FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LDC/2021/0018** **LON/00BG/LSC/2021/0039**
Property	:	**The Switch House, 4 Blackwall Way, London E14 9QS**
Applicant	:	**(i)First Port Property Services Limited** **(ii) Fairhold Freeholds No 2**
Respondents	:	**Nicholas Hodder and *20* leaseholders of the flats within the property**
Type of Application	:	**Application under section 20ZA to dispense with consultation requirements for a scheme of Major work**
Tribunal Members	:	**Judge Daley** **Mr Richard Waterhouse FRICs**
Date and venue of Paper Determination	:	**28 July 2021, hearing by Video Link**
Date of Decision	:	**09 September 2021**

RE:Amended DECISION

Decision of the tribunal

i. **The tribunal grants dispensation in respect of the major works relating to resurfacing work of the roof terrace**

ii. **The Tribunal makes no order for the cost occasioned by the making of the application.**

The application

1. The applicant by an application, made in December 2020, sought 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[1].

2. The premises which are the subject of the application are a nine storey, block of flats containing 60 Residential apartments.

3. The work for which dispensation is sought comprises resurfacing work of the roof terrace and balconies of four penthouse flats at Switch House.

Attendance

4. In attendance on behalf of the Applicants were Ms Katie Helmore- Counsel, Mr Hegarty- Regional Manager First Port, Mr Tony **Ulasi**, Development Manager also of First Port, and Ms Katie Orr- Paralegal. On behalf of the Respondent Nicholas Hodder- Leaseholder, also in attendance Ms Sylvia Baumgartner and Ms **Selena Chotai** both leaseholder of the premises.

5. All who attended including the Tribunal attended by Video-Link.

The Background

6. This case concerns, Switch House, which is a purpose-built block of 60 flats. The **Respondent**s are the leaseholders of **21** of the 60 flats. The First **Applicant** is defined in the Applicants' leases, under its former name Peverel OM Limited, as the manager of the building and is a party to the lease.

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[1] See Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987)

7. The Second **Applicant** is the registered proprietor of the property and the **Respondents' landlord** (2) The case involves 2 separate but linked applications; the tenants application seeks a determination on the reasonableness of costs in the sum of £65,558.85, incurred by the Landlord in relation to the repair of the roof terraces. The tenants argue that the costs are excessive and unreasonably incurred – and moreover incurred without proper consultation. (3) The **First Applicant** made a separate application for Dispensation (retrospectively) in respect of the consultation requirements in relation to those works.

8. The application for dispensation was made in December 2020 during the Coronavirus lockdown; as a result, there was a delay in this matter. Directions were given in writing on 11 March 2021, setting out the reason for the delay and setting out steps to be taken by the **First Applicant**, (including serving the directions on the tenants) for the progress of this case. The directions were further amended on 1 & 6 April 2021.

9. At Paragraph 4 of the Directions, dated 11 March 2021, it stated "It was also agreed, that whether or not dispensation should be granted in accordance with the Respondents' application, should be determined as a Preliminary Issue, because if that application is refused, the respondents would be limited to recovery of the statutory cap in relation to each leaseholder, and it would be unnecessary for the parties to incur the costs of preparing for a full hearing of the section 27 application. Accordingly, it was directed that "The question of whether an order for retrospective dispensation of the statutory consultation requirements in respect of the above-mentioned works will be dealt with as a Preliminary Issue."

10. Further Directions are given at paragraph (2) of the Directions which stated -: "The Tribunal considers that this issue is suitable for determination as a paper case, on written representations without the need for an oral hearing. However, any party wishing there to be an oral hearing is entitled, on written request, to such a hearing, in accordance with the directions below."

11. As a request was made for an oral hearing, the matter was set down for hearing and was attended by video-link by the parties detailed above.

The Hearing

Preliminary Issues

12. The Tribunal was informed by Ms Helmore, that she wished to make an application to submit 5 Invoices related to the breakdown of the Service charges. She stated that this information was provided to those who instructed her very late, and was then provided to the tenant as soon as the legal department had received it.

13. Ms Helmore submitted that these invoices would be very helpful to the Tribunal As they would show the total costs and how these sums had been incurred.

14. The Tribunal having heard from Mr Hodder, who was concerned about the late compliance with the directions, but conceded that, the invoices were relevant, decided to admit the invoices. The Tribunal decided that if during the course of the hearing, the Respondent needed more time to deal with any issue which had arisen as a result of the late production of the invoices. It would consider whether an adjournment was necessary at that stage.

The Applicant's case

15. Ms Helmore informed the Tribunal that the total costs of the work as at 28 /7/21 was £69,136.85. She referred us to the 4 invoices from Rope Tech at paragraph 14(a) of the bundle. Within paragraph 14 of her Skeleton Argument, she provided a comprehensive breakdown of the total costs of the work, however, the respondent had not seen the invoices from Rope tech, in the total sum of £5,200.00, which was broken down at paragraph 14 (a).

16. The application was made by the first **Applicant,** First Port Property Services Limited ("First Port") **who are parties to the tripartite lease. Together with the landlord** Fairhold Freeholds No2 Limited. Ms Helmore stated that the physical work was carried out to the balconies and roof terraces of 4 penthouse apartments, Nos. 57,58,59 and 60 Switch House.

