FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/LDC/2020/0045
Property	**:**	86-88 Stone Lane, Worthing, BN13 2BY
Applicant	**:**	Worthing Homes
Representative	**:**	
Respondent	**:**	Mrs Lorraine Lipscomb and Mr Stephen Lipscomb
Representative	**:**	Ms Caroline Chapman
Type of Application	**:**	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	**:**	Judge J. Dobson
Date of Decision	**:**	31st July 2020 Corrected 17th August 2020

DECISION

Decision

1. The Applicant is granted dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act in respect of major works to attend to and related to attending to a leak under the communal path. The Tribunal has made no determination on whether the costs of the works are reasonable or payable.

The application and the history of the case

2. The Applicant applied for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The Applicant in essence explained that a significant leak was identified under the communal path to the building requiring urgent remedial action and not rendering it practical to consult before undertaking the work.

3. The Tribunal gave Directions on 1st July 2020, advising that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question of whether any service charge costs are reasonable or payable. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any.

4. The Directions stated that the Tribunal would proceed by way of paper determination without a hearing pursuant to of the Tribunal Procedure Rules 2013, unless any party objected. There has been no objection to determination of the application on the papers and indeed agreement from the remaining Respondents, albeit that they objected to the application itself, as referred to further below.

5. This is the decision made following that paper determination.

The Law

6. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

7. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

8. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.

9. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

10. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

11. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "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- i.e. as if the requirements had been complied with."

12. If dispensation is granted, that may be on terms.

13. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

14. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

15. The effect of *Daejan* has very recently been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), a decision published only several days ago, although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Consideration

16. The Applicant explained that the property is a block of self- contained flats, subsequently clarified to contain 2 flats after correction from the Respondent. The 125-year lease of 86 Stone Lane, the property of which

the Respondents are the leaseholders, was provided with the application ("the Lease"), having apparently been obtained from the Land Registry.

17. The Applicant explained in the application that the Applicant is responsible for repairs and other services and for the collection of service charges. The relevant provisions are contained in clause 2 in relation to the matters for which the Respondents must pay, clause 4 in relation to covenants by the Applicant and the Fourth Schedule of the Lease in respect of the outgoings, expenses and other heads of expenditure of the Applicant to which the Respondents must pay a contribution.

18. The application was it is stated by the Applicant made because a significant water leak was identified under the communal path to the building requiring urgent remedial action and not rendering it practical to delay matter for the time required by a formal consultation before undertaking the work. The Applicant states that due to the amount of water leaking, it had no option but to instruct a contractor, Coastal Drains, and that they were instructed on 13 March 2020, as an urgent priority.

19. The application, completed by Ms Parsons of the Applicant, also says that she spoke with Mrs Lipscomb on the 13 March 2020, advising that the Applicant needed to instruct the contractor urgently to carry out the repairs, provided her with the estimated cost and that we were unable to do section 20 consultation. Mrs Lipscomb is said to have accepted the need for works to happen urgently. It is also said that the Applicant was unable to speak to the lessees of 88 Stone Lane, who are no longer respondents to this application.

20. The Respondents' representative stated 4 matters in objection. At least the Tribunal understands the statement of case to be from her, being described as on behalf of the Respondent rather than by them, not that anything turns on that.

21. Firstly, it is said that potential leak/loss of water was identified by Southern Water due to the volume of water being read by the water meter serving no. 86 and Southern Water contractors attended to investigate, finding that a leak was occurring. It is further said that by reference to the meter readings, Southern Water confirmed that the loss of water had been occurring over a pro-longed period of time, which is what gave them cause to investigate.

22. It is stated by the Respondent that there was no internal nor external evidence of loss of water or a leak within either property or otherwise within the boundary of the property. As the leak had been ongoing for a period of time unnoticed, the Respondents dispute that the works were urgent or of an emergency nature. That is perhaps their key point.

23. The Respondents contend, no doubt because they say that the works were not urgent or of an emergency nature, of the Applicant that:

"knowing that they are obliged to consult with all leaseholders due to the potential costs, they should have sought a second estimate."

24. In response to the question of what the Applicant could have done differently, the Respondents' representative reiterates the assertion that there should have been a second estimate

25. The second point made on behalf of the Respondents is that no copy of the estimate or actual invoice from Coastal Drains had been provided, but they assert that Worthing Homes admitted that the original costs provided included for works at another property. The Tribunal understands the Respondents to be concerned that they may have been charged for work for which they are not liable.

