FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/16UG/LDC/2020/0046**
HMCTS code (audio,video,paper)	**:**	**P:PAPERREMOTE**
Property	**:**	**2-8 Sparrowmire Lane, Kendal, Cumbria LA9 5PX**
Applicant	**:**	**South Lakes Housing**
Respondents	**:**	**Mr & Mrs J. Atkinson** **Mr Martin Walton** **Ms Imogen Field**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge J.M. Going** **C.R. Snowball MRICS**
Date of decision	**:**	**19 May 2021**
Date of Determination	**:**	**25 May 2021**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face to face hearing was not held because no one requested the same, and all the issues could be determined on the basis of the papers. The documents that the Tribunal was referred to were in the Application, those supplied with it, and Applicant's bundle, the parties submissions and statements, all of which the Tribunal noted and considered.

The Decision

Those parts of the statutory consultation requirements relating to the amended works, i.e. the demolition of the porch, which have not been complied with, are to be dispensed with.

Preliminary

1. By an Application ("the Application") dated 26 October 2020 the Applicant applied to the First-Tier Tribunal Property Chamber (Residential Property) "the Tribunal" under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of works relating to the removal and replacement of a precast concrete canopy slab, posts and ground plinth of an entrance porch to 2-8 Sparrowmire Lane Kendal ("the Building").

2. The Tribunal issued its initial Directions on 25 January 2021.

3. On 4 February 2021 the Applicant confirmed that, after having studied the terms of the leases relating to the Building, it wished to add the third named Respondent to the Application, and also to amend the works referred to in the Application by restricting those to the removal of the previous structure ("the amended works") which had been deemed urgent, before undertaking, at a later date, the consultation requirements for its replacement "which is not urgent".

4. Having added the third Respondent to the proceedings, the Tribunal issued amended Directions ("the Directions") on 16 February 2021, which confirmed (inter-alia) that "It is considered that this matter is one that can be resolved by way of submission of written evidence leading to an early determination. If any party wishes to make representations at an oral hearing before the Tribunal they should inform the Tribunal in writing of within 21 days from the date of these Directions". After setting out a timetable for each party to provide statements and documents, the Directions confirmed "this matter will be dealt with by a determination on the papers received, unless any of the parties request a Hearing."

5. The Applicant provided written submissions and its statement of case and, as part of the Directions, was mandated to send copies to each Respondent.

6. Responses were received from the second and third named Respondents, and the Applicant also provided copies of emails with the second named Respondent.

7. The Tribunal convened on 19 May 2021.

The Building and the relevant terms of each Respondent's Lease

8. It is understood that each of the Respondents is the owner of 1 of the 4 flats within the Building, purchased under the Right to Buy legislation introduced by the Housing Acts of the 1980s, with original terms of between 120 and 125 years and a nominal annual ground rent of £10, and that, for the most part, each Respondent's Lease contains comparable terms.

9. The Tribunal did not physically inspect the Building, but has identified it on Google's Street view. It has the outward appearance of the two semi detached houses, but is actually a block of 4 purpose-built flats which the Applicant has confirmed was built in the 1960s.

10. Each Lease includes various covenants for the Landlord to keep in good and tenantable repair and condition (inter-alia) " the main roof roof timbers chimney stacks … gutters pipes and other things for conveying rainwater from the Building and the main walls timbers and foundations of the Building…"

11. Each Lease specifies that the Tenant shall pay "a proportionate part….. of the expenses and outgoings incurred… in the repair maintenance renewal and provision of all services to the premises… that is ("the service charge") calculated and subject to the provisions of the said Acts…"

Facts and Chronology

12. The following timeline of events has been confirmed by the Applicant without any dispute from the Respondents.

1 September 2020	The Applicant noted a report from a resident that "the porch/canopy over the entrances to flats no. 2 and 4 is failing. It is reinforced concrete. There has possibly been a leak from rainwater causing spalling of the concrete and chunks falling off. The metalwork is becoming exposed and rusting, possibly making it worse…"
3 September 2020	The Applicant inspected the Building and concluded that the concrete porch was in a dangerous condition requiring a structural engineer to assess its structural integrity. Temporary supports were put in place, photographs taken, and RG Parkins, a local firm of

	consulting civil and structural engineers, instructed to inspect.
4 September 2020	RG Parkins concluded that the existing concrete canopy of the porch entrance to flats 2 and 4 was beyond reasonable repair and should be removed with the posts and ground plinth.
18 September 2020	A specification and plans were drawn up by RG Parkins for the removal of the porch and temporary strengthening measures.
23 October 2020	The work was sent out for tender and the Applicant subsequently engaged a contractor, M K Conversions Ltd, to remove the porch at an estimated cost of £2,257.00 + VAT.
26 October 2020	The Application was made to the Tribunal.
27 November 2020	The removal works were completed. The porch was not at this point in time replaced because the Building was considered safe, and its replacement not deemed urgent.

