FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UG/LDC/2020/0035
Property	**:**	13/15 Rumbridge Street, Totton, Southampton, SO40 9DQ
Applicant	**:**	R. A Sadleir
Representative	**:**	
Respondent	**:**	The 6 Leaseholders
Representative	**:**	(Of 4 of the Respondents) Kirklands Solicitors
Type of case	**:**	To dispense with the requirement to consult lessees about qualifying long term agreements- Section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge Dobson
Date of Decision	**:**	8th December 2020

DECISION

Final decision in the form of a provisional decision- as amended 29th September 2020 to correct a clerical error
issued pursuant to rule 6A of the Tribunal Procedure Rules 2013
as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11

Summary of the Decision

1. The Applicant should be 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 the fire alarm, emergency lighting and related works and to fire doors/ other carpentry on the following conditions:

    i) The service charges charged by the Applicant to the Respondents in respect of the carpentry element of the major works do not exceed £7000, being the most that the Tribunal finds the Applicant would have been likely prepared to expend in the event that the consultation process had been followed;

    ii) The Applicant do pay 75% of the reasonable legal costs of this application of such of the Respondents' as incurred such costs, to be summarily assessed if not agreed.

    iii) The fee for the application is not recoverable by the Applicant from the Respondents through the service charge.

Application

2. On 25th March 2020, the Applicant, on behalf of himself and apparently as trustee of a pension fund, applied for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") from the consultation requirements imposed on the lessor by Section 20 of the Act with regard to certain qualifying works already undertaken by the Applicant.

The history of the case

3. The subject property as described in the application is a semi- detached building which comprises 6 residential flats and 3 commercial units. Qualifying works are described as having been undertaken as required by notices issued by the Fire Service following a formal review and/or as required by a fire risk assessment ("the fire report") dated 7th August 2019 ("the major works"). A fire had broken out in one of the commercial units underneath the residential flats on 15th April 2020.

4. The Tribunal gave Directions on 26th May 2020. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, including the Applicant serving the application on the several Respondents, any Respondent opposing the application completing a form and providing a statement responding together with any documents relied on, following which there was to be the provision by the Applicant of a bundle.

5. All the 6 Respondents replied, 4 additionally responding through solicitors, all providing individual opposition to the application. The bases of that opposition are referred to further below but the essence is that there was sufficient time to have consulted, that there was some inadequacy in the works undertaken and that the major works could have been undertaken at a considerably lower cost.

6. The Applicant provided a Determination Bundle. Issues arose as to the content of that, which stalled the attempted and scheduled consideration of this application by the Tribunal, further delayed when a paper response from one Respondent, Mr Smither, came to light upon partial return to the Tribunal office, although on examination electronic documents with the same contents had been included in the bundle. Other documents had been received piecemeal prior to that and subsequent to the Bundle. However, the Tribunal believes that all parties have been made aware of any additional documents and so the Judge has proceeded on the basis of considering all of the documentation available, on the footing that all of it ought to have been contained in the bundle even where it was not in the event. The Tribunal understands that of the documentation available encompasses all documentation intended by all parties to be before the Tribunal.

7. The Directions advised that the Tribunal would proceed by way of paper determination without a hearing, unless either party objected. One party, Mr Saunders, has specifically objected and requested an oral hearing. The other Respondents appear not to have expressed a view one way or the other, although an objection by any party would ordinarily be enough to preclude a paper determination. It cannot be said, the works having already been undertaken in 2019, that there is urgency such as to make a final determination on the papers appropriate notwithstanding the objection to that.

8. However, the Tribunal considers that the case is eminently suitable for determination on the papers, the relevant questions to be answered and the parties' positions in respect of those appearing clear. That is notwithstanding that this is a relatively unusual matter for the extent to which the application is opposed.

9. The Tribunal is entitled, pursuant to rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11, to make a provisional decision, which the parties can accept and in which event the final decision will be made in those terms. Alternatively, a party can reject the decision, in which event a hearing must be listed for a final decision to be made.

10. The Tribunal noted at the time of the Directions being given that the only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements and that, emphasised in the Directions, this application does not concern the issue of whether any service charge costs will be reasonable or payable, although the ability of the lessees to separately challenge the reasonableness of the service charges

is not an answer to the need to consider the merits of the application for dispensation applying the appropriate legal tests.

11. The Tribunal has accordingly proceeded by way of a paper determination. This is the provisional decision made following that paper determination. The Tribunal does not seek to comment on every last document provided by each party, in particular where they go to issues between the parties as to the works but not specifically the question for determination in this Decision.

The Lease

12. An example of a lease entered into between the Applicant and one of the Respondents ("the Lease") is included in the Determination Bundle. The Applicant asserts that each of the Respondent's leases are in the same terms, which assertion the Respondents have not challenged.

