FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/11UF/LDC/2022/0029**
HMCTS code (paper, video, audio)	:	**V: CVPREMOTE**
Property	:	**The Residence, Saunderton Estate, High Wycombe Bucks HP14 4EA**
Applicant	:	**Maplefox Limited**
Representative	:	**MCR National Homes Limited**
Respondents	:	**All leaseholders of dwellings at the property (including any of their sub-tenants of any such dwelling) who are liable to contribute to the cost of the relevant works**
Type of application	:	**For dispensation from consultation requirements** - Section 20ZA of the Landlord and Tenant Act 1985
Tribunal members	:	**Mary Hardman FRICS IRRV(Hons)**
Date of decision	:	**15 December 2022**

DECISION

Description of hearing

This has been a remote video hearing. A face-to-face hearing was not held as all issues could be determined in a remote hearing.

The tribunal's decision

The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 to dispense retrospectively with all consultation requirements in respect of qualifying works to replace damaged pipework to the development.

Reasons for the tribunal's decision

The application

(1) On 22 July 2022 the tribunal received an application from MCR National Homes Limited, the Managing Agent on behalf of the applicant freeholder, Maplefox Limited. It sought retrospective dispensation from the statutory consultation requirements in respect of works to replace damaged pipework to the development.

(2) The Managing Agent informed the tribunal that in the absence of completion of these works the drains would need to be jetted every 4-7 days at a cost of £528 per visit. This had already been done twice due to sewage back flowing into the apartments.

(3) The work involved excavating a 20-metre length to a depth of 3 metres to expose pipework. Removing and replacing the pipework and setting new pipework in place on flexible seals where needed; bedding the pipe in shingle and back filling the area to a depth of 1 metre below ground level; backfilling the remainder with the removed soil and finally carrying out final CCTV to completed work.

(4) They had obtained one quote and proposed to notify the residents of the problem, why the situation had occurred and the first quote. They would also provide two further quotes, the reasons for going ahead and why they were proposing that consultation will not take place.

Procedural history

(5) Initial case management directions were given on 27 July 2022. The directions included a reply form for any leaseholder who objected to the application to return to the tribunal and the Applicant, also indicating whether they wished to have an oral hearing. Any such objecting leaseholder was required to respond 20 August 2022.

(6) The directions also provided that this matter would be determined on or after 30 August 2022 based on the documents, without a hearing, unless any party requested an oral hearing

(7) The applicant wrote to the tribunal on 2 August 2022 to advise that work had commenced following communication with the leaseholders. They had informed them of their intent on 20 July 2022 and had received payment for their share of the works.

(8) On 6 September 2022 the applicant wrote to the tribunal to say that, as the work had gone ahead with the support of the leaseholders they were not clear whether the leaseholders should be sent further paperwork or if they needed to resubmit the application because the position had changed.

(9) They were informed that it was not for the tribunal to give advice on how to proceed. If they wished the tribunal to determine whether to dispense with all relevant consultation requirements in respect of the works then they needed to comply with the directions of 27 July 2022. Any change to position could be detailed in the submission. If they wished to proceed the time for receipt of the bundle was extended to 23 September 2022

(10) The applicant then served the directions on the leaseholders in line with the revised timetable and provided three quotes to leaseholders.

(11) Eight of the leaseholders returned the reply form to say they had sent a statement in response to the landlord and five of them indicated they wished to have an oral hearing.

(12) The hearing took place by video link on 22 November 2022.

The Property and parties

(13) It appears that the property is a former office building converted into fifty-seven apartments on an eight-acre site. The first property was sold in July 2020 and the last property allocated for sale was sold in December 2021. Thirty-one of the apartments are owned by companies within the same group company portfolio as the freeholder,

(14) The application is made by MCR National Homes Limited on behalf of the freeholder Maplefox Limited. The application was made against the leaseholders of the relevant flats (the "**Respondents**")

The Law

(15) Sections 18 to 30 of the 1985 Act make provision for the regulation of service charges payable by a residential leaseholder. So far as is relevant to this appeal, section 18(1) of the Act defines "service charge" as "an amount payable by a tenant of a dwelling .... for repairs .... The whole or part of which varies ... according to the relevant costs." Section 18(2) defines "relevant costs" as "the costs or estimated costs incurred or to be incurred... in connection with the matters for which the service charge is payable."

