



**FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00CN/LDC/2020/0012**

HMCTS code : **V:CVPREMOTE**

Property : **Flats 13 to 59 Elmwood Court Pershore Road Birmingham B5 7PB**

Applicant : **The Executors of Irving Carter Deceased**

Representative : **Proxim Property Management Ltd**

Respondents : **The long leaseholders of Flats 13 to 59 Elmwood Court**

Type of Applications : **An Application under Section 20ZA of the Landlord and Tenant Act 1985 (“the 1985 Act”) for dispensation of the Section 20 consultation requirements.**

Tribunal Members : **Judge D. Barlow
Mr W. Jones**

Date of Hearing : **26 January 2021**

DECISION

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Covid 19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. the form of remote hearing was skyperemote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. the documents that the Tribunal refer to are within the Application Bundle filed on 19 November 2020 and the Respondents' Bundle filed on 19 January 2021 the contents of which have been fully considered by the Tribunal.

DECISION

- (1) The Tribunal grants dispensation from all or any of the consultation requirements of Section 20 Landlord and Tenant Act 1985, for the purpose of entering into a contract for the Works identified below with Rio Asphalt & Paving Company Limited.
- (2) The Tribunal's dispensation is conditional upon limitation of the service charge costs for Flats 13-59 Elmwood Court, in respect of the Works, to a sum not exceeding £617.50 per flat, inclusive of the costs of this application (if any).
- (3) In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

REASONS

BACKGROUND

1. On 23 September 2020 the Tribunal received an application to grant dispensation from the consultation requirements contained within section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") and the Service Charge (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations") in respect of works proposed to the roof of the tower block at Elmwood Court in Walsall. Under the provisions of the 1985 Act and the 2003 Regulations, the Applicant is required to consult if the cost of the works exceed the sum of £250 including VAT per leasehold interest.
2. The Applicant's proposals are based on a detailed specification of works prepared for an invitation to tender in September 2020, which can fairly be summarised as comprising: the installation of a tapered, insulated roofing system to the tower block 13-59 Elmwood Court, with a built up felt covering,

backed by a 20-year warranty. The system will include an insulated tapered roofing system to the lift motor room roof and will involve raising the roof level of the lift motor room, cladding and renewal/replacement of doors and rainwater pipes to accommodate external drainage. This whole programme including project management and supervision, is termed “the Works”.

3. Directions were issued on 19 October 2020 for the service by the Applicant on each of the Respondents a copy of the application and the directions which provided for the leaseholders to confirm if they consented to or objected to the application by 6 November 2020. Six leaseholders confirmed their consent to the application. Four leaseholders objected to the application.

THE LEASE

4. The Applicant is the head lessor of the Elmwood Court development which includes the Property. The Property is a 12 storey Tower Block containing 48 self-contained flats numbered 13 - 59. Many of the flat owners hold under long leases.
5. Relevant provisions within the sample lease dated 21 September 1979, provided by the Applicant are as follows:

Clause 2 of the lease states:

“(2) AND to pay the Interim Charge and Service Charge at the times and in the manner provided in the Ninth Schedule hereto both such Charges to be recoverable in default as rent in arrears.”

The Ninth Schedule states:

“(1) The Lessee’s Proportion means 1.3% of the Lessor’s Expenses attributable to the matters mentioned in Part I of the Eighth Schedule hereto and 2.13% of the Lessor’s Expenses attributable to the matters mentioned in Part II of the Eighth Schedule.....”

Part II of the Eighth Schedule sets out the extent of the landlord’s repairing obligations in respect of the “Tower Block” – Flats 13 to 59. The relevant section is as follows:

“1. Repairing rebuilding repointing improving or otherwise treating as necessary and keeping the Tower Block forming part of the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof including all cisterns tanks drains pipes wires ducts and conduits including

any to be laid within 80 years of the date hereof serving the Tower Block exclusively wherever they may be situate within the Development”.