26. The third and final point made is that there was a lack of communication received by the Respondents from the Applicant between the problem being reported to the Applicant by Mrs Lipscomb on 13th March 2020 and June 2020. The Respondents assert that during that time, the Applicant could have undertaken a consultation ahead of the works being undertaken.

27. More particularly:

"a) A Notice of Intention should have been issued on 13 March 2020 when Worthing Homes were notified of the potential costs. Had this been issued, it would have expired on 15 April 2020.
(b) Allowing for 7 days to obtain further estimates, a Statement of Estimates could have been issued on 22 April 2020 setting out the proposed costs and each leaseholders liability. Had this been issued, it would have expired on 25 May 2020.

28. The last element which the Respondents state there would have been if there had been consultation is just that i.e. that there would have been a consultation.

29. The Applicant has replied to the Respondent's response at some length and has supplied both the original quote from Coastal Drains and the invoice subsequently received dated 8th April 2020, which does include charges in respect of work to other properties owned by the Applicant, although the charges for each property are clearly identified and the charge in respect of 86-88 Stone Lane reflects the quote given. A number of items of correspondence are also provided.

30. The reply includes, importantly, a chronology. That contends that, contrary to the Respondent's assertions, the work was in fact undertaken in March 2020, being completed on 26th March 2020 with the exception of a specific matter in relation to access to the stopcock. It is said to be only that specific matter which was not dealt with until June 2020.

31. The chronology says that Mrs Lipscomb first informed the Applicant of the leak on 28th February and that the Applicant raised a job ticket with Coastal Drains on 2nd March 2020.

32. The chronology then gives more detail as to the contact with Mrs Lispcomb. It asserts that Mrs Lipscomb was anxious for the works to be undertaking and that she chased up the works as early as 5th March 2020, chasing again on 13th March 2020. Ms Amanda Parsons of the Applicant states that Mrs Lipscomb agreed there was a need to carry out the works urgently and that to works being commenced and to no consultation be undertaken. She continues that she explained to Mrs Lipscomb that she would have to seek dispensation of the consultation requirements and that Mrs Lipscomb offered to tell her neighbour and to ask them to call the, so that the Applicant could explain the situation to them. The Applicant paints a picture of Mrs Lipscomb being very keen for the work to be undertaken.

33. The Applicant also states that after perceived completion of the works, the Applicant contacted the Respondents and asked whether they were happy with those works, at which time it was that the Respondents informed the Applicants that they could not isolate the stopcock from outside but only from inside. Ms Parsons states that she informed the Respondents that additional work would be organised. The implication is that the Respondents had no other concerns.

34. The chronology then sets out that the additional work to the stopcock, described by the Applicant as a "functional alteration" was completed on 2nd June 2020.

35. The Applicant's position in terms of the Respondent first point is that whilst the leak may have been ongoing for a period of time unnoticed, once it had been identified and brought to the attention of the Applicant it would have been inappropriate to allow the leak to continue and to risk the water causing damage, where there was a significant amount of water to be reported to be leaking. The Applicant states that the rate of water leaking amounted to approximately one litre per minute.

36. The Applicant states that in the event of completing the full consultation process, the work could not have commenced until the end of May 2020. The leak would have continued until after that date.

37. Consequently, the Applicant states that it instructed Coastal Drains, an approved contractor in terms of quality of work and cost.

38. In relation to the Respondent's second point, the Applicant says that the actual charge was the same sum as the estimate, although the Applicant accepts that a clerical error was made.

39. In relation to the third point, the Applicant's response is essentially that the Respondents, having not raised any issues when spoken to in March 2020, would not have raised any matters in any consultation process.

40. The Applicant's final argument is that the Respondents having, it is said, agreed to the works being undertaken without consultation, are now "estopped" from raising lack of consultation in this matter.

41. For the avoidance of doubt, it should be recorded that the other leaseholders did not respond.

Findings and Reasons for Decision

42. In respect of the Respondent's first point, that there should have been second estimate obtained, the Tribunal finds that the key aspect for the purpose of this application.

43. In that regard, the Tribunal accepts that the substantive work was undertaken by 26th March 2020. The Tribunal has received nothing which can properly cast doubt on the timetable and sequence of events set out by the Applicant in response to the comments of the Respondent and the invoice from Coastal Drains dated 8th April 2020 is for work understood to have been completed. Indeed, the assertion that the Respondent identified the issue with the stopcock appears consistent with other aspects of the matter and compelling. It follows that the Tribunal also finds that the Respondents were aware of the completion of the substantive work. The remainder of the evidence supports the other work having been completed as the Applicant states.

