FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LDC/2021/0250**
Property	**:**	**Flats 1, 4 & 5, 333 Clapham Road, Stockwell, London SW9 9BS**
Applicant	**:**	**The Mayor & Burgesses of the London Borough of Lambeth**
Respondents	**:**	**Michaela Ann Kelly (Flat 1)** **Christopher Nicholas Woodman (Flat 4)** **Dorette Danvers-Russell (Flat 5)**
Type of application	**:**	**Dispensation from consultation requirements**
Tribunal	**:**	**Judge Nicol** **Mrs A Flynn MA MRICS**
Date	**:**	**10th January 2022**

DECISION

The Applicant's application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation from the statutory consultation requirements in respect of works to the subject property is refused.

Reasons

1. This matter has been determined on the papers because the Tribunal directed that the case was suitable for the paper track and the parties consented. The documents before the Tribunal were contained in a bundle of 156 pages compiled by the Applicant.

2. The Applicant is the freeholder of the subject property at 333 Clapham Road where there are 5 flats. The Applicant has let flats 2 and 3 on secure tenancies but the other three are subject to long leases held by the Respondents.

3. On or about 2nd March 2017 the Applicant completed works to the flat roof area of the subject property. Under their leases, an appropriate share of such costs would be payable by each of the Respondents. The

final cost was £9,031.36. £1,633.96 was apportioned to Flat 5. The Tribunal has not been told the amounts apportioned to the other two Respondents but it was over £250. Such amounts triggered the Applicant's obligations to consult the Respondents under section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003.

4. The Applicant failed to comply with the statutory consultation requirements. In the case of Flat 5, the Tribunal issued a decision on 29th July 2021 (ref: LON/00AY/LSC/2021/0165) determining that the Third Respondent had not been given the requisite notice in writing because it was sent to the subject property itself rather than her correspondence address. The Applicant already had her address in Birmingham where she lives and had used it previously but failed to use it on this occasion because a new computer system they had implemented was incapable of doing so.

5. It is worth noting that, in the current application, the Applicant has expressed bemusement at the Tribunal's decision but this is the result of two errors:

   (a) The Applicant gives every appearance of regarding itself as the innocent victim of problems arising from the new system they implemented so that, if the system sent notices to the wrong address, they should not be fixed with the consequences. This is not correct. As recorded in the Tribunal's previous decision, the Applicant "admitted that they knowingly and deliberately implemented a system whereby correspondence would be sent to the [Third Respondent] at an address where she would not receive it." The Applicant is entitled to implement new systems of administration but it is up to them, and no-one else, to ensure that it works. It is the Applicant, and no-one else, which bears the risks and the consequences if the system were not to work as it should.

   (b) Under clause 5(B) of the lease, the provisions of section 196 of the Law of Property Act 1925 are deemed to be incorporated. The Applicant appears to be under the impression that this entitles them to post any notices to the property which is the subject of the lease. However, while sub-section (3) does provide for serving a notice by leaving it at that property, sub-section (4) does not provide for service by post to that address. Rather, any notice must go to the last-known place of abode. When the Applicant purported to serve the section 20 consultation notice by post, section 196 would only have been satisfied by posting it to the Third Respondent's address on record, not to the subject property.

6. The other two Respondents have not participated in these proceedings and so the Tribunal is unaware of whether they suffered the same problems as the Third Respondent with service of the notice. However, what the Tribunal does know is that the purported section 20 notice was dated the same day as the Applicant says the works were completed. The Applicant was unable to provide an explanation other

than that the notice must have been served much too late. For obvious reasons, consultation must be carried out in advance of the relevant works being started, let alone completed.

7. The Tribunal is satisfied that the Applicant failed to comply with the statutory consultation requirements in respect of all 3 Respondents and the only way that they may charge each Respondent more than the £250 limit imposed by those requirements is if they are granted dispensation from them.