The Maintained Property is defined as the parts of the Development described in the Second Schedule, the relevant part of that schedule being as follows:

“ ...FOURTHLY the structural parts of the Buildings.....including the roofs gutters rainwater pipes....”

INSPECTION

6. By reason of the Covid-19 pandemic an inspection of the Property was not carried out by the Tribunal, but regard was had to the reports within the Bundles and internet accessed street views.

THE HEARING

7. A CVP video hearing was held on the 26 January 2021. The Applicant was represented by Mr Drake-Lee of Proxim Property Management Limited (“Proxim”). The three Respondents in attendance were, Mr Gallagher the long-leaseholder of Flats’ 57, 58 and 59, Ms Hussain the long-leaseholder of Flat 44 and Ms Nolan the long-leaseholder of Flat 43. All Respondents represented themselves.

Submissions on behalf of the Applicant.

8. Mr Drake-Lee confirmed the contents of the Applicant’s written statement and explained at the hearing that Proxim had only been appointed as managing agents in April 2019. The previous managing agents, SDL Property Management Limited, had arranged for the roof to be renewed in 2018. The work undertaken by the appointed roofing contractor, Brindley Asphalt Ltd (Brindley), was unfortunately defective, not least because the new roof did not include thermal insulation as required by Building Regulations 2010, in relation to upgrading thermal elements when carrying out works of renovation (“the 2018 roof works”). The total cost of the 2018 roof works (inclusive of management and project fees) charged to the service charge was £43,915.78.
9. Mr Drake Lee confirmed that County Court proceedings had been brought by Mr Gallagher against the landlord for breach of the landlord’s repairing covenant, in respect of the 2018 roof works. In September 2019, an expert report provided within those proceedings, concluded that the only practical way to insulate the roof to comply with Building Regulations, would be to apply a

layer of insulation on top of the existing roof structure, covered by concrete slabs laid over to act as ballast.

10. Proxim obtained some initial quotes for the remedial work. The lowest was received from Brindley in the sum of £28,000.00, which with VAT and professional fees added, brought the total estimated cost of the remedial works to £41,736.00
11. Proxim proposed to the leaseholders that Brindley were instructed to carry out the remedial works to rectify the thermal deficiencies, but that the leaseholders' contribution to the costs of the remedial work should be limited so as not to exceed the difference between what they were actually charged for the defective 2018 roof works and what they would have been charged in 2018 for the installation of an insulated roof. Proxim calculated that the total cost of installing an insulated roof in 2018 including VAT, management and project fees would have been £73,556.17 (the notional sum). This calculation was based on a quote received from Brindley on 27 November 2017 in the sum of £54,486.05 plus VAT to which they added management and project fees to arrive at the notional sum. (Appendix 8 of the Applicant's bundle).
12. From this, Proxim calculated that the difference between the notional sum for installing an insulated roof in 2018 as compared with the actual costs of the defective 2018 roof works (assuming the work would be carried out by Brindley) was £29,640.39 ($£73,556.17 - £43,915.78 = £29,640.39$). Proxim therefore proposed that the charge to the leaseholders for the remediation works should be capped at £29,640.39 and the balance of £12,095.61 paid by the landlord. A calculation showing the difference in the costs of installing an insulated roof and a non-insulated roof in 2018, appears that Appendix 13 of the Applicant's bundle.
13. On 14 January 2020, Notice of Intention to carry out the remediation works was sent to the leaseholders by Proxim pursuant to section 20 of the 1985 Act inviting the leaseholders to make observations to the proposed works by 20 February 2020 and/or to propose alternative contractors for the purpose of obtaining an alternative estimate(s) within the same period.
14. However, Proxim did not after all, proceed on the basis of the remedial works specified in that Notice. This was because an expert report prepared in connection with the County Court proceedings identified a further issue with the roof. Sagging of the flat roof had caused rainwater to pool on the roof rather than flow to the rainwater outlets. It was therefore considered that a tapered insulated system should be installed to improve drainage to the rainwater outlets and extend the longevity of the roof. Proxim contend that the proposed variation was not required under Building Regulations and whether a tapered

system was included or not, should not affect any proposed warranty offered by Brindley. Proxim submitted however that it was advantageous to the leaseholders, in terms of service charge expenditure, to install a tapered insulated roof because it would obviate the need for future repairs to the roof in the medium to long term.