13. The Lease contains the usual sort of provisions found in long leases of flats, including an obligation principally set out in the Fifth Schedule to the Lease on the Applicant lessor to provide services, such as keeping the common parts and the exterior in repair, and a corresponding obligation, for example in clauses 1 and 4 of the Lease, on the Respondent lessees to pay for their proportion of the costs incurred by means of a service charge.

14. Accordingly, the reasonable costs incurred by the Applicant for work of a reasonable standard in complying with his obligations pursuant to the Lease are payable by the lessees, subject to potential limits imposed by statute in the absence of appropriate consultation in relation to major works or dispensation from such consultation being granted - see below- or by the Tribunal in the course of granting dispensation from such consultation.

The Law

15. Section 20 of the Act and the Services Charges (Consultation Regulations) (England) Regulations 2003, as amended, ("the Regulations") made pursuant to the Act 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 in advance or retrospectively.

16. The consultation requirements include the lessor serving a notice of intention to undertake qualifying works and providing 30 days for the lessees to make observations, together with the lessees being able to nominate a person or persons from whom the landlord should try to obtain an estimate for the carrying out of the proposed works. The lessor must then obtain a minimum of two estimates and must try to obtain an estimate from at least one of the lessee's nominees. The lessor must take other steps if the lessor does not contract with the person nominated by the tenants or the person who provided the lowest estimate.

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

18. 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.

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

20. The factual burden of demonstrating prejudice that they would or might have suffered 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, "credible prejudice", the lessor must then rebut it. The Tribunal should be sympathetic to the lessee(s).

21. The nature of the lessor's failure and the financial consequences to the lessor are not relevant factors and dispensation should not be refused solely because of the seriousness of the breach of, or departure from, the consultation requirements. The more significant the lessor's failure, however, the readier the Tribunal is likely to be to accept prejudice.

22. However, 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- ie as if the requirements had been complied with."

23. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether or not the Lessee(s) has(ve) been caused relevant prejudice by the failure of the Applicant to undertake the consultation prior to entering into the long-term qualifying agreement and so whether dispensation from consultation should be granted.

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

25. The lessees may, in an appropriate case, be able to prove financial prejudice by obtaining a cheaper quote from another contractor.

26. If dispensation is granted, that may be on terms, as Lord Neuberger explains in paragraph 58:

> "Accordingly, where it is appropriate to do so, it seems clear to me that the LVT can impose conditions of the grant of a dispensation under s 20(1)(b). In effect, the LVT would be concluding that, applying the approach laid down in s20ZA(1), it would be reasonable to grant a dispensation but only if the landlord accepts certain conditions. In the example just given, the conditions would be that the landlord agrees to reduce the recoverable cost of the works…."

27. Lord Neuberger then stated in paragraph 61 of the judgment as follows:

> "[59] I also consider that the LVT would have power to impose a condition as to costs eg that the landlord pays the tenants reasonable costs incurred in connection with the landlords application under section 20ZA(1).
>
> [60] It is true that the powers of the LVT to make an actual order for costs are very limited. The effect of paragraph 10 of Schedule 12 to the 2002 Act is that the LVT can only award costs (in a limited amount) (i) where an application is dismissed on the ground that it is frivolous, vexatious or an abuse of process, or (ii) where the applicant has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
>
> [61] However, in my view, that does not preclude the LVT from imposing, as a condition for dispensing with all or any of the requirements under section 20(1)(b), a term that the landlord pays the costs incurred by the tenants in resisting the landlord's application for such dispensation. The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a freestanding order for costs, which is what paragraph 10 of Schedule 12 to the 2002 Act is concerned with. To put it another way, the LVT would require the landlord to pay the tenants costs on the ground that it would not consider it reasonable to dispense with the requirements unless such a term was imposed.
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> [62] The case law relating to the approach of courts to the grant to tenants of relief from forfeiture of their leases is instructive in this connection. Where a landlord forfeits a lease, a tenant is entitled to seek relief from forfeiture. When the court grants relief from forfeiture, it will often do so on terms that the tenant pays the costs of the landlord in connection with the tenant's application for relief, at least in so far as the landlord has acted reasonably: see e g *Egerton v Jones* [1939] 2 KB 702, 705—706, 709. However, if and in so far as the landlord opposes the tenant's application for relief unreasonably, it will not recover its costs, and may even find itself paying the tenants costs, as in Howard v Fanshaw [1895] 2 Ch 581 at 592 [1895-9] All ER REP 855 AT 860.
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> ….
>
> [64] Like a party seeking a dispensation under s20(1)(b), party seeking relief from forfeiture is claiming what can be characterised as an indulgence from the Tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted and, if so, on what terms, it seems appropriate that the first party should pay those costs as a terms of being accorded the indulgence"

28. The effect of the decision in *Daejan* was considered and applied earlier this year by HHJ Stuart Bridge sitting as a judge of the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC).