17. The managing agents were informed that there were issues with water penetration to the roof terraces at the property. A report was prepared by surveyors **MD Bithrey Chartered Surveyors**. A specification of work was prepared and it was decided to award the contract to Infallible Systems, as they had provided a competitive tender, and were also on the list of approved contractors, for the waterproofing system company (Kemper) who would only provide a guarantee if an approved contractor was used.

18. The cost of the initial work was £10,000.46, as this was below the consultation threshold no consultation was carried out. The work commenced on 14 and 15 January 2019. The statement of case set out that on the roof covering being exposed it became evident that there

was significant damage to the floor installation and tapering scheme to the roof terrace of No 59.

19. As a result, the work was paused, so that specialist from Kemper could attend. At paragraph 17 of the statement of case, it was submitted that-: "It appeared there were punctures to the existing waterproofing where the decking bearers were screwed through the waterproofing of the roof terrace of apartment 59. Due to the location of the damage it was not visible until the project was a third of the way through."

20. A revised quotation was obtained in the sum of £18,091.51 to include for a new tapered insulation scheme that had to be manufactured and waterproofing with rubber promenade tiles. Given the location of the damage it had been necessary to proceed quickly in order to avoid further damage. As water would continue to penetrate the roof, and damage the ceilings below.

21. Further work was undertaken to install a hard, wearing course and matting system in the sum of £5,293.60. Paragraph 18 of the statement of case stated that-: "All the penthouse floors are interlinked and therefore the Applicant believed that similar damage may have been caused to apartments 57 and 58. Given the location of the suspected damage, and the impact upon the flats below, works were undertaken in July 2019. All four roof terraces were finished to the same specification as agreed with the leaseholders.

22. Ms Helmore stated that as the first works were below the consultation threshold they were commenced immediately. It was only after the discovery of the water penetration, that it became necessary to undertake the subsequent work. And due to the urgency and the nature of the work it was impracticable to consult with the leaseholders as envisaged by Section 20 of the LTA 1985.

23. In the statement of case, the Applicant set out details of the legal relationship between the two applicants, and the leaseholders, and the provisions of the lease that were relied upon in support of the work undertaken by the First Applicant.

24. In her oral submissions, she set out that the legal principle was as set out in Daejan Investment -v- Benson (2013) 1WLR 854, which was that dispensation cannot be refused simply as a result of a failure to consult. She stated that the issue for the Tribunal was if the tenants had been consulted what would they have done differently (Aster communities -v-Chapman [2021] 4 WLR. Ms Helmore stated that in order to demonstrate prejudice it was necessary to show a causal link

that arose from the failure to consult. She referred to the legal burden of proof being on the Applicant and the factual burden to proof that prejudice had arisen as being on the tenants.

25. Ms Helmore referred to the issues which had been raised by the tenants in the defence. She stated that it was asserted that the First Applicant had failed to claim for the costs of the work from the builder. She accepted that in theory this could raise a potential counterclaim as in Continental Property Ventures-v- White (2007) with the possibility of a breach of covenant by the First Applicant. However, in her view, (without reference to the merits of this challenge), this was relevant to Section 27A and the question of the reasonableness of the cost of the work.

26. However, she submitted that the failure to claim under the warranty which had expired in 2013 was not a consequence of the failure to consult, as even if the First Applicant had consulted, they could not have asked the builder to pay for the work as the warranties had expired.

27. Ms Helmore stated that dispensation ought to be granted unless the respondent tenants could demonstrate prejudice, having arisen as a result of the First Applicant's failure to consult.

Mr Tony Ulasi- Development Manager

28. Ms Helmore tendered Mr Tony Ulasi, as a witness on behalf of the First Applicant. And asked that his statement be adopted as his evidence in chief.

29. Mr Ulasi is the development manager for First Port . He had been involved in managing the premises since 2004. His statement which comprised 6 pages was signed on 1 July 2021. Ms Helmore asked Mr Ulasi about the cost of work in paragraph 11 of the witness statement, and whether the abseiling was required. Mr Ulasi stated that it was required as it was necessary to abseil to the balcony to carry out works.

30. In cross examination, Mr Hodder referred Mr Ulasi to his email dated 23 August 2019, in his letter he stated that the surface of the 9th floor roof terrace suffered defects allowing water ingression before the 10-year warrant had expired.

31. Mr Ulasi stated that the management agents had, as a result of the issues raised by Mr Hodder, written to Barratts who had provided the warranty, however they had not responded by indicating that the works were covered and inviting the Applicant to submit a claim. As the roof terrace was demised to the owner of flat 57, the leaseholder

had been encouraged to write to Barratt as they were a party to the Warranty.

32. Mr Ulasi in answer to a question stated that the balcony sat over the ceiling of two flats which form part of the roof, which was why the First Applicant was responsible for the repairs. Mr Ulasi stated that the guarantee expired in 2013. He stated that although there were some reports of bumps in the surface, the First Applicant had no knowledge that it was a defect at the time. Mr Ulasi stated that the leaseholders were policy owners they could have put in a claim.

