



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	: CHI/00ML/LDC/2021/0115
Property	: 185 Kingsway, Hove, East Sussex BN3 4GL
Applicant	: J McMullan
Representative	: Austin Rees Ltd
Respondent	: P Singh (LGF & GF Flats) J P Lindsey-Halls (Flat 2) Y Shiarlis (Flat 3)
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(s)	: D Banfield FRICS Regional Surveyor
Date of Decision	: 14 February 2022 without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11.

REVISED DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 in respect of additional works to the rear roof subject to the following conditions;

- a. Copies of all quotations received for the additional works to be provided to the Respondents within 7 days of this decision.**
- b. If within 10 days of receipt of the copies referred to above any Respondent comments on those quotations or nominates a potential contractor, the Applicant will reply within 7 days and if an alternative contractor is nominated a quotation shall be sought from them.**

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

Background

1. On 8 February 2022 the Tribunal issued its decision on this application on the mistaken understanding that the Applicant had failed to reply to the Respondents' objections. On 9 February 2022 the Tribunal wrote to the parties stating that its decision was set aside in accordance with Rule 51 (2)(b) of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013 on the grounds that a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time. The following decision is therefore made taking into account the additional information now received.
2. 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.
3. The Applicant explains that certain roof works were being undertaken following a section 20 consultation. Whilst the works were being undertaken it became apparent that works were required to the rear section of the roof to prevent water ingress to the top floor flat. The application suggests it would be more cost effective for such works to be completed whilst the scaffolding which is currently erected is in place.
4. The Tribunal made Directions on 16 January 2022 indicating that it is satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11.
5. The Directions required the Applicant to send them together with a copy of the application to each Respondent and to confirm that it had done so. Confirmation was received on 19 January 2022.
6. Included with the Directions was form for the Leaseholders to indicate to the Tribunal whether they agreed with or opposed the application. Those Leaseholders who agreed with the application or failed to return the form would be removed as Respondents.
7. One objection form was received electronically signed by the three Leaseholders listed as Respondents above. Understandably Mr and Mrs McMullan as Freeholders did not respond. In addition to the

objections listed the Respondents asked that they be permitted to expand their case at an oral hearing

8. The objection was received late and by Directions dated 31 January 2022 the time for receipt of responses was extended to allow their consideration. Judge Dobson also said that unless a case management application was made giving reasons for requiring an oral hearing the determination would continue to be made on the papers. No case management application has been received and the matter is therefore determined on the papers as directed.
9. Before making this determination, the papers received were examined to determine whether the issues remained capable of determination without an oral hearing and it was decided that they were, given that the Respondents' objections have been clearly set out.
10. 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.

The Law

11. 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.

12. 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

- 13. An outline of the Applicant's case is set out in paragraph 2 above. Further detail was contained in the application which referred to the original S.20 works consisting of repair to the main roof and front dormer commencing in June 2021. The scaffolding at the front of the structure has now been extended to allow for access to the rear portion of the roof and the necessary repair works which have been identified and quoted for. It is said that works are due to commence once dispensation has been granted.
- 14. In their response the lessees named as Respondents have objected on the following grounds;
 - a. The application has been made by Austin Rees Ltd, not the landlord.
 - b. The lessees are in the process of purchasing the freehold and works are being rushed through to avoid the works being approached in a different manner.
 - c. The application fails to make clear that the freeholder also owns the flat suffering water ingress.

- d. There is no urgency or if there is it is of the landlord's making.
 - e. The S.20 consultations were flawed, and lessees had refused to pay and asked for an accurate schedule of works and 2/3 estimates. The lessees did however allow for scaffolding to be erected to enable a proper tender process.
 - f. Instead an application for additional works without a consultation has been made.
 - g. Since the scaffolding has been erected no works have been carried out.
 - h. The lessees may be prepared to pay for temporary preventative works to halt water ingress in the freeholder's flat.
 - i. The "small additional cost" said to have been provided by email to the lessees is estimated to be £19,200 in comparison with the original costs estimated to be around £10,000.
 - j. The lessees have not been provided with copies of the estimates.
 - k. The scaffolding is in place due to the landlord's failure.
 - l. The application should be rejected and the costs not recoverable through the service charge.
15. In their reply the Applicant responds to the lessees' objections as follows;
- The Applicant has been stated correctly with Austin Rees acting as agent.
 - No formal discussions on acquiring the freehold have been held and the purpose of the application is to prevent further damage to the flat and avoid the additional costs of scaffolding. If the leaseholders acquire the freehold, they would have to undertake the work anyway.
 - The ownership of the flats is irrelevant as the freeholder's obligation to repair is unaffected.
 - The application remains urgent whether or not there is a hearing. They are willing to work with the leaseholders to obtain alternative quotations although additional scaffolding costs may be incurred.
 - Full section 20 consultation was undertaken, and the Notices made available the opportunity of requesting a full copy of the Specification of Works a copy of which has now been provided.
 - The works for which dispensation is sought have only been identified since the erection of the initial scaffolding as not being visible from the ground.
 - The application is in respect of the need to consult not the reasonableness of the charges details of which can be provided.
 - It is uncommon to erect scaffolding just to prepare a Specification of Works and the additional work has been identified since the initial project has been on site.

Determination

16. 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.
17. The question the Tribunal must ask itself is therefore whether the Respondents will be prejudiced by not being consulted prior to carrying out the proposed works to the rear roof. Any deficiencies in the previous S.20 consultations whether or not they occurred do not form part of and are not relevant to the application.
18. The Tribunal accepts that in any building work, particularly where the roof is concerned lack of access may give rise to unexpected additional work being required. Contractors can be asked to provide quotations on both what is initially evident but also what might be discovered on closer inspection. Alternatively, as in this case where additional work discovered, once scaffolding has been erected and closer inspection made possible. Both alternatives have their merits, but neither can be deemed to be unreasonable.
19. As referred to above, the test is what prejudice are lessees likely to suffer? Clearly Mr and Mrs McMullan in their capacity as lessees may suffer if the prevention of further water ingress is delayed unduly. However, the lessees suggest that temporary repairs could be carried out whilst tenders are sought. On the other hand, is the lessees' loss of the opportunity to comment on the proposals, to nominate a contractor and for competitive quotations to be obtained.
20. The Respondents' objections regarding the ownership of the flats and their desire to purchase the freehold are not relevant to whether dispensation should be granted. The Freeholder's maintenance obligations under the leases remains the same in whoever's ownership the freehold may rest. Likewise, this decision is solely in respect of dispensation, not whether any costs are reasonable that being a matter for an application under S.27A of the Landlord and Tenant Act 1985.
21. Given that the Applicant is only obliged to "consider" the lessees comments in any consultation process rather than be bound by them and the Applicant's reply indicating a willingness to engage with the lessees in obtaining alternative quotations it is the Tribunal's view that, subject to conditions, dispensation from consultation should be granted.
22. **The Tribunal therefore grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 in respect of additional works to the rear roof subject to the following conditions;**

- a. **Copies of all quotations received for the additional works to be provided to the Respondents within 7 days of this decision.**
 - b. **If within 10 days of receipt of the copies referred to above any Respondent comments on those quotations or nominates a potential contractor, the Applicant will reply within 7 days and if an alternative contractor is nominated a quotation shall be sought from them.**
23. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
14 February 2022

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.