(16) Section 19 provides that relevant costs "shall be taken into account in determining the amount of a service charge

(a) only to the extent that they are reasonably incurred, and

(b) ... only if the ... works are of a reasonable standard.

And the amount payable shall be limited accordingly"

(17) Section 20 imposes a requirement on landlords to consult with lessees in prescribed circumstances before carrying out works or entering into a qualifying long-term agreement. Section 20(1) provides:

"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 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."

(18) A "relevant contribution" is defined in section 20(2) as the amount a tenant may be required to pay towards service charge costs under the terms of their lease. Section 20(7) and regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 limit the relevant contribution to £250 per flat.

(19) The cumulative effect of these provisions is that, if the landlord fails to comply with the consultation requirements, the tenant's contribution to the service charge will be limited to £250 unless and until the landlord obtains dispensation from the FTT.

(20) The statutory consultation requirements are set out in the 2003 Consultation Regulations. The regulations include five different sets of procedure which landlords must follow depending on whether the landlord seeks either to carry out works to a building or to enter into a qualifying long-term agreement and furthermore whether or not the landlord is obliged to give public notice of those works or that agreement.

(21) The power to dispense with the consultation requirements is conferred on the tribunal by section 20ZA(1) of the 1985 Act which provides:

"Where an application is made to [the appropriate tribunal] for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works … the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

(22) The scope and extent of the dispensation power in section 20ZA has been prescribed by the Supreme Court in the case of Daejan Investments Ltd v Benson [2013] UKSC 14 (Daejan).

(23) By reference to sections 19 to 20ZA of the 1985 Act, Lord Neuberger said in Daejan [at 43] that: "*…the obligation to consult the tenants in advance about proposed works goes to the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed*

works." Given that purpose, it was indicated [at 44] that the issue on which the tribunal should focus when entertaining an application for dispensation: "*…must be the extent, if any, to which the tenants were prejudiced … by the failure … to comply …*" and [at 45]: "*…in a case where it was common ground that the extent, quality and cost of the works were in no way affected by … failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason)…*"

(24) Lord Neuberger referred [at 65] to *relevant* prejudice, saying the only disadvantage of which tenants: "*…could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted*." He noted [at 67] that, while the factual burden of identifying some relevant prejudice would be on the tenants: "*…the landlord can scarcely complain if the LVT views the tenants arguments sympathetically, for instance by resolving in their favour any doubts whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points*."

The Applicant's case

(25) In their written submission the Applicant states that prior to May 2022 they were not aware of an issue with the drainage to the site other than the occasional minor clearance due to blockages from wipes or sanitary products which were cleared by the drainage company.

(26) In late May 2022 complaints were received of the drains in the basement overflowing into tenanted properties, courtyards and bathrooms. The contractor, Abbey Drains attended the site, cleared the immediate blockage and recommended a CCTV survey.

(27) They carried out that survey at the beginning of June and advised that weekly or twice- weekly jetting would be needed to stop the drains overflowing if repairs were not carried out. They gave an estimate for the work of £21,582 including VAT.

(28) Two further quotes were then obtained for £24,400 including VAT and £22,282.20 including VAT.

(29) On 11 July 2022 there was a complaint from a leaseholder that there was flooding to the bathroom and the outside drain. Contractors were engaged to deal with the issue, but this recurred on 19 July 2022 and again the contractors were called out.

(30) On 20 July 2022 the applicant made an application to the tribunal for dispensation from consultation requirements and a decision was made to commence with the main works following advice from the contractor. At

this point they had expended £4,266 in dealing with the blockage/leakage.