29. The case principally related to the imposition of conditions on a grant of dispensation. The First Tier Tribunal had granted dispensation from consultation on conditions, in particular payment by the lessor of the fees of the lessees' expert surveyor.

30. The Upper Tribunal held that the landlord had failed to consult the lessees adequately, had presented the lessees with a fait accompli, had not given the lessees the opportunity to consult their expert and there was, at least, a "credible case of prejudice". The Upper Tribunal explained, in upholding the decision of the First Tier Tribunal, that the appropriate approach was to place the lessees in the position they would have been in if there had been proper consultation.

31. The Upper Tribunal further said the question of whether the service charge claimed by the landlord is excessive, in the sense that the landlord seeks to recover costs which were not reasonably incurred is not an issue as far as the application to dispense is concerned. The Upper Tribunal said the following:

> "An application to dispense with consultation requirements does not take place in a vacuum. If the FTT takes a view of the application without regard to what has happened previously as between the landlord and the tenants, and what is likely to happen in the foreseeable future, it is difficult to see how it can properly consider what if any prejudice has been suffered.
>
> There is one further point. If the tenants were obliged in every case to show that the works proposed were inappropriate (or too expensive) as a prerequisite to the FTT refusing the landlord's application for unconditional dispensation, it would entirely frustrate the process of dispensation.
>
> In effect, the FTT would be answering the question it is asked in every section 27A application at the stage of dispensation. I agree with what was said in this regard by the FTT that:
> "If every lessor making a section 20ZA application could neutralise a plea of inappropriate (or excessively costly) works by saying that there is no prejudice because the lessees can always challenge the service charge under section 19 in a section 27A application, unconditional dispensation would be the norm."

32. Consequently, it is no answer to the lessee's argument of prejudice for the lessor to assert that dispensation from consultation should be granted because the lessees can separately challenge the reasonableness of the service charges.

The parties' cases

33. The application states that the lessees were advised by letter of electrical and fire alarms works of £3896.40 (excluding additional works later identified as required to the consumer unit costing £420 including VAT) and of the start date of the carpentry and associated works.

34. The Applicant does not assert that any part of the consultation process was followed. The Applicant's case is that there was insufficient time between 28th May 2019 and 1st September 2019 for the consultation required by Schedule 4 Part 2 of the Regulations. That period is said to reflect the 3-month time limit imposed by the Fire Service for obtaining a current fire safety report, obtaining quotes for the works and dealing with the other required matters.

35. Therefore, the application states that in the interests of safety for the lessees and in order to comply with the time limit, it was decided by the Applicant to proceed without consultation. No other explanation is offered in the application as to why no part of the consultation process required by the Regulations was followed and why no other type of consultation was attempted. However, the reason for the Applicant failing to consult is not, following *Daejan*, relevant to the question of whether or not dispensation should be granted.

36. There is generally a lack of detail provided with the application by the Applicant to explain the approach taken, the matters in the four preceding paragraphs being essentially all that the Applicant presented. The Enforcement Notice(s) served by the Fire Service, any fire risk assessment and/ or fire safety report, the letter said to have been sent by the Applicant to the lessees and the estimates received by the Applicant for both parts of the major works are all items of evidence that the Applicant could have produced to the Tribunal had the Applicant wished to do so. However, they have not in the event been produced. That was a matter for the Applicant, who was not compelled to produce those documents and who can scarcely complain if they may have assisted him- although see below in relation to the Enforcement Notice.

37. As noted above, there are individual responses objecting to the application from each of the Respondents. There is also what is termed a consolidated statement of opposition from 4 of the Respondents- Ms Springford, Mr Smither, Mr Saunders and Mr and Mrs Brunsden. That was served by Kirklands Solicitors LLP and apparently subsequent to the individual responses.

38. Certain of the Respondents complain that the Applicant was late in serving the application, providing the Respondents with only a short time in which to respond. Nevertheless, and whilst the evidence on that point, such as it is, appears to support the Respondent's contention, in the event there have been responses. As such, there is no benefit in addressing the issue further.

39. Substantively, the first principle point argued by various of the Respondents is that as between the above dates and further adding the additional month of extension said to have been given to the Applicant, there was ample time to consult. The second is that if there had been two quotes obtained by the Applicant and the opportunity for the Respondents to obtain any, they would have agreed to the "best"- which appears to mean cheapest- quote. Certain of the Respondents contend that fire safety works should have been undertaken by the Applicant at an earlier stage.

40. Mr Alexander particularly makes the point about the "best" quote", although in practice Mr Alexander goes beyond the abilities of the Respondent in such situations. Mr Alexander, in a further letter in relation to the contents of the bundle referred to a desire to deal with the replacement of the fire door to his flat himself. There was something of an issue between Mr Alexander and the Applicant as to the production of an estimate from Mr Alexander and so, out of caution, the Tribunal will not refer further to that.

