FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LDC/ 2020/0170**
HMCTS Code	**:**	**V: Video**
Property	**:**	**1-18 Metcalfe House Albion Avenue London SW8 2AE**
Applicant	**:**	**London Borough Lambeth**
Respondents	**:**	**Mr I Morris (Flat 3)** **Mr J Peasley (Flat 2)**
Type of Application	**:**	**Dispensation from consultation requirements under Landlord and Tenant Act 1985 section 20ZA**
Tribunal Members	**:**	**Judge Professor R Percival** **Ms A Flynn MA, MRICS**
Date of Hearing	**:**	**28 January 2021**
Date of Decision	**:**	**16 March 2021**

DECISION

Decisions of the tribunal

The Tribunal pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") grants dispensation from the consultation requirements in respect of the works the subject of the application.

Procedural

1. The landlord submitted on 6 October 2020 an application for dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 and the regulations thereunder in respect of the replacement of a boiler supplying hot water to the building.

2. The Tribunal gave directions on 13 November 2020, which provided for a form to be distributed to those who pay the service charge to allow them to object to or agree with the application, and, if objecting, to provide such further material as they sought to rely on. The deadline for return of the forms was 3 December 2020. The directions made provision for a notice to be posted at the building to inform tenants of the requirement to return the form. The directions were subsequently amended to dispense with this requirement, in the light of the prevailing Covid-19 pandemic and the constraints it imposed on the working pattern of the Applicant's employees (see the Tribunal's letter of 19 November 2020).

3. Forms were received from two of the tenants, Mr Morris and Mr Peasley, the respondents. Mr Morris requested an oral hearing. Initially, Mr Peasley indicated on the form that he did not wish for an oral hearing, but subsequently informed the Tribunal that he wished to attend.

4. Mr Morris' form was received by email on 19 November 2020. Mr Peasley's was sent by post, the form being dated 30 November 2020.

The property and the works

5. The building is described as a mixed tenure block of 18 flats, nine of which are held on long leases. It is part of a wider estate known as the Larkhall Estate.

6. In April 2020, one of two boilers providing hot water to Metcalfe House failed. Attempts to repair it were unsuccessful. Considering the boiler to be irreparable, the Applicant secured a quotation for its replacement from a contractor, with which it has a long term qualifying agreement. The works were completed in May 2020.

7. The Applicant undertook an informal consultation process by way of a letter dated 24 April 2020.

The hearing

8. A remote hearing was conducted using CVP, at the request of the Respondents.

9. The Applicant was represented by Mr Aleksandr Stepanyan, a litigation officer employed by the Applicant. Mr Lincoln Sampson gave evidence for the Applicant. Mr Morris and Mr Peaseley represented themselves. They were assisted by Mr Bruce McGregor. Mr McGregor is a retired solicitor.

10. In the light of our conclusions, we do not think it necessary to rehearse all of the evidence and submissions that we heard. We have, however, read the papers provided and taken account of them and the oral evidence and submissions made at the hearing.

11. It is, nonetheless, necessary to give a brief summary of Mr Sampson's evidence. His witness statement was not included in the bundle, and was provided at a late stage. The Respondents did not object to us receiving Mr Sampson's evidence.

12. Mr Sampson is the principal heating and water engineer for the Applicant. He explained that Metcalfe House was served by two boilers providing hot water to the block. Care of the boilers is contracted OCO Ltd under a long term qualifying agreement.

13. The background to the immediate circumstances resulting in the works was that, some time ago, there had been a proposal to replace the hot water boilers with combi boilers in each flat, as part of larger major works relating to services to the blocks on the estate. This had occasioned controversy, and was eventually not implemented at that time. The extent to which it had merely been put to one side for the time being, or had been effectively abandoned as a policy by the Applicant, was controversial between the parties.

14. A further background element was that about two years before, it had been discovered that some of the pipe work in the estate, including Metcalfe House, was defective, being subject to heavy lime scaling which could not be practically removed.

15. The boilers had been installed in 2014, at an approximate cost of £12,000.

16. Mr Sampson explained that in the morning of 20 April 2020, he was informed by OCO Ltd that one of the hot water heaters for Metcalfe House had developed a fault, and it was being "nursed" to continue in operation. His understanding was that the boiler might continue to operate for perhaps two weeks or so (in fact, it lasted somewhat longer in the event), and that no repair was possible.

17. He secured the quotation for a new boiler from OCO Ltd immediately – he explained that this was easily done, as it was the same as a quotation recently drawn up for a boiler replacement at another of the blocks on the estate. The quotation was for £19,650.

18. The original boilers were direct fired water heaters. The replacement identified was a condensing Mikrofill boiler and two Mikrofill cylinders.

19. The direct fired boilers had been adversely affected by the lime scale problem with the pipework, Mr Sampson said. This would present less of a problem for the new boiler.