(31) At the same time the applicant wrote to the leaseholders advising them of the application to the tribunal and their intention to instruct for the work to go ahead. They provided the totals of the three quotes and indicated that they had chosen to proceed with the lowest quote on the basis of cost and that the company was familiar with the property. They invited leaseholders to contact them if they had any questions or queries and said that an invoice would follow shortly.

(32) There was a further call out to unblock the drains before work commenced on 28 July 2022. The work involved excavating a 20-metre culvert to a depth of 3 metres to expose the existing pipework, removing and replacing the pipework and then reinstating the area. The final works were checked using a CCTV survey.

(33) They had contacted the insurance company who had advised that the work would only be covered if it was accidental damage.

(34) At the hearing Stephanie Hilditch for the applicant said that following the complaint of sewage leakage to the basement they had contacted Abbey Drains as they were familiar with the site. When questioned she said that the first time they were aware of this was 25 May 2022. They had cleared the drains and carried out a CCTV survey. Further work was required as pipes had collapsed under land to the front of the building. They reviewed the surveys and were aware that further delay would result in additional drain clearance and the situation was not compatible with health and safety, and there was the risk of costs spiralling.

(35) They had followed the process as well as they could. The delay in issuing the directions was because they had sought further guidance from the tribunal as they had started work and thus circumstances had changed from those when they made the application. They had given 10 days' notice to the leaseholders to respond.

(36) In response to questions from the respondents she said that there had been problems with drains previously, but she believed that was due to blockages caused by flushing of sanitary products and wipes and not collapsed pipework. She was not aware that this particular issue had occurred before. She was aware that there was an issue with other parts of the pipework which was the responsibility of Thames Water. She did not believe that this work had caused flooding in other parts of the building although was aware of freshwater flooding in communal corridors, but this was not connected to foul drainage.

The Respondents' position

(37) Eight of the leaseholders, completed the reply form to say they had sent a statement in response to the landlord and the statements were provided in the bundle. One statement, that of Alex Day (Flat 56) was omitted and supplied to the tribunal prior to the hearing.

(38) Their objections to the grant of dispensation were varied, with a number of them adopting, in some cases with adaptations, a standard letter. Objections raised by a number of leaseholders in their written submissions to the tribunal were.

a) Lack of time to provide a statement of opposition – leaseholders stated that they had received the directions from the applicant around 4 working days (6 days) before submissions were due. This did not give them time to allow interested parties to raise concerns, to independently verify or assess the situation in a timely manner or to generally voice any comments on matters that concerned leaseholders.

b) The letter to leaseholders of 20 July 2022 stated that the applicants had submitted an application to the tribunal when one hadn't been submitted at that point (application received by tribunal 22 July 2022)

c) Demand for payment for the works was received via e mail on 25 July 2022. Leaseholders had paid £250 of the invoice on the basis that it was 'Payment in protest' and that charges were not agreed or admitted.

d) No information was formally shared on when the works would take place, where they would take place (location of the site within the grounds) or details of the cause. Individual leaseholders had requested additional information, and this was directed solely to them and not shared with all leaseholders

e) They did not agree that it was not a foreseeable event. They were made aware over 12 months ago of issues with drainage for the basement properties and understood that now a tenant was in the property the immediacy of the works had increased. In addition, the quote initially shared was dated 29 June 2022, 21 days before the initial section 20 notice was issued. This suggested that the applicant was aware for several weeks that there was a requirement for work to be carried out before informing leaseholders. Even if they were waiting on other quotes at this time, they would have been in no doubt told that this was a really costly piece of work that should by law require consultation

f) The demand was issued with no 30-day consultation. Allowing then as leaseholders to ask questions before the demand had been made, rather three working days between notification of section 20 intention and receipt of the demand.

g) It had not been made clear whether the building was signed off at the point of conversion from offices to residential. There were significantly more toilets for a building hosting over 50 apartments

and they questioned whether the building was fit for purpose in the first place.