41. Mr Saunders additionally refers to the electricians only attending on 27th September 2019, although he has also produced photographs indicated to show poor quality work. Ms Springford specifically cites a lack of communication from the Applicant until 25th July 2019. She also raises issues with certain subsequent matters, which fall outside of the scope of this application.

42. Ms Beaurain additionally complains that she received a letter only dated 27th August 2019 from the Applicant informing her that Teame Electrical Limited ("Teame") had been instructed to undertake fire alarm works in the communal areas, at a cost estimated at £3247 plus VAT and stating that the Applicant would be in touch about the doors, which may not be of a fire- resistant standard and may need replacing. She states that no other information or consultation was provided. Ms Beaurain has produced a quotation in respect of obtaining and fitting a fire door to her flat and related works from Oakdale Carpentry ("Oakdale") in the sum of £522.82. She has also produced a quote from Southern Fire Doors ("Southern") in the sum of £424.52 for a fire door to her flat, although the impression created is that is the cost of the door alone. She says that she would have obtained quotes in 2019 if given the opportunity to do so but that she only received a few days' notice of the works to the fire door to her flat.

43. Ms Beaurain also produced a photograph of her door area, correspondence from the Applicant seeking payment of service charges and in relation to the fire door works more generally, primarily from this year but prior to the application. A portion of a document which seems to be the fire risk assessment, although the portion does not take matters much further.

44. Mr Brunsden highlights, amongst other matters, that the review by the fire service was provided on 28th May 2019, six weeks after the fire, and suggests that the Applicant could have identified suitable contractors during that period. He says that the work to the replacement was scheduled for mid-November 2019 but only completed in December 2019.

45. Both Ms Beaurain and subsequently Mr Brunsden provided the Enforcement Notice, being one of those documents received piecemeal that the Tribunal has nevertheless considered in this instance because it appears that Ms Beaurain provided it with her objection and so it ought to have formed part of the Bundle. In the event, save for confirming the issue date of 28th May 2019, it takes matters no further.

46. Mr Smither adds that he has obtained a quote from his father in law, described as a retired construction site manager and carpenter by trade to

attend to the 7 doors required for just under £3000, £428.17 per door, as compared to the cost incurred by the Applicant of almost £14,000. Hence, there is financial prejudice asserted by Mr Smither on the basis of a significantly excessive cost being incurred, where the consultation process would have facilitated works at a much lower cost.

47. In addition, reference is made by certain of the Respondents to poor workmanship, with holes rendering the fire doors not fire-proof and not all of the door self- closing. However, those matters about the quality of the works not matters directly relevant to the question of dispensation from consultation requirements.

48. Kirklands Solicitors LLP comment principally in relation to the fire-resistant doors, referring in particular to an estimated obtained by Mr Brunsdon from a contractor called Navajo Developments Limited ("Navajo"), indicating a cost for the replacements fire door works of £2997.89. They emphasise the difference of £8726.11 between the charges of the Applicant's contractor and Navajo and the extra £1454 cost per residential lease. Significant prejudice is asserted. There are other comments made as to the quality of the works, in reliance on a report by Mr Rodgers.

49. Shorter comments are made by Kirklands in respect of the fire alarm and emergency lighting works, presumably including the consumer unit work. Reliance is placed on another quotation obtained from DNR Electrical Hampshire Limited ("DNR") on behalf of the Respondents in June 2020, for £3221.69. It is accepted that the discrepancy in cost is more modest but prejudice is asserted by Kirklands, albeit they say on a smaller scale.

50. The Applicant has provided the separate responses sent by him to each of the letters of objection and to each of the specific objections contained made by the individual Respondents, reiterating the need to meet the time limit imposed by the Fire Service and stating that no extension of time was requested from them, re-iterating his position that there was insufficient time to undertake the consultation process but there was time to undertake the required work once the fire report was received, that obtaining alternative quotes would have caused delay and explaining about the increase in cost for the fire alarm works.

51. The Applicant also asserted that no schedule of works could be devised prior to the formal review from the Fire Service and then the fire report being received, that there was no purpose in contact until the fire report was received and that the cause of the fire was not the result of any breach or failing by the Applicant. The Applicant has additionally denied that there was a previous indication of the need for the major works, citing a Fire Service review in 2009, and also commented on difficulties in respect of the doors and other matters raised which fall outside of this application.

52. The Applicant has covered essentially the same ground in his response to the objections as submitted to the Tribunal and dated 23rd June 2020. That adds that the lessees were informed by letter dated 25th July of an inspection on 5th August and on 6th August that the inspection had been

carried out. The response also identifies that the fire alarm installation was estimated to cost £3,896.40 and that £420 was added to that for a new consumer box and further that carpentry works were estimated at £11,724.