15. Therefore, on 7 August 2020, Proxim issued new Notices to the leaseholders under section 20 of the 1985 Act, of its intention to renew the roof with a tapered insulated roof that would facilitate drainage to the rainwater outlets. Once again, the leaseholders were invited to make observations or nominate an alternative contractor(s) before the end of the consultation period which ended on 12 September 2020. Furthermore, Proxim confirmed that although the total cost of installing a tapered insulated roof would be £124,417.27 (including fees and VAT) the leaseholders' contribution through the service charge would remain capped at £29,640.39. This would leave the landlord paying the balance of £94,776.88.

16. Mr Drake Lee confirmed that Proxim had received some observations from the leaseholders in response to the s20 Notices, but no nominations for alternative contractors to be invited to tender for the works. The responses mainly sought clarification of the following matters:
 - i. The actual cost per flat, which was confirmed by Proxim as being £617.50 ($£29,640.39 \div 48 = £617.50$). Proxim had also confirmed in correspondence that although the costs could be largely met from the service charge reserve fund a supplementary charge of £200.00 per flat would need to be made toward the costs.
 - ii. Whether it was just the Tower Block leaseholders who would pay the charges – this was confirmed.
 - iii. Whether the roof was actually leaking – Proxim confirmed not.
 - iv. Whether the new specification was available – Proxim confirmed that a copy would be forwarded once the specification was agreed.
 - v. How the difference in the actual costs paid for the non-insulated roof as compared to an insulated roof in 2018 had been assessed – a summary spreadsheet of comparison prices and the 2019 quote from Brindley for an inverted insulated roof was provided by Proxim.

17. Proxim invited tenders from four contractors in relation to the new specification which now included a tapered roof system. The tendering process was conducted by Alcott Associates LLP (“Alcott”) who reported on the outcome in November 2020. The quotations received were as follows:

Tendering Contractor	Tender return date	Cost	Project length

Rio Asphalt & Paving Limited	16/10/2020	£89,170.59	9 weeks
Thomas Cassie & Sons (Leicester) Limited	16/10/2020	£100,000.29	10 weeks
SPV Group	16/10/2020	£97,664.18	9 weeks
Cooper & Williams Limited	16/10/2020	£DNT	n/a

18. Mr Drake-Lee confirmed at the hearing that Proxim intended appointing Rio Asphalt & Paving Limited (“Rio Asphalt”) to carry out the Works in accordance with its tender.

19. He submitted that the grounds for the application are simply that, as the leaseholders will be charged only a capped sum of £29,640.39, with the landlord contributing the balance of £94,776.88, it is not possible to achieve the intended outcome of the consultation process. Which is to allow the leaseholders an opportunity to obtain a more competitive price. In this case the price of the contract would not affect the amount charged to the leaseholders unless any leaseholder nominated contractor was prepared to tender for the Works for a sum that was materially less than £30,000.

Submissions on behalf of the Respondents.

20. Mr James Gallagher the leaseholder of Flats 57, 58 and 59, made written representations on 9 January 2021. The Respondents’ Bundle of documents containing written statements prepared on behalf of three other leaseholders was received on 19 January 2021. Those leaseholders being, Mr J. Ramsbottom, leaseholder of Flat 15, Ms Christine Nolan, leaseholder of Flat 43 and Ms Furhein Hussain, leaseholder of Flat 44 (together referred to below as the “respondent leaseholders”). Mr Ramsbottom did not attend the hearing due to other commitments.

