



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

**Case Reference** : CHI/21UH/LDC/2022/0072

**Property** : Wolsey Place, 49-51 London Road,  
Hailsham, East Sussex, BN27 3FU

**Applicant** : McCarthy & Stone Retirement Lifestyles  
Ltd

**Representative** : McCarthy & Stone Management Services

**Respondents** : Mrs Denise Wand Flat 2  
Mrs Dorothy Martin Flat 3  
Miss Barbara J Barrett Flat 4  
Mrs Kay m Wilson Flat 17  
Mr David John Morris Flat 19  
Mr Geoffrey Holyoake & Mrs Maisie  
Holyoake Flat 26

**Representative** : -

**Type of Application** : To dispense with the requirement to  
consult Leaseholders about major works  
section 20ZA of the Landlord and Tenant  
Act 1985

**Tribunal Member** : W H Gater FRICS  
Regional Surveyor

**Date of Decision** : 15 September 2022

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## PROVISIONAL DECISION

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**The Tribunal provisionally grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of works to the heating system as described in the application.**

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

**The Applicant is to send a copy of this determination to all of the leaseholders liable to contribute to service charges.**

### **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. The application was received on 28 July 2022.
2. The Applicant states that urgent works are required, scheduled to take commence on 12 August 2022, and described as *“The heating system is not functioning correctly due to impurities and corrosive materials within the system. This is adversely affecting the boiler which heats the water for the development.... We need to carry out this work asap as our residents will need a functioning heating system as winter approaches.”*
3. The Tribunal made Directions on 9 August 2022 indicating that it 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 its Directions to the parties together with a form for the Leaseholders to indicate to the Tribunal whether they agreed with or opposed the application and whether they requested an oral hearing. The Applicant confirmed on 17 August 2022 that this had been done. Those Leaseholders who agreed with the application or failed to return the form would be removed as Respondents.
5. Leaseholders of ten flats responded. Four were in agreement. Those Leaseholders who agreed or failed to respond were removed as Respondents.
6. 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

7. 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.

8. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson* [2013] UKSC 14. 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**

- 9. The Applicant's case is set out in the application dated 28 July 2022.
- 10. They point out that this is a purpose built block of 38 flats comprising one and two bedroom apartments and is an age-restricted community for the over Sixties.
- 11. They state that the heating system is not functioning correctly due to impurities and corrosive materials within the system. This is adversely affecting the boiler which heats the water for the development. To remedy this, it requires a biocide wash, dynamic flush, chemical clean and a water meter to monitor water being added to the system. Supply and insertion of X100 to protect the boiler heat exchangers. We need to carry out this work as soon as possible as our residents will need a functioning heating system as winter approaches.
- 12. They seek dispensation from consultation requirements as this work needs to be completed promptly to avoid further degradation of the heating system and to ensure all homeowners have access to a correctly functioning heating system:
- 13. The total cost is £8,360.40 including VAT for the completion of the works.
- 14. The Respondent's responses were as follows: -
- 15. Miss Barrett: Flat 4 did not agree with the application or the determination of the matter on the papers. She commented that "I agree that it needs to be done but don't think the Contingency Fund should be used. Job should have been done properly".
- 16. Mrs Martin: Flat 3 did not agree with the application or the determination of the matter on the papers. She commented that "I strongly feel that the cost should be met by the owner I builder as not done properly when built and tested and regularly serviced.
- 17. Mrs Wand: Flat 2 did not agree with the application or the determination of the matter on the papers. She commented that "I feel attention should have been given earlier to this hot water system and therefore money should not be taken out of the Contingency Fund but I agree work has to be done."

18. Mrs Wilson: Flat 17 did not agree with the application or the determination of the matter on the papers but made no further comment.
19. Mr and Mrs Holyoake: Flat 26 did not agree with the application or the determination of the matter on the papers. They commented that “We agree with the work being done but not with it being paid for out of our contingency fund, we feel this should be paid for by McCarthy and Stone.”
20. Mr Morris: Flat 19 did not agree with the application but did not comment on the determination of the matter on the papers. He commented “the heating system is not OLD, has the system been adequately maintained since it's Inception? Has regular service taken place, has a inhibitor been added to the system on these occasions? Have you obtained at least three estimates for the work required? When did the problem become apparent and what are the current systems?”

### **Provisional Determination**

21. 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.
22. The Respondent’s submissions centre on who should pay for the works, the source of funding and the cause of the problem. Three agreed that the works should be done.
23. The issue of whether the cost of the works should be taken from the contingency fund or payable by McCarthy and Stone is not pertinent to a determination of this type.
24. Section 27 provides recourse for Tenants in determining whether works have been reasonably incurred, are reasonable in cost and by whom they are payable. A 20ZA determination is concerned with whether the Tribunal may grant dispensation from consulting the parties. The test laid down is whether they are prejudiced by the absence of consultation.
25. Whilst the Respondents clearly feel strongly in their comments these do not demonstrate relevant prejudice and are more pertinent to a Section 27 application. The Tribunal is satisfied that no such prejudice has been caused to the Leaseholders.
26. The Tribunal finds that the works required to the heating system were urgent and that it was not possible to operate the full statutory consultation.
27. For this reason, the Tribunal is of the view that it should grant dispensation.
28. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

## Hearing

29. Notwithstanding this, five of the Respondents have objected to the matter being determined on the papers and Mr Morris has not provided consent to a paper determination.
30. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 state at Rule 31 that the Tribunal must hold a hearing unless it has the consent of the parties to dispense with such hearing. Accordingly, this is a provisional determination pending a hearing.
31. The directions of 9 August 2022 state at Direction 9: -

The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. This application is not about the proposed costs of the works, and whether they are recoverable from the leaseholders as service charges. The leaseholders have the right to make a separate application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 to determine the reasonableness of the costs, and the contribution payable through the service charges.
32. It appears from the Respondents submissions that they are concerned with matters more relevant to a Section 27A application. The Tribunal is satisfied that none of the submissions provides evidence of prejudice as set down in Daejan above.
33. Under the overriding objective of the Tribunal Rules the Tribunal is charged with dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal
34. Before making this determination, the papers received were examined to determine whether the issues were capable of determination without an oral hearing and it was decided that they were, given that the facts are undisputed.
35. For that reason, the Tribunal issues this preliminary decision and invites the Respondents to confirm by **1 October 2022** that they do indeed wish to proceed to a hearing. The matter will be set down for hearing as soon as convenient. The hearing will proceed unless all Respondents provide written consent to determination on the papers. If all Respondents consent to dispense with a hearing the Tribunal will issue this provisional decision as a final determination and the hearing will not take place.
36. The Applicant is to send a copy of this provisional determination to all of the leaseholders liable to contribute to service charges.

## **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](mailto: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.