53. The Applicant does not accept the quote given to Mr Smither. He additionally stated that he had no reason to believe that the estimate from the contractors who undertook the work was anything other than fair and reasonable, referencing a quote for replacement doors and windows for a flat owned by the Applicant in London.

54. One of the last comments made by the Applicant is that the Respondents made no suggestion at the time that they wished alternative quotations to be sought. The comment does not otherwise address the assertions of the Respondent about the consultation process or lack of it.

Consideration

55. The Applicant has not sought to explain why this was only lodged in March of this year, 2020, and some months after the completion of the qualifying works, still less why it was not made in or after May 2019. However, that delay does not alter the nature of the long-term qualifying agreement that had already been entered into and does not, at least of itself, affect the prejudice or lack of it caused, or otherwise amount to relevant factor in determining whether or not dispensation should be granted.

The Fire and emergency lighting/ other electrical works

56. There are two contractors involved in works to the property, each having undertaken an apparently distinct portion of the works. It is not especially clear whether the comments made by the Respondents individually relate to both the fire and electrical works and carpentry works on the one hand or only the carpentry works on the other. However, the Tribunal is unable to discern any point made by the Respondents individually about the fire and electrical works save for the lack of communication and consultation.

57. Modest prejudice is asserted by Kirklands in relation to the fire alarm and electrical works and an alternative quote has been provided. However, that assertion and quote is in the context of a contested application and 4 of the Respondents receiving legal advice in respect of that.

58. There is nothing advanced specific by or on behalf of the Respondents as to what they would have said and done in relation to the fire and electrical works in the event of consultation in 2019 and how that would have altered the end position. It is not, at least in any clear terms, asserted that an alternative quote would have been obtained in summer 2019.

59. In any event, the Tribunal cannot find that the estimate from DNR would necessarily have been the same in the event that an estimate had been requested at the time at which the work needed undertaking. The contractor would have considered the actual situation and given a quote for a contract which it might well have then performed, assuming that the nature of the work and the timing of it fitted with the work on other

buildings scheduled by the contractor to be undertaken around and about the relevant time. In contrast, the estimate which has been given was given in the somewhat artificial circumstance of the work having already been undertaken, there most likely being knowledge of the nature of the dispute about the invoice from the Applicant's contractor. DNR cannot have seen the building as it was and did not have to fit the work into its commitments and price the work according to the extent to which it suited at that time to undertake it.

60. The estimate additionally may or may not include the new consumer unit found to be required following the initial estimate given by Teame. The estimate does not mention it and none of the long list of applicable materials have been highlighted to include a new consumer unit or very obviously do- such unit may be included somewhere in the list but is not apparent to the Tribunal.

61. It is therefore quite plausible that an estimate given at the time for the required work would have been higher. Similarly, whilst it may only have been the "best" i.e. cheapest quote which would have been acceptable to the Respondents, that does not equate to their any reason to assume that the Applicant would have chosen the cheapest quote. The cheapest quote may well not have been considered, for one reason or another, by the Applicant to be the best and so the most appropriate quote to accept.

62. The difference between the quotes is not substantial and may have been even less so if DNR had quoted at the time following inspection of the then position, as opposed to many months later in very particular circumstances. The difference would also be even less so if DNR has not allowed for a new consumer unit, as appears on balance to be the case. The Tribunal finds that even if there had been a consultation undertaken in 2019, there is insufficient evidence to demonstrate that the Applicant would have been likely to proceed with a different contractor and that the end result would have been any different to that which occurred.

63. The Tribunal therefore finds that there was, despite an unsatisfactory approach having been taken by the Applicant, no prejudice caused to the Respondents because of the lack of consultation in relation to such works.

<u>The fire door/ carpentry works</u>

64. In contrast, the gulf in the costs incurred by the Applicant in respect of the carpentry/ fire doors as compared to the quote from Navajo produced on behalf of the Respondents, and to a lesser extent those from Oakdale and Southern for work to the door to the flat of Ms Beaurain and from Mr Smither's father-in-law in respect of the flats as a whole, is the matter which does have resonance in relation to the Respondents' argument as to prejudice having been caused. The cost to each according to the Navajo estimate and that from Mr Smither's father-in-law would have been under £500 and the costs according to Oakdale for an individual flat is £522.82. In comparison the cost according to the Applicant's contractor' estimate is 4 times that, a little under £2000 per lease, an additional £1454 cost per residential lease above the level of the Navajo quote.

