FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HN/LDC/2021/0036
Property	**:**	Viewpoint, 7-9 Sandbourne Road, Bournemouth BH4 8JR
Applicant	**:**	Viewpoint Limited
Representative	**:**	Napier Management Services Limited
Respondents	**:**	Darren Hazell (11) Susannah Groome (36) Brian Hill (37) Susan Butler (44) Keith Brown (48) Nicholas Brecker (50) Nigel Hall (61) Patrick Cauldwell (62)
Representative	**:**	Frank Groome
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member	**:**	D Banfield FRICS Regional Surveyor
Date of Determination	**:**	21 July 2021

DETERMINATION and FURTHER DIRECTIONS

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the additional works of repair to the brickwork not already included in the original specification of works.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

Background

1. The Applicant seeks 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.

2. The Applicant explains that whilst undertaking other works for which there had been section 20 consultation, further repairs to deal with cracking and brickwork issues became apparent. The work has been started and therefore retrospective dispensation is requested.

3. The Tribunal made Directions on 18 May 2021 indicating that the Tribunal considered that the application was suitable to be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected.

4. The Tribunal required the Applicant to send to the Respondents its Directions together with a copy of the Application and a form to indicate whether they agreed with or objected to the application and if they objected to send their reasons to the Applicant.

5. It was indicated that if the application was agreed to or no response was received the lessees would be removed as Respondents.

6. Objections were received by or on behalf of 9 lessees all of whom remain as Respondents. Those lessees who did not respond have been removed as respondents.

7. No requests for an oral hearing were made and the matter is therefore determined on the papers in accordance with Rule 31 of the Tribunal's Procedural Rules.

8. The only issue for the Tribunal is whether it is reasonable to dispense with any statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be reasonable or payable.

9. Before making this determination the hearing bundle was examined to determine whether the issues remained capable of being determined on the papers without a hearing. In view of the issues involved I decided that the matter would not be assisted by the receipt of oral evidence.

10. As directed the Applicant has supplied a numbered hearing bundle and references to page numbers in this decision are shown as [x]

11. The property has been the subject of recent determinations by the Tribunal on 4 March 2021 (CHI/00HN/LIS/2021/0036) in respect of internal repairs and 10 May 2019 (CHI/00HN/LIS/2018/0065) in respect of these current works. I do not propose to repeat the

description of the property and lease terms which will be well known to the parties.

The Law

12. The relevant section of the Act reads as follows:

S.20 ZA Consultation requirements:

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.

13. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following

i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

ii. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

v. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).

vi. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

vii. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable

standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

viii. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

The Applicant

14. In their statement of case [17] the applicant explains that following the FTT decision and completion of the S.20 process a major project commenced in June 2020 to remedy the brickwork issues at the property.

15. During the contract additional works were identified resulting in a significant increase in the projected costs. Regular reports were made to the lessees as to progress and the likely cost increases.[45-52]

16. A report from R Elliott Associates Ltd (Consulting Structural & Civil Engineers) dated 5 September 2020 [97] details the issues encountered once works commenced and makes recommendations for further work.

17. A report from Winkle-Bottom Chartered Surveyors dated 1 April 2021 explains that once the walls were opened up assumptions that had been made regarding the location, specification and condition of metal angles were not proved correct resulting in the following additional works being necessary.

1.Open up and provide inspection holes exposing the existing horizontal metal angles on the levels for the structural engineer to inspect
2. Break out the brickwork, a total of 5 courses, to allow the removal/replacement of the inadequate existing horizontal metal angle
3. Set up props to support the brickwork above due to the increased course height of brickwork being removed, as specified by the structural engineer (to ensure the stability of the brickwork above)
4. Carefully remove any original concrete overspill on the existing horizontal metal angles
5. Cut the existing fixings off the existing metal angles to allow it to be carefully removed
6. Inspection of each existing metal angle check its suitability for reuse

7. To existing metal angles that can be reused, treat as specification and drill holes in it for new fixings
8. Drill holes into the existing concrete slab and resin in threaded bar for the metal angles to be fixed too (sic)
9. Once the resin has set, fix the metal angle to correct location with packers, cut off ends of threaded bar
10. Test strength of new fixings and record

18. A further letter from Winkle-Bottom dated 1 June 2021 states that "*we have almost completed the South block, and on the North block we have completed floor 6 and working on floor 5. This leaves floors 3 and 4 on the North block to open up and complete the horizontal movement joints."*

