FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/LDC/2020/0046/AW
Property	**:**	45-49 Broadwater Street West, Worthing, West Sussex BN14 9BY
Applicant	**:**	Vert Estates Limited
Representative	**:**	Heywood and Partners
Respondent	**:**	(1) Mr & Mrs Steel (45a) (2) Mr Jack Newnham (49b)
Representative	**:**	
Type of Application	**:**	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	**:**	Judge J. Dobson
Date of Decision	**:**	24th 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 the walkway above 45 Broadwater Street West.

2. The Applicant is not 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 walkway above 47 Broadwater Street West. Accordingly, the maximum which may be recovered by way of service charges in respect of such works is £250 per residential property lease.

3. 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

4. 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 asserted that emergency works were required to an area described in the application as the rear walkway and as the flat roof to the retail units at 45 and 47 Broadwater Street in order to prevent continued water damage to the structure and to the units below and not rendering it practical to consult before undertaking the work. The work has been undertaken.

5. 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 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.

6. The Directions stated that the Tribunal would proceed by way of paper determination without a hearing pursuant to Rule 31 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.

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

The Law

8. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations ("the 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.

9. 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".

10. 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.

11. 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".

12. 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.

13. 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."

14. 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.

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

16. 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.

17. 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), 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

18. The Applicant explained that the building includes a pair of retail units, each with two dwellings above, hence four such in total. Each of the dwellings is held on a long lease by a leaseholder (collectively referred to below as the "Lessees").

19. The Applicant's preferred contractors were not available to quote. The Applicant contacted three other contractors for quotes, one of which declined to respond. The Applicant inspected the property with the other two contractors, called Royal Roofing Services and Broadwater Roofing. The former quoted at £3600 and the later at £3863, although the later also did not quote for the entire area of the walkway- there is no indication as to why not if that was what the Applicant had requested- and had a lead-in time of twelve weeks, which the Applicant appears to have regarded as unacceptably long. The Applicant instructed the former (referred to below as "the Contractor") to undertake the works. The Applicant states that there were difficulties experienced with obtaining contractors due to Covid-19 restrictions.

20. The Applicant states that it informed the Lessees of the above and that a formal consultation would not take place due to the urgency. The Applicant further states that the urgency reflected the risk of continued damage to the structure and risk of damage to the "shop" below, where the area in question was too large for a temporary fix (implicitly ahead of major works providing a longer- term solution and following consultation).

21. The Applicant has provided a lease described as a sample lease ("the Lease"), from which the Tribunal understands that the leases of the four residential dwellings are all in the same, or materially the same, terms. Specifically, the lease is of 49b, which the Applicant appears to have obtained from the Land Registry.

22. 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 5 and Schedules 4 ("Tenant's Covenants") and 6 ("Landlord's Covenants) of the Lease and in the definitions.

23. The definitions also include Service Charges payable by the individual Lessees, Service Costs- being the costs of the Applicant providing the Services plus some other expenses- and the Services themselves. The Services include the following:

"1.1.1 cleaning, maintaining, decorating, repairing and replacing the Retained Parts"

24. Importantly, the definitions also include a definition of "Retained Parts", which includes;

"all parts of the Building other than the Property including

1.1.5 the accessway coloured brown on the attached Plan."

25. The said Plan is exhibited to the Lease and shows an area coloured brown, including crossing an area otherwise comprising of flat roof.

26. The Respondents both stated what were essentially 3 matters in objection, albeit not using exactly the same wording. Those objections are as follows:

i) The extent of the works is greater, "far beyond" in the wording adopted by the Second Respondent, than necessary. Not only was the walkway replaced above 45 but also above 47.

ii) There was a delay from the leak being reported to the Applicant by the commercial tenant of 45 until the Applicant informed the Respondents of over a month.

iii) The materials used were not appropriate, being roofing materials and not appropriate for a walkway.

27. The Applicant has replied to the Respondents' objections on the following lines:

i) The condition of the walkway above 47 was similar to that above 45 and so the Contractor was asked to undertake work to that further area in order to prevent any water entering the building structure. The further reply notes that the walkway to 45a was cracked and that there was an active leak into 45.

ii) The Applicant accepts delay between water penetration into 45 being reported and the work being undertaken. The Applicant states that the Covid-19 pandemic caused delay in obtaining reports and quotes, whereas the Applicant needed to obtain such in order to ascertain what the issue was and from where the water got into the retail unit at 45. Whilst the first quote, from the Contractor, was obtained on 29th May 2020, the second one, from Broadwater, was only received on 22nd June 2020. The Contractor informed the Applicant that it could undertake the work swiftly if instructed to do so swiftly, having a gap in its scheduled work, but that there would otherwise be a delay. Broadwater had a 12-week lead period.

iii) The materials are those that the Applicant was advised by the Contractor to be the most appropriate and that it would last a long time on roofs and on walkways, in addition to being ready to use for walking on in a very short period of time.