65. An obvious difficulty with the Applicant's case is that however fair and reasonable the estimate from the contractors for the carpentry works instructed by the Applicant may have appeared to the Applicant- and the Tribunal's role is not to consider the genuine or other nature of the Applicant's belief- the Applicant appears to have had no way of knowing that the estimate was indeed fair and reasonable. The most obvious way in which the Applicant may have checked and then demonstrated that his belief was a reasonable one, would have been to obtain and produce in evidence at least one alternative estimate from an alternative contractor.

66. The Tribunal's role is to determine whether there was in fact prejudice, including if appropriate financial prejudice, caused to the Respondents. The Tribunal firstly finds that if the consultation process had been followed, the likelihood is that the Respondents, or at least one of them, would have nominated other persons from whom an estimate should be sought. The Applicant would have been obliged to seek to obtain an estimate from that alternative contractor, even if the Applicant had not by then sought a second estimate himself.

67. At the very least, it would then have been apparent to what extent the estimate from the contractor instructed by the Applicant was reasonable. On the evidence before the Tribunal, the Tribunal finds that such estimate(s) would, as the estimate produced on behalf of the Respondents within these proceedings is, have been appreciably lower than that from the company with which the Applicant did contract.

68. In the same manner as set out above in respect of the quote from DNR, the Tribunal cannot find that the estimate from Navajo would necessarily have been the same in the event that an estimate had been requested at the time at which the work needed undertaking. Navajo or any other contractor would also have considered the actual situation and given a quote for a contract which it might well have then performed, assuming that the nature of the work and the timing of it fitted with the work on other buildings scheduled by the contractor to be undertaken around and about the relevant time. In contrast, the estimate which given by Navajo was also given in the somewhat artificial circumstance of the work having already been undertaken, there again most likely being knowledge of the nature of the dispute about the invoice from Teame. Similarly, Navajo had also not seen the building as it was or did not have to fit the work into its commitments and price the work according to the extent to which it suited Navajo at that time to undertake it.

69. Significant caution is required when considering the estimate said to have been given by the retired father-in-law of Mr Smithers to his son-in-law. There is no information before the Tribunal to demonstrate that the gentleman would have been considered by the Applicant appropriate for the Applicant to contract with. Limited additional weight can be placed on the amount of that particular estimate alone in those circumstances. Some caution is also appropriate in respect of the quote to Ms Beaurain, where that relates to an individual property. That may scale up to seven times the figure for the seven fire doors.

70. More likely there would be some reduction and the net effect may or may not be similar to the Navajo figure but the Tribunal is engaged in speculation. Irrespective of the caution to be applied when considering the other estimates, they do accord in broad terms with the Navajo and give some basis for a belief that the estimate from Navajo may bear some relation to the level of an estimate which a contractor asked to estimate in or about summer 2019 might have given. Overall, the Tribunal adopts the Navajo quote as being the best comparator and does not specifically refer further to the other quotes, although it is mindful of them.

71. Whilst accepting that *Daejan* requires the Tribunal to be sympathetic to the lessees, it is as equally plausible as it was in respect of DNR that an estimate given at the time would have been higher. There is again no proper basis upon which to preclude that. Nevertheless, the weight of evidence indicates that if the Applicant had sought a second estimate in relation to the carpentry works, particularly one from a contractor proposed by one or more of the Respondents, whether Navajo or otherwise at the time, that second estimate would have been considerably lower than the estimate from the contractor with which the Applicant did contract.

72. The Applicant would have needed to do one of i) contract with the contractor nominated by the Respondents, as being such a person and in any event as having provided the lowest estimate or ii) contract with any other contractor approached by the Applicant that gave a lower quote or iii) take the steps otherwise required and then have contracted with a company estimating a higher cost for reasons which the Applicant would have needed to provide to the Respondents, although as noted above, there may have been reasons for taking approach iii) considered by the Applicant to be sound. Approach iii) could in principle have included a contract with Teame.

73. In the event of contracting with Teame, that would, on the evidence, have been at a significantly higher cost, the Applicant would have had to do so in the knowledge that the lessees would be likely to subsequently challenge the reasonableness of the service charges which arose and that the Applicant may find himself having incurred significant costs which he could not recover as service charges. There would have been no discernible advantage to the Applicant in that particular approach unless there were obvious issues with the work proposed by other contractors and/ or the contractors themselves and, in contrast, there would have been a marked financial risk.

74. The Tribunal finds it to be unlikely that the Applicant would have taken the approach of contracting with Teame in such circumstances. The far more likely position is that the Applicant would have contracted either with the contractors nominated by the Respondents if acceptable to the Applicant on appropriate enquiry or, on balance more likely, another contractor charging a more similar cost but which the Applicant considered to be a more appropriate contractor to undertake the work. Hence, the Applicant would have been likely to incur significantly lower cost than he did.

75. The failure of the Applicant to consult and to obtain at least two estimates, including at least attempting to obtain an estimate from contractors nominated by the Respondents, led to the Applicant contracting with a company estimating appreciably greater cost than would have been likely in the event of at least some attempt at consultation, which the Applicant presumably will wish to recover through service charges, hence this application in which the Applicant seeks dispensation to avoid the limit otherwise imposed.