33. He reiterated that when the works commenced the First Applicant was unaware of the full scope of what was required and this was why the First Applicant had not had the opportunity to consult. In answer to whether sums had been paid from the reserve he referred to the end of year accounts, which detailed how the service charges had been incurred. Mr Hodder denied that the tenants had been provided with these accounts or indeed with any on a regular basis.

The Respondents case

34. Mr Hodder represented himself and the other leaseholders who opposed this application. He stated that there were 4 flats which had roof terraces, however there were 56 leaseholders who were unaware of the costs or that work was required. He stated that the First Applicant's should have been pursuing the matter of the warranties, as these leaseholders had no idea about the work. The leaseholders had reported the defects in 2011; however, the First Applicant did not make a claim on behalf of the 56 leaseholders.

35. Mr Hodder stated that First **port** should have carried out a Section 20 consultation in 2011, when the problem first arose. He stated that the respondents' position was that the First Applicant should have carried out the work in 2011. First port failed to carry out a consultation, had they done so, then the First Applicant would have been in a position to make a claim on the warranty.

36. He submitted that the First Applicant did not take the necessary action and waited over 8 years to carry out the repairs, by this time the costs, and the work required had increased and there was no opportunity to claim the cost from the warranty.

37. Mr Hodder stated that the First Applicant had not disclosed the cost of the work, which was paid for from the reserve. He stated that the leaseholders had not been provided with details of the costs in any accounts. He stated that the cost of the work would have been zero had the First Applicant taken action when the need for the work first became apparent.

38. Mr Hodder also submitted that various items of the cost such as the abseils were too high and unnecessary. As the leaseholders had not been consulted, they had not had the opportunity to provide their views on the work.

39. He asked that the Tribunal refuse the application, for dispensation.

40. Counsel Ms Helmore in her closing submissions reminded the Tribunal of Daejan-v- Benson, she stated that there was a factual burden on the respondent, and although they had raised issues that they were paying for inappropriate work, she submitted that they had not discharged the burden that they had suffered prejudice as a result of the First Applicant's failure to consult.

41. In respect of the allegation concerning the warranty, Ms Helmore submitted that the Applicant did not have the benefit of the warranty, it was provided by the builder for the benefit of the leaseholders, and the freeholder was not a party to it. She submitted that the leaseholders could have claimed under the warranty given this Mr Hodder and the Respondents had not proved prejudice. She submitted that although the respondent raised issues concerning the costs of some of the items of work, this was not an application concerning reasonableness and payability.

42. Ms Helmore submitted that the Application for dispensation should be granted.

The tribunal's decision and reason for the decision

I. The Tribunal having considered all of the circumstances in this case, it did not attempt to set out every issue that had been raised verbatim, however it did set out the material grounds relied upon by each of the parties.

II. The Tribunal in making its determination noted that its jurisdiction in this matter is somewhat limited, the scope is set out in Section 20ZA and as discussed by the court in *Daejan –v- Benson (2013)* which requires the Tribunal to decide on whether the leaseholders would if dispensation is granted suffer any prejudice.

III. The Tribunal finds that there is no prejudice suffered to the leaseholders in dispensing with the consultation requirements. It accepted the submissions of Ms Helmore that the issues raised by the leaseholders concern the reasonableness and payability of the service charges, as such the respondent still has the right to raise these issues as part of the Section 27A Application and this is the position regardless of whether dispensation is granted.

IV. The Tribunal further finds, that given the nature of the work discovered in 2019, as a result of the roof work undertaken to flat **59**9, there was urgency. A proper consultation exercise could not have been undertaken without risking further damage to the fabric and structure of the building.

V. However, the Tribunal consider that the leaseholders should be entitled to further information so that they can make an informed decision concerning the scope of any further application they wish to make.

VI. The Tribunal therefore grants dispensation on the following terms-:

VII. The Applicant **shall within 28 days** provide the Respondents with details of the breakdown of the work, details of the sum to be paid from the reserve and under the provision of the lease the contribution to the costs of the work to be paid by each leaseholder.

VIII. The leaseholders will of course enjoy the protection of section 27A of the 1985 Act so that if they still consider the costs of the work are not reasonable (on the grounds set out above or any other ground) they may continue with their application to the tribunal for a determination of their liability to pay the resultant service charge.

IX. The Respondents may write to the Tribunal to ask for the Section 27A application to be set down for a case management conference.

X. No applications were made for costs before the tribunal.

Judge Daley **Date** 9/09/2021

We exercise our powers under Rule 50 to correct the clerical mistake, accidental slip or omissions in our Decision dated 09/09/2021. Our amendments are made in bold. We have corrected our original Decision because of clerical omissions and errors.
Signed: Judge Daley
Dated: 14.10.2021
Re;dated 31.10.21

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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) a leasehold valuation 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.]

1. **S20ZA Consultation requirements: supplementary**

(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. [...]

2. The relevant Regulations referred to in section 20 are those set out in Part 2 of Schedule 4 of the Service Charge (Consultation etc) (England) Regulations 2003.