44. None of the above directly answers the Respondent's point that a second estimate could and should have been obtained. In contrast, it is possible that another estimate could have been obtained shortly following 13th March if the Applicant had sought one. It is reasonable to expect that companies whose business it is to deal with water leaks are used to urgent action being required and to urgent quotes or estimates being provided.

45. However, the Tribunal also accepts the Applicant's case in relation to Coastal Drains being approved by the Applicant, including as to price. Hence, the Applicant reasonable had confidence that the price quoted for this particular work would be competitive.

46. The Tribunal finds that where the Applicant had been made aware of a leak of a significant volume of water leaking, the Applicant was compelled to take urgent action to address that, and in contrast the usual formal consultation would have allowed the loss of a six-figure sum of litres of water if the rate of loss stated is correct. Whilst the Tribunal considers, looking at the situation with the benefit of hindsight and with no immediate issue now to address, that a second quote could probably have been swiftly obtained, it is understandable that the Applicant focussed on the work being commenced.

47. In those circumstances, the Tribunal finds that the decision to proceed with Coastal Drains was a reasonable one and that criticism of that decision is not appropriate. It was also reasonable to regard the approach

of the Respondents as at March 2020 as one indicating that no other estimate or quote was regarded by them as required and for the Applicant to have concluded that a formal consultation would not have added anything of benefit.

48. In any event, is correct to say that the Respondents, whilst making their point clearly, have not provided any alternative quote or estimate to demonstrate that any second estimate which they assert ought to have been sought by the Applicant, may have been likely to have been lower than the quote from Coastal Drains.

49. Some caution may have been required in considering any such quote or estimate if there had been one produced as the Applicant may well, for example as a public body, have needed any contractor to meet certain requirements and that may have affected the price. However, that is not relevant in the event.

50. The Tribunal finds that there is no evidence that any such second quote or estimate would have been received from any other contractor complying with any appropriate requirements and resulting in a reduced cost to the Respondents. The Tribunal therefore finds on the evidence before it that the lack of a second quote or estimate did not cause the Respondents any prejudice.

51. The Tribunal considers the explanation from the Applicant in respect of the Respondent's second point, namely that there will be no charge for work to another property, is cogent and the Tribunal notes the documentation from the contractor. The Tribunal notes the Applicant's clerical error in the letter 3rd June 2020, which is unfortunate and may quite understandably have caused concern to the Respondents. The letter 5th June 2020 did, nevertheless, correct the figures.

52. However, the Tribunal does not consider that the point requires determination in this decision, for the reason that the point relates to the amount of any service charge which the Respondents may be asked to pay, as opposed to relating to consultation or lack of it.

53. The third point made by the Respondent, namely that there was time for the Applicant to consult, does not identify anything which should have been done differently over and above their first point i.e. that a second estimate or quote should they say have been sought. It is implicit in the Respondent's case that the Respondents would have asked the Applicant to obtain such a second estimate or quote in the event of a consultation process being entered into.

54. The Tribunal finds that a consultation would necessarily have meant that the Respondent's would have been consulted but the point does not go any further than the second point in terms of any benefit or otherwise to the Respondent. Neither therefore does it add anything to the prejudice or lack of it caused to the Respondent.

55. Whilst it adds nothing to the matters to be determined in those circumstances, the Tribunal accepts the Applicant's evidence that there was communication with the Respondents by the Applicant, and something of an informal consultation by way of explaining the estimate costs of the works and the reasons for urgency, although no formal consultation. There is no evidence that the Respondents would have sought a second quOte in the event of a formal consultation process.

56. Indeed, the weight of evidence is that the Respondents, or at least Mrs Lipscomb, would have been anxious not to cause delay and to conclude the consultation as swiftly as possible in order that the work could proceed and the leak be attended to.

57. The Tribunal finds that nothing different would have been achieved in the event of consultation having taken place, except for a period of delay from the works being completed, but for access to the stopcock, in March 2020 and instead those works only being completed in or about June 2020. That would have allowed the potential creation of greater problems to address, with potentially greater expense.

58. In the circumstances, it is unnecessary to reach a determination on the Applicant's estoppel argument, although the very limited basis advanced for that argument renders its prospects doubtful.

59. Accordingly, on the question which the Tribunal is asked to determine, i.e. whether the Respondents have been caused any, tangible, prejudice by the lack of consultation, the Tribunal finds that the Respondents have not suffered any such prejudice by the failure of the Applicant to follow the consultation process.

60. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works which were undertaken to attend to the leak.

61. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying long-term agreement. The Tribunal has made no determination on whether the costs are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1968 would have to be made.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.