19. With regard to costs it is reported that "*The contract sum was £287,365.00 (plus VAT), including £23,000.00 contingencies and provisional sums. This is an increase of £184,876.30 (plus VAT). Considering that it is likely there could be further unforeseen works, we recommend a contingency of £30,000.00, (an increase of £7,000.00) therefore increasing the overall project sum to £479,241.00 (plus VAT). This is an overall increase of £191,876.30 (plus VAT)."*

20. In a letter dated 2 June 2021 R Elliott Associates repeat the issues encountered and comments that the situation could not be ignored and "*By the time the full extent of the extra works was clear the contract with Greendale Construction had progressed beyond a point when it would have been practicable or financially appropriate to re-tender*"

The Respondents

21. In a response by Mr Frank Groome on behalf of the respondents [117] reference is made to the Supreme Court case of Daejan and Benson and the requirement of section 19 of the Landlord and Tenant Act 1985 "*that the work or services provided meets an acceptable standard or does not cost more than is appropriate.*" (para 6)

22. Mr Groome says that several tenants have reported damage to the interior of their flats caused by contractors (para 10) and that Mr Hill has concerns about the quality of their workmanship. He concludes that the reference in the Newsletter of 6 April 2021 to Greendale forgoing any profit on the remainder of the work means that the tenants must have been paying more than is appropriate and have therefore suffered relevant prejudice.

23. Mr Groome further concludes that the structural engineer's reference to inadequate or defective works to the west elevation and that works carried out in 2013 now require renewal identifies that prejudice has occurred.

24. Mr Groome further questions the adequacy of the S.20 consultations carried out, both as to whether all of the lessees' observations were included in the Summary of Observations and whether the specification consulted upon was adequate. *"If the surveyor had properly investigated the extent of the required works, the Specification put out for competitive tender would have been much more in line with reality, albeit that a reasonable sum for contingencies would still have been necessary. As it stands currently, tenants are faced with spiralling costs that bear no relationship to the original estimates. Tenants still don't know what the final costs will be; nor when the works will be completed; nor whether the works will be provided to an appropriate standard"* [122]

25. Mr Groome then goes on to review the progress of the works and the information provided to lessees, questioning whether some of the costs are payable by the lessees by way of service charge. He considers the S.20ZA application is an attempt to seek validation for a consultation process that has been flawed throughout and that any consent should be conditional upon the appointment of a RICS qualified surveyor to provide an impartial report to review the quality of the works, whether prejudice has been suffered and to provide expert evidence in any subsequent FTT hearing.

26. An application under LTA 1985 s.20C is made.

27. Mr Hill, the lessee of Flat 39 also makes a statement [196-206] in which he refers to the perceived inadequacies of the S.20 consultation process particularly that his Observations of 29 May 2019 were not fully addressed, simply being stated as "noted". He does not agree that the issues were unforeseen and sufficient evidence was available from the remedial works carried out in 2012 and 2017.

28. On page 201 he details the cost increases identified in Greendale's spread sheet of 6 April 2021 and considered that they should not have been allowed to re-estimate the cost of the North Building work but should honour the Tendered price adjusted only for legitimate additions and reductions. He was concerned with the poor quality workmanship evident at Flat 37 and had to intervene when he observed corroded metalwork being cleaned for re-use contrary to Napier's letter of 15 July 2020.

29. At pages 222-227 is a statement from Patrick Cauldwell of Flat 62 commenting on the manner in which the contract was progressing in comparison to the work undertaken in 2012 in which he had been involved. He also questioned the adequacy of the 2017 works which had been carried out under Napier's watch.

Applicant's Reply

30. In their reply [228] the Applicant notes that:

- No replies from Susanna Groom have been received
- Despite being represented by Mr Frank Groome Mr Cauldwell and Mr Hill have submitted their own representations
- No evidence of what they may have done differently for compliance with the full statutory process has been provided