21. Mr Gallagher confirmed that his three flats were situated on the top floor of the Tower Block and that he was engaged in County Court proceedings against the landlord concerning the defective roofing work carried out in 2018, which had rendered two of his flat’s unlettable, due to unacceptably low EPC ratings. The proceedings were currently stayed pending settlement negotiations with Proxim. Mr Gallagher’s primary concern was to obtain a detailed specification for the Works which he suggested the Tribunal also needed to see in order to fully consider the dispensation application. He also suggested that if the actual

cost of the Work were less than anticipated there should be a pro-rata reduction in the leaseholders capped contribution and that the landlord should be required to provide full details of the contract documents so that the landlords actual financial commitment could be ascertained.

22. Mr Gallagher did not dispute the landlord was contractually obliged to keep the roof in repair or that the Works were necessary to that achieve that end. He had his own ideas about the methodology Proxim were employing to remediate the roofing system, but did not go as far as suggesting that the proposed Works were inadequate or likely to prove defective. He was concerned that if dispensation was granted there would continue to be delays in actioning the Works and that the landlord may not instruct Rio Asphalt, but find a cheaper alternative.
23. In evidence Mr Gallagher said that if dispensation was granted the Tribunal should make it conditional upon the following matters:
 - i. A condition that Rio Asphalt is appointed to carry out the Works
 - ii. A time limit imposed on commencement and completion of the Works.
24. The Respondents' Bundle contained written representations of Mr Ramsbottom, Ms Nolan and Ms Hussain in one statement, with exhibits and appendices attached. The statement provided helpful background information about the history of management of Elmwood Court Estate. The statement confirmed the respondent leaseholders' view that there had been a long history of neglect of maintenance, confusion about random demands for service charges and historic lack of communication with the landlord's managing agents. They were hopeful that when Proxim took over management matters would improve. Despite a promising start, relations with Proxim soon deteriorated and a lack of trust returned.
25. There was a previous dispensation application in October/November 2019 in respect of fire safety works, which had the effect of crystallising the leaseholders discontent with management of the buildings and led to further discussions about attempting to seek a Right to Manage. They were first alerted to issues with the roof by Mr Gallagher who was most affected by the absence of insulation because his flats are on the top floor. Their concern about the Tribunal ordering dispensation is that the Works will be carried out by Proxim without consulting them. The respondent leaseholders' point out that this is not a situation where emergency works are required or where the landlord has inadvertently proceeded with works without consultation. The respondent leaseholders have concerns about the negligence of the landlord in relation to

the 2018 roof works and would like more information about the decision not to insulate the roof at that time.

26. So far as any financial implications are concerned the respondent leaseholders believe they could suffer financial loss as a result of the failure to consult because;
- i. There is confusion as to what the charge per leaseholder will be;
 - ii. There is concern that the Works will again not be up to the standard required leading to additional costs and the lack of consultation means that they will not be provided with full details of the contract documents necessary for them to interrogate any issues with the Works;
 - iii. They have concerns about Proxim's ability to supervise this kind of project and they will have no input in the contract process to allow them to assess this;
 - iv. Dispensation will prevent the leaseholders from obtaining written assurances about any reimbursement of service charge through indemnity insurance for the faulty workmanship in 2018.
 - v. The cost of the Works may prove to have been wasted should the landlord decide to build extra flats above the current top floor.
27. The respondent leaseholders also questioned Proxim prioritising the roof works over other essential items of repair such as the malfunctioning intercom system, front door security, lack of CCTV, condensation and mould in flats with outdated windows, the poor state of garages and a flooded sump. All items they say, should have had priority over the roof works.
28. The respondent leaseholders believe that dispensation will prevent them from negotiating a better position for the leaseholders on the following matters;
- i. postponement of the Works until the covid-19 crisis is more contained and the other priorities outlined above, dealt with;
 - ii. obtaining an independent expert report on the contract documentation to ensure the proposed Works are satisfactory;
 - iii. obtaining legal advice on the leaseholders' contractual obligation to pay for the Works through the service charge;
 - iv. satisfying themselves about supervision of the project;
 - v. engagement with Proxim to revisit the Programme of Works and re-prioritise certain items taking account of the leaseholders' concerns;
 - vi. clarification of the leaseholders' contribution to the cost of the Works including payment plans for some leaseholders and assurances regarding reimbursement in the future.