76. It should be mentioned for the sake of completeness that the work in respect of the fire doors and any other carpentry was undertaken in November and December 2019. That is long after the start of September date which appears to have troubled the Applicant and is said by him to have led to the lack of consultation. Indeed, there is a period in the region of four months long between the fire report being obtained and the carpentry works.

77. Not only does that suggest such work not to especially urgent, but it also allows ample time for there to have been a good effort made to consult, even if not necessarily the time for a full consultation, accepting a likely time- gap between instructing a contractor after completion of any consultation and tender process and the time at which the contractor was able to undertake the works. It supports the likelihood that any process would have resulted in other quotes, including by the Respondents, and that consideration would have been given to those.

78. Whilst the Tribunal accepts that it would have been rather difficult to obtain quotes ahead of receipt of the fire report and consequent knowledge of the works for which quotes were required, that is no reason not to have communicated with the Respondents at all about the need for some works. More significantly, the Applicant ought to have done more upon receipt of the fire report to make the Respondents aware of the position and to engage with them thereafter, failing to facilitate any input from the Respondents by not doing so.

79. The Tribunal finds that the Respondents have suffered prejudice by the failure of the Applicant to follow the required consultation process or any other attempt at consultation insofar as that relates to the carpentry works.

80. However, the Tribunal does need to carefully consider the extent of the prejudice. finds that in the event of consultation the Applicant would have incurred a rather greater cost than that and hence the prejudice actually caused to the Respondents reflects the cost incurred by the Applicant which may be claimed as service charges as compared to the cost which it is likely would have been incurred by the Applicant in the event that the consultation procedure had been followed.

81. It is important to emphasise the point that the Applicant would not have been obliged to contract with those proposed by the Respondents and may have been able to provide sound reasons for accepting a quote from another provider of the same services, stating those reasons and setting

out both the observations which had been made by any of the Respondents and his response to those. More than one costs figure may be reasonable and there may be reasons other than cost supporting the instruction of one contractor over another. Whilst the sensible conclusion is that the greater the disparity in cost, the less likely such a higher estimate would have been accepted, as explained above, the Applicant may well have quite properly considered it appropriate, armed with the estimates and other information which the consultation process would have placed before him, to then accept an estimate at a more similar to but nevertheless somewhat higher level than £2997.89.

82. Although it may only have been the cheapest quote which would have been acceptable to the Respondents, that does not amount to any reason to assume that the Applicant would have chosen the cheapest quote. The cheapest quote may again not have been considered- for reasons which might have included the materials proposed, the experience and track-record of the contractor, the insurance cover and/ or guarantees offered, the date at which the works would be undertaken or indeed a myriad of other reasons- by the Applicant to be the most appropriate quote to accept. The best contractor may have quoted for rather more than Navajo and still have been chosen by the Applicant.

83. The Tribunal is required to address prejudice. The Tribunal is not in this application required to, or indeed able to, address the reasonableness of the costs and consequent service charges and determine the maximum sum so reasonable. There is a danger of the Tribunal falling into the trap of doing so.

84. The Tribunal is able to grant dispensation, to refuse dispensation or to grant dispensation on the basis of certain conditions. It is abundantly clear that the ability of the Tribunal to impose conditions enables the grant of dispensation by the Tribunal subject to compliance with the conditions where that dispensation would not be reasonable in their absence. The Tribunal can, by way of the conditions, address the prejudice which would otherwise have been caused.

85. The prejudice found is that there was an apparently excessive cost incurred by the Applicant in respect of the carpentry works, but not the fire system and electrical works, which would not have been incurred in the event of consultation. That excessive cost is the difference between the cost actually incurred and the sort of level of cost which the Applicant might have been likely to consider reasonable in the event of at least one more estimate having been obtained and otherwise the consultation process having been followed. It is not, it must be emphasised, the difference between the cost incurred by the Applicant and any lower sum which the Tribunal may, in the event of an application for the question to be determined, later decide is the reasonable sum to be recovered as service charges.

86. Sensibly therefore, and particularly in the absence of any other contemporaneous quote to consider, quite some margin must be allowed in relation to an acceptable- to the Applicant- level of quote other than that from TEAME but recognising that the further the level of the quote travel

from the Navajo quote to the TEAME one, the more that the perceived weight of acceptability and risk would shift, until a point were reached where the latter outweighed the former.

87. Broadly midway between the level of the TEAME estimate and the Navajo one is a rough and ready, but no less sensible for it, level to allow for, rounding down a little to reflect likely caution to avoid the scales tipping.