8. Having said that, the requirement to consult all lessees is triggered if the contribution of any one tenant is more than £250. For the purposes of the statutory consultation requirements, the contributing lessees are all treated alike. If dispensation is granted, it applies to all lessees, irrespective of whether they participated in the proceedings, let alone whether they opposed it or not. Similarly, if dispensation is refused, the consequences apply to all lessees equally whether they participated or opposed it or not.

9. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Applicant has applied to the Tribunal for unconditional retrospective dispensation.

10. The Tribunal noted in its previous decision that, by letter dated 25th June 2021, Judge Vance had directed that, "If the [Applicant] wishes to pursue a s.20ZA dispensation application it must complete the relevant application form and pay the required tribunal fee." By letter dated 2nd July 2021 the Applicant replied, "The Council does not currently intend on making a separate application for dispensation."

11. The fact is that the Tribunal has already determined that the Third Respondent's charge for the works is limited to £250 for the relevant works. The Applicant has already had the opportunity to raise the issue but specifically eschewed that opportunity. They have not appealed or sought to have that decision reviewed. They cannot seek to have that decision effectively reversed by making an application for dispensation now. The Tribunal has ruled and the Applicant is stuck with that decision.

12. Nevertheless, the Applicant has made arguments for dispensation and the Tribunal will address them. In particular, they have sought to rely on the guidance provided by the Supreme Court on the exercise of this power in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

    (a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42] (It is arguable that the statutory consultation requirements arising from section 20 were aimed at more than just addressing the costs

referred to in sections 18 and 19 and that it is absurd to suggest that lessees' interests, particularly where their property is also their home, do not go beyond the cost to them, but the Supreme Court thought otherwise.)

(b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

(c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]

(d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

(e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]

(f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

(g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

(h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

(i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

(j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

(k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

13. The Applicant asserted that the Third Respondent has failed to establish that she suffered any prejudice by their failure to consult her and that this is sufficient for their application for dispensation to be granted. The Tribunal rejects this assertion for a number of reasons:

(a) As the Supreme Court was itself at pains to point out, it is not just a simple equation of no prejudice equals dispensation. If that were the case, landlords could, as a matter of standard practice, get away with avoiding any consultation whenever they can predict that prejudice is unlikely, thus driving a coach and horses through the legislation.

(b) The Tribunal accepts the Third Respondent's submission that she suffered prejudice in the form of being unable to budget for the expense of the works. A section 20 notice provides a lessee not only with the opportunity to participate in a consultation process but also with an estimate of the likely cost. The particular form in which the Applicant failed to comply with the requirements in this case means that the Third Respondent was unaware of the potential charge until she received the bill.

(c) Perhaps most significant is that the process outlined by the Supreme Court only works if the lessee is given a genuine opportunity to make a case that there has been prejudice. That opportunity depends on having access to the necessary information. If a lessee did not know the relevant facts, it would be impossible for them to demonstrate any prejudice arising from them. In this case, the Third Respondent initiated email correspondence with the Applicant in 2018 asking for the relevant information. Two years later, in October 2021, the Applicant provided a schedule of the relevant works, on the basis of which they asserted that the Third Respondent had everything she needed. However, the Applicant has overlooked a vital aspect, namely why the works were initiated. The only information on this is in the section 20 notice which simply states, "Responsive repair works required." This implies that the relevant area was somehow in disrepair but the Applicant has failed to provide any details of this. The Third Respondent specifically asked for such information but she never received it. Therefore, due to the Applicant's failure to provide relevant information, she never had the opportunity to make her case.

(d) Further, such information needs to provided within a reasonable time frame. The older any works are, the more difficult it will be for any expert to comment usefully on them. What information the Applicant did provide came a long time after the event.

14. In summary, the Tribunal's earlier decision precludes the grant of dispensation now but, even if that were not the case, the Tribunal would conclude that it is not reasonable to grant it.

Name: Judge Nicol **Date:** 10th January 2022