29. If dispensation is granted the respondent leaseholders would seek the following conditions:
- i. that the leaseholders' contribution is limited to £200 per flat on the basis that poor communication from Proxim has misled a number of leaseholders into believing that the proposed £200 additional levy toward the reserve fund, is the total extent of their contribution to the cost of the Works.
 - ii. That comprehensive Covid-19 precaution measures are put in place to cover the Works and properly enforced.
 - iii. That the landlord is required to provide full details of the contractual arrangements so that an effective paper trail is in place should the leaseholders need to challenge the cost or standard of the Works.
30. The Tribunal put Mr Gallagher's comments and those of the respondent leaseholders to Mr Drake-Lee at the hearing.
31. Mr Drake-Lee accepted that good communication between Proxim and the leaseholders was important. He confirmed that the 2018 works did not comply with building regulations and the remediation work needed to insulate the roof should therefore be done as soon as possible to allow for settlement of the County Court claim with Mr Gallagher, who was currently unable to let two of his flats. He acknowledged the County Court case had taken up so much time and resource that little was left for the general management of the Elmwood estate and for that reason he regarded getting the Works done as a top priority. Proxim had no reason to delay and would instruct the contractor as soon as they could.
32. Mr Drake-Lee also confirmed that Rio Asphalt was a well-regarded company known to carry out good quality work and he was confident that the Works would remediate all outstanding problems with the roof. He did not dispute the leaseholders' concerns about poor communication but confirmed that the charge to the leaseholders for the Works would be capped at £617.32 per Flat. He also confirmed that, at the date of the correspondence concerning the £200.00 additional levy (September 2020), it was anticipated that there would be sufficient reserves within the service charge fund, with the addition of the £200.00 levy, to meet the overall cost of the Works.

THE LAW

33. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to

pay by way of a contribution to “qualifying works” (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250.00.

34. There are multiple stages in the consultation procedure, the pre-tender stage; Notice of Intention at the tender stage; Notification of Proposals including estimates; and in some cases, a third stage advising the leaseholders that the contract has been placed and the reasons behind the same.
35. The Tribunal has power under s20ZA(1) to grant dispensation from some or all of the Consultation Requirements.
36. It should also be noted that the dispensation power of the First-tier Tribunal under section 20ZA of the 1985 Act only applies to the statutory consultation requirements and does not confer any power to dispense with any contractual consultation provisions which may be contained in the lease.

THE TRIBUNAL’S DETERMINATION

37. The Works are ‘Qualifying Works’ for the purposes of the s20 of the 1985 Act. There is no dispute that the Works fall within the landlord’s contractual repair covenants or that the contractual provisions of the lease enable the cost of the Works to be recovered from the leaseholders through the service charge.
38. Section 20ZA of the 1985 Act does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with the Consultation Requirements. However, following the Supreme Court’s judgment in *Daejan Investments Limited v Benson et al* [2013] UKSC 14, the Tribunal, in considering whether dispensation should be granted in a matter, should take into account the extent to which leaseholders were or could be subject to actual or potential prejudice resulting from the landlord’s failure to follow formal consultation procedures under s20. The *Daejan* case also determined that a Tribunal may grant dispensation on such terms as it thinks fit, provided such terms are appropriate in their nature and effect.
39. There has been partial consultation in this case. Proxim alerted the leaseholders of the landlord’s intention to carry out remedial works to insulate the roof by serving a first s20 Notice to all leaseholders on 14 January 2020, explaining what works were proposed and why the repairs were necessary. The County Court proceedings identified a further issue with drainage from the roof and Proxim considered that works to address the drainage issue should be carried out at the same time, partly to promote settlement of the County Court claim,

but also because it was more practicable and economic for, what were likely to be disruptive roof works, to be carried out together. Perhaps anticipating a lengthy engagement with the leaseholders on the additional drainage works the landlord took the pragmatic decision to foot the bill for the additional work.