88. The final matter to address in relation to the carpentry element of the major works is the wish of Mr Alexander to deal with the fire door to his flat himself. That has been indicated to have been raised with the Applicant at the time and so may have been unaffected by the lack of consultation process. However, that desire and the responsibility under the Lease are different matters but, more importantly in the context of this application, none of that is directly relevant to the question to be determined.

Legal Costs incurred

89. Knights on behalf of their 4 Respondent clients request in their consolidated statement that the Applicant be ordered to pay those 4 Respondent's costs of opposing the application.

90. The Tribunal reminds itself that under Rule 13(2)(b) of the 2013 Rules, the Tribunal may only make an order in respect of costs "if a person has acted unreasonably in bringing, defending or conducting proceedings". The Tribunal notes the invitation to be brief in addressing that question and that process to adopt given by the Upper Tribunal in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC) at paragraph 43, namely:

> "The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read."

91. No specific basis is advanced of unreasonable conduct on behalf of the Applicant. The Respondents may rely on the circumstances in 2019 generally but that is not stated in relation to any award of costs in terms. The conduct of this application by the Applicant cannot be described as unreasonable on the basis of anything seen by the Tribunal. There was an incomplete and unsatisfactory Bundle and indeed quite a number of documents from the Respondents over and above the response forms were omitted. There can be little doubt such a matter could amount to unreasonable conduct and could, in appropriate circumstances, result in an order for payment of costs. However, the Tribunal finds that there was some confusion on the part of the Applicant and, whilst not without some concern as to the Applicant's approach, finds that there is insufficient evidence of a positive intention to mislead. Neither is there otherwise sufficient for a finding of unreasonable conduct.

92. However, whilst the Tribunal does not award costs of opposing the application as such, the Tribunal is specifically entitled, pursuant to *Daejan* and as set out in the lengthily quote above, to consider the appropriateness of making an award of some or all of the costs incurred by the Respondent a condition of the grant of dispensation in the event that the Tribunal considers that appropriate.

93. The Tribunal has not received specific representations in respect of the imposition of such a condition but is well aware of the positions of the parties, who must be taken to know the power available to the Tribunal to grant dispensation on such terms as it considers appropriate in all of the circumstances. The Tribunal considers that it has ample on which to consider the point. The Tribunal has given careful thought to the appropriate potential course of action.

94. The Tribunal finds that it is unlikely that the Respondents would have sought legal advice and have incurred cost in doing so in the event that the Applicant had followed the consultation process. It is impossible to categorise the decision to seek such advice as not being reasonable. In principle, the costs of the Applicant's claim being considered should be paid by the Applicant.

95. That said, the Respondents who sought advice went beyond seeking advice about the application and incurred legal costs in arguing whether it should be granted. *Daejan* allows for the award of those costs also. However, that is to the extent those are reasonable.

96. The advice to obtain alternatives quotes has contributed significantly to the degree of success achieved by the Respondents. The further statement of case rather less so and indeed it is not easy to discern that the outcome would have been any different without it. Detailed objections from each Respondent had already been provided. In addition, only some of the points made have been accepted, for example the point about the fire safety and electrical works has not.

97. The Tribunal has no costs figures from the solicitors representing some of the Respondents, still less any breakdown of the work involved. Neither is the imposition of a condition the circumstance for a detailed analysis of figures. Rather, it is an exercise in reaching the condition that it is appropriate to impose on granting dispensation and hence there must be something of a broad-brush approach on consideration of the relevant factors as a whole.

98. On balance, the Tribunal considers that it is appropriate to place a condition on the grant of dispensation that the Applicant contributes to the legal costs incurred by the Respondent and that 75% is the appropriate level of that contribution.

Decision

99. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works but only on the following conditions, namely:

i) The amount which the Applicant may recover from the Respondents by way of service charges in respect of the carpentry element of the major works is limited to a maximum of £7000, which is the sum which the Tribunal finds is the maximum cost which the Applicant would have been likely to have incurred in the event that the consultation process had been followed and other quotes for the relevant works had been obtained.

ii) The Applicant pay 75% of the Respondents', or such of them as incurred such costs, reasonable legal costs of this application, to be summarily assessed if not agreed; and

iii) The fee for the application should not be recoverable by the Applicant from the lessees through the service charge.

100. For the avoidance of doubt, it is re-iterated that condition i) above does not amount to a finding that the above amount is the maximum reasonable pursuant to section 19 of the Act but rather that no more than the above sum may be recovered, assuming that sum is determined to be reasonable in the event that a relevant application is made.

101. Conditions ii) and iii) reflect the caselaw referred to above and the partially successful opposition to the application on the part of the Respondents. The Respondent's solicitors will need to demonstrate the full costs incurred, from which 75% of that figure can be identified, and the breakdown of those costs, from which all or an agreed reduction in them can be paid.

102. 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, it re-iterates, 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