31. In answer to Mr Groome's response it is stated that " *There were only two options available to Viewpoint Ltd, when the additional costs as a result of the unforeseen work to finish the project were provided to the Board in March 2021. At this time, buildings were fully scaffolded, the work to the South block was almost complete and the whole project was subject to a JCT contract. Those two options were:*
OPTION A - To stop the work, and have the additional work put into a new specification, start a new S20 Consultation. Advice on this option was sought both from the Contract Administrator and the Structural Engineer, and the cost of doing so would have been far in excess of the additional amount requested.
OPTION B .To continue with the work, using the existing scaffolding (maintained throughout at a cost of £106,000 plus VAT) and using the contractors that know the building having worked on the South Block and having opened everything up they were able to on the North block and make an application to the FTT for dispensation of the S20 requirements.
The cost, delays and implications of Option A were huge, and the advice of the experts was to continue with Option B for a myriad of reasons as explained below. This option was chosen to protect the lessees from further delays and the additional costs were Option A chosen.
Throughout this project the lessees have been give regular updates, explaining the delays and additional work. Copies of all those newsletters are attached.
It is unfortunate that there are more costs and certainly the project has been delayed, not just by the extra work that could not have been foreseen until all the affected areas were opened up which requires full scaffold , but also the difficulties with Covid 19 – this has affected the project directly with the site having to be closed down, and with key members of the contractors team falling ill with it, and also the Contract Administrator, however these lessees have not been financially affected by those delays, it is the extra work that has caused the additional costs."

32. In answer to the allegation that the original S.20 consultation was flawed the Applicant answers "*The S20 consultation papers are included within this bundle and we believe have met the requirements in full. We cannot see how the lessees have been prejudiced when the decision to continue with the project was made in order to make savings, particularly when a negotiation for no additional scaffold costs and no profit on the additional*

work to the contractors has been agreed, we believe the correct decision was made to protect the lessees position and they have benefited from this."

33. In conclusion it is stated "*As detailed above, we do not agree with this, and we believe we have explained the situation clearly and Viewpoint Ltd have endeavoured to act in the best interest of all lessees throughout to resolve a long standing defect in the building for the best possible price and to the best possible specification with proper professional supervision throughout.*
Negotiations with the lowest tendering contractor (Greendale), made with the CA, the Directors and Napier have meant no additional scaffold costs, reduced prelims, and the contractor has foregone their profit on the additional work – as a result we believe the lessees have benefitted and not been prejudiced. The lessees have also been informed throughout with the best information available at the time as evidenced in the numerous enclosed newsletters.
The difficulties of Covid have not been acknowledged by the respondents at any time, and whilst they have not affected the overall cost, the difficulties of minimising staff on site, obtaining materials, keeping everyone safe within the unforeseen government restrictions, and generally on every project over the last 15 months should not be underestimated and have also played a part in the delays."

34. Responses to Mr Hill's and Mr Cauldwell's statements are at pages 275 and 286 however given that they largely relate to the work in progress will not, for the reasons given below, be recorded.

Determination

35. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with those requirements. Guidance on how such power may be exercised is provided by the leading case of Daejan v Benson referred to above.

36. Objections have been received from a number of lessees largely on the grounds that the lessees wish to investigate whether the actions of the Applicant and its contractors have increased the costs eventually payable by the lessees. Challenges have also been made as to whether the original S.20 consultation was flawed.

37. Neither the conduct of the current works or the compliance of the previous consultations is before the Tribunal, the application being simply whether by dispensing with the consultation requirements of section 20, **in respect of the additional works now identified,** the Respondents have shown that they would be prejudiced.

38. This is not an application to determine whether the costs expended or the quality of the work are reasonable and it is unfortunate that the respondents have focussed their attentions in this area rather than in providing "Evidence of what they may do/have done differently if the Applicant were or had to comply with the full statutory consultation process" as referred to in the Tribunal's Directions.

39. In determining an application for dispensation, the only issues for the Tribunal is to decide whether the landlord's actions would have been different if consultation with the lessees had been carried out.

40. No evidence of the type of prejudice referred to in the Daejan case referred to above has been submitted and I am not satisfied that if consultation had taken place there would have been a different outcome.

41. On the evidence before me therefore I am not persuaded that the Lessees have been prejudiced by the lack of consultation and as such am prepared to grant the dispensation sought.

42. In view of the above **the Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the additional works of repair to the brickwork not already included in the original specification of works.**

43. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

COSTS

44. In his response to the statement of case Mr Groome has made an application under S.20C of the Landlord and Tenant Act 1985 to which the Applicant has not had the opportunity to respond. **The following Directions will therefore apply;**

45. By **4 August 2021** Mr Groome will send to the Applicant and to the Tribunal (electronically) a statement setting out the grounds for making such an application and confirming those lessees on whose behalf the application is made.

46. By **18 August 2021** the Applicant will send a reply to Mr Groome and to the Tribunal (electronically)

47. The Tribunal will determine the application as soon as convenient thereafter.

D Banfield FRICS
21 July 2021

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 by email to rpsouthern@justice.gov.uk 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.