28. There is no dispute as to the works falling within the Applicant's obligations under the Lease or as to the cost of the works falling within Service Costs as defined.

29. For the avoidance of doubt, it should be recorded that the other two of the Lessees did not respond.

Findings and Reasons for Decision

30. It is convenient to deal with the areas of objection and the approach of the Tribunal to them using the same numbering as above for ease of reference. The Tribunal then refers to the effect of that on the decision made and the reasons for making the decision stated at the start of this Decision.

31. Firstly therefore, the Tribunal addresses the specific objections.

i) <u>The extent of the works</u>

32. The 2 photographs taken prior to the works being completed show the general condition of the area of walkway within them. The photographs appear to show essentially the same modestly sized area but from different angles. There is no indication of the condition of the remainder of the walkway.

33. The Applicant has produced no report, quote or other document from the Contractor recording their opinion that there was damage above 47 causing leaking of water into the commercial units below or risk of that, or the extent of that damage or leaking if indeed there was any. Indeed, there is no document emanating from the contractor produced by the Applicant at all. There is a single page within the bundle being the quote from Broadwater Roofing but that alternative contractor was not instructed in the event.

34. There are photographs of the effects of the leaking within a commercial unit. It is not clear exactly where that is as compared to the walkway, although it might seem obvious that the leak is underneath the walkway, save that the quote from Broadwater Roofing is apparently for work to the stairs and specifically excludes the walkway itself. The Applicant has no chosen to proffer any explanation. The works actually undertaken by the Contractor did not, on the evidence presented, include any works to the stairs.

35. The Respondents have not asserted that work was undertaken to the wrong area in terms of the work above 45. The application made by the Applicant describes leaking to a shop, singular. The Tribunal finds

on the evidence presented that the leaking occurred into 45 and that the damage caused was damage to the retail unit at 45.

36. The Tribunal accepts on balance that damage to the walkway above 45 was the source of a leak and an ongoing one, into the commercial unit below, i.e. 45, and did require remedial work.

37. Common sense dictates that any continuation of the leak(s) into the commercial unit would increase the staining within that unit and potentially result in other damage, all of which would potentially increase the cost of repair and of the charges which may be leveed to pay for that cost. Whilst the extent of that increased damage is unclear- there being in particular no indication of to what use the part of 45 affected by the leak(s) is put- nevertheless allowing continued water penetration into the unit was understandably unsatisfactory.

38. In contrast, there are no photographs of any leaks into the commercial unit at 47, and the Tribunal infers that to be because there would be nothing to show. That is consistent with the application referring to a leak into one shop, singular, found to be the retail unit at 45.

39. The only basis for work above 47 identified by the Applicant is that the Contractor apparently stated to the Applicant that the condition of the walkway above 47 was the same as that above 45 and he considered that liquid was likely to be getting into the roof structure. There is, as noted above, not even anything produced in writing from the Contractor which confirms them holding that opinion, still less explains the basis for it. There is, in particular, no indication within the evidence that the Applicant has chosen to present that there was a short- term risk of damage within 47 such that urgent action was required, or that the cost of remedial works to the walkway above 47 would be greater if left for a time.

40. There are equally no photographs which are clearly indicated to be of the walkway about 47 and in addition, not only is there nothing from the Contractor but further there is no other evidence of what is asserted to have been said by the Contractor to the Applicant to demonstrate the condition of that area of walkway. The Tribunal has received no evidence that work to the walkway above 47 was urgent and could not await the undertaking of the consultation process.

41. The price said by the Applicant to have been quoted for work above 45 was £1800: the cost said to have been incurred for work above 45 and 47 was £3600, double the former figure.

42. There is therefore no indication that any saving was achieved by the work being undertaken to both 45 and 47 at the same time or that the cost of the work above 47 would have been greater if undertaken in isolation from the work above 45- certainly the work above 45 does not appear on the evidence to have been any cheaper for having been

undertaken in conjunction with the work above 47 than it would have been if undertaken alone.

43. If the evidence had demonstrated an appreciable cost saving in undertaking the work above 47 at the same time as the work above 45- which would have been quite plausible in principle- then the Applicant's position would have been stronger. So too, if the evidence had demonstrated that completion of the work above 45, with the new walkway surface, would have had a detrimental effect upon the surface above 47, for example where the two joined. However, there is no such evidence presented. Aesthetically, there would have been 2 distinct areas and that would not have been especially attractive, although arguably neither are the areas both before and after in any event.

44. The evidence presented by the Applicant does not demonstrate that it was appropriate to undertake work above 47 as a matter of urgency and without undergoing any consultation.

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

46. This not a case where it is clear that the extent, quality and cost of the works were in no way affected by the lack of consultation. Rather, this is a case where on the evidence, it is more likely than not that the extent of the work and the consequent cost of the work have been reduced in the event of consultation, because the Applicant has not demonstrated any immediate need for the work above 47 or any benefit achieved by taking the approach that it did to having the work above 47 undertaken at the same time as the work above 45.