20. It was Mr Sampson's evidence that he came to the view that the section 20 consultation would have to be dispensed with, given his professional view of the urgency of the situation. He accordingly authorised the order for the boiler.

21. The internal administrative arrangements were that, in such circumstances, the engineer responsible would produce a justification report for consideration by other officers of the Applicant concerned with major works coordination. On its face, the justification report anticipates a decision being made by those in receipt of it as to whether a dispensation should be sought. However, Mr Sampson said in terms that in this situation, the decision was in reality his, and he made it during the course of 20 April. Mr Stepanyan was later to say that in less urgent cases, a decision would be made by the major works coordinators, but in this case the only prudent way forward was for the order to be placed immediately. We take this as endorsement by the Applicant of Mr Sampson's decision making on the 20 April.

22. In answer to a question from Mr Stepanyan in re-examination, Mr Sampson said that there was nothing that the tenants could have said on consultation that would have changed his mind.

23. The Applicant relied on what it described as an informal consultation, by way of a letter to leaseholders (not received by Mr Peasley) dated 24 April 2020. This informed the leaseholders about the work and its emergency nature, informed them of their estimated service charge contributions, and invited questions and observations.

24. Both in cross examination, and in their submissions, the Respondents made a number of potentially cogent points about the previous history as noted paragraph in [13] above, the reduced life span of the failed boiler, the maintenance of the old boilers, the status of the Applicant's future plans in relation to services to the block, the "informal consultation" and a number of matters to do with the process and language used by the Applicant. For the reason we give below, it is not necessary to outline these in detail.

Determination

25. The Tribunal is concerned solely with an application under section 20ZA of the 1985 Act to dispense with the consultation requirements under section 20 of the same Act.

26. The decision making process of the Applicant is clear. Mr Sampson, we find, made the decision to go ahead with the order for the new boiler during the day on 20 April 2020. That necessarily required that the section 20 consultation process would not be undertaken, and that a retrospective application for a dispensation under section 20ZA would have to be made. Mr Sampson was fully aware of the legal consequences of his decision. Mr Sampson is an experienced engineer specialising in this field. We found him a robust, honest and persuasive witness.

27. In the first place, we agree with Mr Sampson that, as he understood the position on 20 April, there was a clear emergency. We note that at the conclusion of the hearing, Mr Peasley acknowledged that the evidence of Mr Sampson had changed his mind as to whether the boiler break down amounted to an emergency.

28. We must determine whether it was reasonable to dispense with the consultation arrangements. In our view, that means, on the facts of this case, we must ask ourselves whether Mr Sampson's assessment of the situation on 20 April, and his decision made on the basis of that assessment, were right. We are clearly of the view that they were. The danger of the faulty boiler failing completely in a short time was high, and should the other boiler fail, the block would have had no hot water for however long it then took to complete a consultation process and install a replacement service. The seriousness of this consequence at any time for all of the residents of the block is clear. That concern was higher, given the prevailing pandemic conditions of the time. Further, the solution that Mr Sampson set in train – the now preferred Mikrofill boiler – was a reasonable and appropriate one, and one that would not have been affected had the consultation taken place – we note Mr Sampson's statement to that effect.

29. Thus our first conclusion is that, in the terms used in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14; [2013] 1 WLR

854, our conclusion is that – seen from the perspective of 20 April 2020 – "the extent, quality and cost of the works were in no way affected by the Landlord's failure to comply with the [consultation] requirements" ([45]). Accordingly, it is appropriate without more to grant dispensation.

30. Secondly, and if we are wrong to so characterise the position, while the legal burden of proof remains on the Landlord, the tenants face a factual burden of identifying some relevant prejudice suffered by them, such that we should dispense on terms designed to remedy that prejudice (*Daejan* [67]). On the facts, we do not think they have been able to do so. Indeed, when asked this specific question, the Respondents' complaint was that they were unable to provide evidence of prejudice, because as a result of the lack of consultation, and other failings on the part of the Applicant, they did not have the necessary information to do so. In the circumstances of this case, we do not think that such an argument is capable of making headway. There are no doubts that we can resolve sympathetically in favour of the tenants, in the terms used by Lord Neuberger (in *Daejan*, at [67]).

31. We add that, despite Mr Stepanyan's skilled advocacy, we do not consider that the Applicant's "informal consultation" assists it in this context. It was no doubt helpful in informing the tenants, but, as the Respondent's argued, it was not consultation in any meaningful sense.

32. This application relates solely to the granting of dispensation, which, as we have indicated, in this case involves close attention to the specific circumstances that the Applicant encountered on 20 April 2020. The issues raised by the Respondents are more suited to an application under section 27A, on which the Tribunal would be in a position to take an expansive view of the reasonableness of expenditure incurred by the Applicant over a longer period, and covering a greater range of outcomes.

Name: Judge Prof Richard Percival **Date:** 16 March 2021

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in

accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20ZA

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

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.