40. Proxim issued a second s20 Notice to all leaseholders on 7 August 2020 with details of the revised proposal to install a tapered insulated roof connected to the external drainage system. Correspondence took place between Proxim and the leaseholders about the costs of the Works which confirmed the landlord's intention to cap the leaseholders service charge contribution to £617.50 per Flat with the landlord paying the balance of some £94,776.00.
41. There is no dispute that the Works are required or, that if carried out competently, should address the identified defects. The respondent leaseholders' question whether they should have priority over other items of disrepair, but that is not a matter for the Tribunal to determine on this application.
42. The respondent leaseholders' are also concerned that dispensation will deprive them of an opportunity to properly interrogate the standard and overall costs of the Works and the proposals for the safe and competent management and supervision of the Works. Other than the cost of the Works, these are not matters that are relevant to determining whether it is reasonable to grant dispensation. The purpose of s20 is not to allow the leaseholders to have input in the management and supervision of the Works. The purpose of the consultation is to give practical effect to the purposes of s19(1) of the 1985 Act, by ensuring that the leaseholders are not asked to pay more than they should for the Works or pay for Works that are provided to a defective standard. Furthermore, there are existing statutory provisions within the 1985 Act that regulate service charge costs and also confer various rights on residential tenants to demand information concerning service charge costs from their landlord. Dispensation does not affect any of these rights.
43. The landlord has agreed to cap the leaseholders service charge contribution to the overall costs of the Works to the sum of £29,640.39 (£617.50 per Flat) and pay the balance of the costs currently estimated to be £94,776.88. Proxim have confirmed its intention to instruct Rio Asphalt to carry out the Works on the basis of their tender, which has been costed by Proxim to provide the calculation of overall cost.
44. The Tribunal is satisfied that the Works are required and that, on the evidence provided, it is reasonable to dispense with the consultation requirements of section 20 of the 1985 Act, on condition that the leaseholders' contribution to the overall costs of the Works is capped as agreed by the landlord. Accordingly, dispensation is duly granted subject to that condition.

45. The Tribunal did not consider it appropriate or reasonable to impose any condition concerning commencement and completion of the Works because such a condition goes beyond the purposes of s20.
46. Although sympathetic to the leaseholders that had misconstrued Proxim's correspondence concerning the £200.00 additional levy, the Tribunal did not consider that the letter was an attempt to mislead the leaseholders or could amount to a representation that their contribution to the costs of the Works would be capped at £200.00, because the same correspondence explained that the overall cap would be set at £29,640.
47. In determining reasonableness, the Tribunal placed particular weight to the following:
 - i. that partial consultation was undertaken to inform the leaseholders of the proposed Works;
 - ii. that the leaseholders should not suffer significant prejudice by dispensing with the requirements and that any financial consequences were more than compensated for by the landlord's offer to cap the leaseholders' contribution to the sum of £617.50 per Flat and to personally pay the considerable balance of the cost of the Works, estimated at £94,776.88.
 - iii. Given the size of the landlord's contribution, it is inconceivable that any relevant comparative quote/estimate could be obtained if the requirements were not dispensed with.
48. Parties should note that this determination does not prevent any later challenge by any of the Respondents under sections 19 and 27(A) of the 1985 Act on the grounds that the costs of the works when incurred had not been reasonably incurred or that the works had not been carried out to a reasonable standard.
49. The Tribunal observes that it has only considered the issue before it, that is to say, dispensation from the statutory regime. This is not a determination of the reasonableness of service charges (Section 19) or liability to pay service charges (under Section 27A). Further, were these to become issues before the Tribunal, they would also no doubt be considered in the context of the cap imposed by this Tribunal.
50. Finally, and for the avoidance of doubt, the cap imposed by this Tribunal will include any sum that may be recoverable through service charges for the cost of this application. This is appropriate to give effect to the landlord's stated intention to limit the leaseholders' contribution to the overall cost of Works to the capped sum.

APPEAL

51. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

JUDGE D. BARLOW

18 February 2021