47. The Respondents have advanced a credible case for having been prejudiced in respect of the walkway above 47 and the Applicant has failed to rebut that.

48. In contrast, there is no credible case advanced, or obviously even attempted to be advanced, by the Respondent that the works above 45 would have been reduced in their extent or cost and no evidence has been presented creating a case which the Applicant need rebut. The question of quality is dealt with at iii) below.

ii) <u>The delay in informing the Respondents</u>

49. There is, the Tribunal finds, no adequate reason given by the Applicants as to why the Respondents were not informed in late May 2020 that a leak or leaks had been reported by the commercial tenant of 45 and that work was proposed to the walkway.

50. Neither is there any adequate reason given for the Applicant having failed to provide the quote received from the Contractor or at least informing the Respondents of receipt of it and of the work contained within it, including the suggested need for works above 47.

51. The Tribunal further finds that if the Respondents had been informed about the proposed works prior to those being undertaken, the Respondents would have been likely to raise issues the same as or similar to those raised now. Therefore, the Applicant's failure to inform did prevent, in the way that lack of consultation generally did, the Respondents raising questions of the extent of the works, which may well have affected the extent and/ or cost of the works undertaken. If the work to the walkway above 47 had not then been undertaken, the two areas would have looked quite different. However, that does not alter the principles to be applied in this application.

52. That contributed to the situation described at i) above, although the Tribunal finds is likely to have had the same effect, or rather lack of it, as described at iii) below.

iii) <u>The materials used</u>

53. The Tribunal has carefully considered the Respondents' case in relation to this item and notes that the look of the walkway appears rather different to how it previously did. Further, that there are a large number of small areas of surface material and a large number of joins. As noted above, aesthetically, the surface area, whilst looking newer does not particularly look improved.

54. In addition, from the photographs supplied, the mineral cap sheet looks like materials used for roofing, albeit that does not of itself render the materials inappropriate for other use. The Tribunal has received no evidence as to alternative materials for the surface of the walkway and the extent to which those may have been better, if at all, than the material actually used. Whilst concrete was apparently used when the walkway was first created or at least at a time at which it was previously resurfaced, the Tribunal is unable use it expertise to reach any decision as to whether the material actually used was inappropriate for the particular job undertaken on the evidence presented by the parties.

55. The Tribunal has some concern that the Applicant obtained quotes from roofing contractors, presumably well versed in the use of roofing materials but not necessarily other materials, where the work was not as such roofing work. The walkway plainly provides part of the covering above the commercial units but equally provides access on foot to the dwellings. However, the Tribunal has nothing before it to translate that degree of concern into anything greater, in particular

nothing which has the effect of calling into question the suitability of the contractors contacted.

56. The Respondents have not provided other quotes or estimates or other information about the particular covering used or indeed other suitable coverings. The Respondent have failed to advance a sufficient case that the material used is inappropriate.

57. Equally, there is nothing to suggested that they would have done so if consulted at the time. Indeed, the Respondents have commented now with the benefit of seeing the materials used, where the difference from the previous materials is visually obvious and they have been able to comment with the benefit of walking on the walkway.

58. It is far from being obvious that the difference would have been as apparent in advance. In any event, in light of the Respondents not having produced evidence as to alternatives now where they have disputed the application made, the Tribunal finds that they would not have done in the event of a consultation.

Decision

59. The Tribunal finds that nothing different would have been achieved in respect of the walkway above 45 in the event of consultation having taken place, except for a period of several weeks of delay. That would have allowed the potential for further leaking of water into the commercial unit below- and potentially of the walkway itself-and so the creation of greater problems to address, with potentially greater expense.

60. 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 in respect of the work to the walkway above 45.

61. However, the Tribunal finds that the position is not the same in respect of the work to the walkway above 47. In contrast, there is a realistic prospect that the position of the Respondent would have led to further investigation of the walkway above 47 and that work may not have been undertaken to that or at least not at the time of the work to the walkway above 45.

62. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements only in respect of the major works which were undertaken to attend to in respect of the walkway above 45.

63. The Tribunal has considered whether dispensation ought to be granted in respect of the works to the walkway above 47 on conditions.

However, the Tribunal finds that would not be appropriate in this instance. The amount recoverable by the Applicant in respect of the works to the walkway above 47 is accordingly limited pursuant to the Regulations.

64. The Tribunal does record that the bundle provided for determination contains at pages 56 to 58, at pages 65 to 67 and at pages 71 and 75 to 76 the same two pages of photographs. It serves no purpose and causes a degree of inconvenience to have the same documents multiple times within the bundle. The Directions were clear that "The bundle shall contain one copy of:" the documents listed. Such provision of multiple copies must not occur. Where documents refer to other documents, the pages on which the other documents occur can be noted. There is no need for multiple copies of the same document, hence the very clear direction given.

65. 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 any of the Lessees wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1985 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.