicant states that the works are necessary to maintain the structure and exterior of the building.

(iv) The works are being carried out under a Qualifying Long Term Agreement by one of the Applicant's long term contractors, Mears. The works are qualifying works undertaken under Schedule 3 of the Service Charges (Consultation Requirements) England) Regulations 2003.

(v) The estimated building cost is based on the schedule of rates that fall within the pricing framework of the contract.

(vi) The Notice of Intention (NOI) was dated 7th October 2019 and the Respondents were given until 11th November 2019 to provide their observations. The NOI provided, alongside other necessary information, a description of the works to be carried out, block estimates and estimated individual contributions.

(vii) The Respondents provided their written observations on 9th November 2019 via email. Each observation

was therefore received within the stipulated timeframe as per the date in the NOI.

(viii) The three observations received by the Applicant are almost identical. Each observation contained a number of additional documents and in total the number of pages ranged from 67 to 93. Due to the large volume of documentation the Applicant was unable to adhere to the requirement of having regard and providing a written response to the observations within 21 days of receipt.

(ix) The observations provided by the Respondents drew in part on a condition report prepared by Dunsin Surveyors, included collective observations and observations relating specifically to individual properties and/or circumstances.

(x) The Applicant provided a response to each Respondent on 2nd January 2020.

The Applicant's argument

11. The Applicant argues that the works are necessary. It argues that the Respondents have not supplied any evidence to the contrary and the Respondent did receive the NOI. They were able to provide observations, and did receive, albeit late, a full response. As such the Respondents are in the same position as if the requirements of the Regulations had been complied with.

12. The Applicant accepts that it did not comply with part of the Regulations by not having regard to an observation received from the Respondents and by not providing a written response within 21 days of receiving the observations.

13. The Applicant has had regard to the observations and provided a full response. This has been provided to the tribunal.

14. As the works had not started and the Applicant did not conclude its internal observation period until it had had regard to and issued a full response to each Respondent, the Applicant's failure to comply with part of the Regulations has caused no relevant prejudice to the Respondents.

15. The Applicant argues – drawing on *Daejan Investments Limited v Benson and others* [2013] UKSC 14 that the right to be consulted is not a free standing right, and the statutory consultation requirements are a means to an end, and not an end in themselves. It is not covneient or sensible to distinguish between a serious failing and a minor oversight,

save in relation to the prejudice it causes and the Respondents have not attempted to discharge the factual burden in relation to relevant prejudice.

16. The Applicant therefore applies for retrospective dispensation from the relevant statutory consultation requirements on the grounds that the Respondents have suffered no relevant prejudice as a result of the failure to comply with the Regulations.

The Respondents' argument

17. The Respondents argue

(i) The Applicant had received the Respondents' observations on the works prior to November 2019 as the Respondents had responded to a NOI originally served 3rd July 2019. The Respondents submitted observations on the first NOI on 7th August 2019. On 23rd August 2019 the Respondents were told that the first NOI had been cancelled, just before the 21 day deadline for a response from the Applicant. The Applicant should therefore have been able to reply to the Respondents within the proper period as it was aware of the Respondents' concerns and the Respondents had made it clear that the observations remained the same.

(ii) The Respondents consider that the Applicant has disregarded the Respondents' objections to the scope and cost of the project, the reservations that the Respondents have outlined regarding the quality of the contractor's work and the unaffordability of the project for the Respondents.

(iii) The Respondents strongly refute the argument that the Respondents have failed to provide any evidence that the works were not necessary and refer the Tribunal to the observations that they have submitted.

(iv) The Respondents argue that the Applicant should not be given dispensation from the consultation requirements.

The Law

(i) The Tribunal is being asked to exercise its discretion under s.20ZA of the Act. The wording of s.20ZA is significant. Subs (1) provides

'Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreements, the tribunal may make the determination **if satisfied that it is reasonable to dispense with the requirements'** (emphasis added).

The tribunal's decision

18. The tribunal determines to grant the application.

Reasons for the tribunal's decision

19. The application before the tribunal is a very narrow application. It concerns dispensation from a small part only of the consultation requirements, the requirement to respond to observations within 21 days.

20. The tribunal notes that the observations, quite properly, were extensive. The tribunal also notes that the Applicant did eventually provide responses. There was a delay of about five weeks in addition to the statutory period.

21. The tribunal agrees with the Applicant that the Respondents have not provided evidence of the prejudice suffered from the delay in responding to the observations. Whilst the Respondents provided extensive submissions, and arguments about the prejudice they suffer from the major works project, they have not provided any evidence to show the prejudicial consequences of the delay in providing responses.

22. The tribunal determines, in the absence of evidence to the contrary, that no prejudice was suffered as a result of the delay.

23. In these circumstances it is therefore reasonable to grant the application sought.

24. The tribunal notes the extensive observations on the project provided by the Respondents. It understands that the Respondents have put considerable work and other resources into compiling the paperwork for this case. These observations include serious concerns about the scope of the works, the inadequate information provided, the estimated costs

and their unaffordability, arguments about historic neglect, and the stress caused by the scale of the major works.

25. This is not the place for the tribunal to detail those concerns in full or to respond to them. That is not to say that those concerns are not serious and should not be addressed. The Respondents may wish to consider taking advice on their next steps.

26. What is important at this stage is that this determination does not concern the issue of whether any service charge costs will be reasonable or indeed payable. The Respondents are able, if it appears to them to be appropriate, to make an application under s.27A of the Landlord and Tenant Act 1985 as to reasonableness and payability.

Name: Judge Carr **Date:21st August 2020**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) 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 .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).