The Applicant's submissions

13. The Applicant explained that the amended works were "deemed urgent due to the risk posed by the defective porch to those that inhabited flats numbered 2 and 4 when entering and exiting their properties. Though it is preferable to conduct a section 20 consultation when undertaking major works such as this, it was felt that we did not have time to consult in this way given the urgency with which the work needed to take place."

The Respondents responses

14. The third named Respondent provided copies of a letter sent by her solicitors in 2009 relating to various invoices then raised by the Applicant, and in which various points were made as to the distinctions to be drawn between works falling within the service charge provisions of each lease and those carried out purely for the benefit of an individual flat, or which might be regarded as improvements rather than repairs.

15. Copies of emails between the second named Respondent and the Applicant in March and April 2021 were also provided to the Tribunal. The second named Respondent stated that "I had been unhappy with the original intention of claim both for the removal and replacement of the porch, and I welcome the amendment to the dispensation claim". He also included comments as regards the correct way of apportioning the costs and the design of a replacement porch. In response the Applicant stated (inter alia) it hoped to begin the section 20 consultation process relating to a replacement porch in May 2021.

16. In a further email, dated 16 May 2021 and sent to the Tribunal, the second named Respondent contrasted the deterioration of the Building's porch, where after construction a rainwater hole had been cut through the concrete slab, to the unaltered porches in nearby properties which "appeared to be clean, sound and show no sign of damage" stating "I believe the demise of the porch, leading to its removal is due to a lack of attention and maintenance by the freeholder, and it is unreasonable to expect the leaseholders to contribute to the costs now incurred".

17. In the same email, the second named Respondent also stated "There has been much said about the urgency of the initial works, however, I believe that there was ample time to consult with the leaseholders affected, and to have made them fully aware of SLH's intention to recover costs from them".

18. However, the Respondents offered no supporting evidence to challenge the Applicant's evidence of the urgency of the works.

The Law

19. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

20. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to go through a 4 stage process: –

- Stage 1: Notice of intention to do the works

Written notice of its intention to carry out qualifying works must be given to each tenant and any tenants association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought, allowing at least 30 days. The Landlord must have regard to those observations.

- Stage 2: Estimates

The Landlord must seek estimates for the works, including from a nominee identified by any tenants or the association.

- Stage 3: Notices about estimates

The Landlord must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

The Landlord must give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the tenants' nominee.

21. Section 20ZA(1) states that: –

"Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

22. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others (2013) UK SC 14* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;
- The purpose of the consultation requirements, which are part and parcel of a network of provisions, is to give practical support to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
- In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
- The financial consequences to the landlord of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord;
- The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
- The more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that tenants had suffered prejudice;
- Once the tenants have shown a credible case for prejudice the Tribunal should look to the landlord to rebut it and should be sympathetic to the tenant's case;
- The Tribunal has power to grant dispensation on appropriate terms – provided that any such terms are appropriate in their nature and their effect, including a condition that the landlord pays the tenant's reasonable costs incurred in connection with the dispensation application;
- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed and compensate the tenants fully for that prejudice.

The Tribunal's Reasons and Conclusions

23. The Tribunal began with a general and careful review of the papers, in order to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

24. None of the parties requested an oral hearing, and, having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing. The issues to be decided have been clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact.

25. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –

- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.
- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Respondents retain the ability to challenge the costs of the works under section 27A of the 1985 Act.
- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, and very rarely less than three months, even in the simplest cases.
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)…."

26. Having carefully considered the evidence before it, the Tribunal found that the Applicant had made out a compelling case that the amended works were necessary, appropriate and urgent on health and safety grounds.

27. The Tribunal agreed, particularly in the light of RG Parkins unambiguous assessment, that once the problem was highlighted, there was an urgent need to demolish the porch, and make the Building safe without delay.

28. Clearly whilst it remained in a dangerous condition there were inherent dangers to those occupying flats 2 and 4 and anyone visiting the same.

29. Applying the principles set out in *Daejan* the Tribunal focused on the extent, if any, to which the Respondents have been or would be prejudiced by a failure by the Applicant to complete its compliance with the consultation requirements.

30. The factual burden of identifying some form of relevant prejudice falls on the Respondents.

31. The Tribunal finds the Respondents have not identified any relevant prejudice, within the context of the regulations, in the Applicant's actions to date. There is no evidence that the Respondents disputed the extent of the defects, or objected to the removal of a dangerous structure.

32. The Tribunal is satisfied that to insist on the completion of the consultation requirements in relation to the demolition works would be otiose.

33. For all the stated reasons, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements in respect of the amended works.

34. It is however emphasised that nothing in this decision should be taken as an indication that the Tribunal considers that any service charge costs resulting from the amended works or future works will be reasonable or indeed payable. The Respondents retain the right to refer such matters to the Tribunal under section 27A of the Landlord and Tenant Act 1985 at a later date, should they feel it appropriate.

Tribunal Judge J Going
19 May 2021