Further points raised by individual leaseholders were:

h) Why was the cheapest contractor chosen?

i) Why are the leaseholders being charged for this work when drainage works on the basement were completed shortly prior to the issue arising?

j) Subsequent to carrying out of these works at the front of the building raw sewage came up through a number of internal drain covers in common corridors on a number of occasions over August 2022. They had spoken with the attending drainage company and had been told that MCR homes had not explored the drains with cameras but only authorised jetting of the affected drains. This left questions as to the possible extent and nature of the drainage issues throughout the building.

k) On one occasion in August 2022 a 3" x 2" hard concrete like obstruction was washed out of the pipework during the jetting process.

l) The owner of the basement apartment (56) which was particularly affected by the blockage, Alex Brown said his neighbour had informed him that there has been a previous 'massive' sewage spill from the drain at what was now flat 56 before Christmas 2021.

m) On 7 July 2022, within a week of his purchase, he came home to find raw sewage coming out of the shower waste and overflowing the toilet and flooding the floor. This was cleared but the mess left was not cleared by MCR homes meaning the garden patio is unsafe to use.

n) When the work was done in late July 2022, his father had been informed by the foreman in charge of the work that they had completed the job but that the drain still wasn't flowing as there was a second blockage nearer to the road. They had called Thames Water to power clear the drain. He was told that this was an original drain and had partly collapsed. He was not aware whether this work had been done. However, since the repair work there had been further drainage problems in the building. He did not believe that they should be charged in order to have a working sewage system in a development which had been sold as 'new build'

(39) 5 of the leaseholders attended the hearing. They were Sophie Porter (Flat 1) Anita Borishade (Flat 9) Richard Mumford (Flat 10), Keith Osborne (Flat 29) and Ian Brown on behalf of Alex Brown (Flat 56)

(40) In addition to the comprehensive points raised in their written submissions Mr Mumford said that the reason so few people had objected was that there were only around 15 individual leaseholders, the remainder were renting from subsidiary companies of MCR.

(41) He believed that the works had caused further issues and the flushing out of a 3" x 2" hard concrete like obstruction suggested issues that should have been picked up during the redevelopment.

(42) Miss Borishade said that subsequent drainage issues were experienced a few weeks after the work was done and she felt this was a direct consequence of the work. She also felt that had the consultation gone ahead she could have raised an issue with the company selected and maybe the work could have been done by someone else.

(43) Both Mrs Porter and Mr Osborne said that there was a lack of detail with the quotes, and they had never seen MCR homes face to face for a discussion. Mr Brown expanded on the detail of the flooding to his sons flat and the very unpleasant aftereffects meaning that the garden was not usable by his son's family. He believed that it was unreasonable that, 8 months after the building was occupied, the drains blocked, and the tenants were expected to pay for repairs.

Determination

(44) Following the Supreme Court decision of ***Daejan Investments Ltd. v Benson*** [2013] UKSC 14, the only issue for the Tribunal is whether the Respondents have suffered prejudice in dispensing with the requirements.

(45) This was a situation where raw sewage was coming up through the drains into an apartment and the surrounding garden which is clearly not a sustainable situation in a residential development.

(46) The landlord engaged a drain company to jet the drains and to undertake a drain survey which revealed a blockage. When flooding continued, they decided that it was not appropriate to undertake a consultation exercise – which was likely to take three months – and informed leaseholders that they proposed to carry out works recommended by the drain company and to apply to the tribunal for dispensation.

(47) During that work they were advised by the drain company that there were problems further down the drainage system but that those drains were the responsibility of Thames Water.

(48) The work was undertaken in July 2022 and appeared to fix the immediate issue – although flooding occurred elsewhere in the building the following month.

(49) It is entirely understandable that the residents feel aggrieved at the situation. They have purchased properties in an upmarket development, and, within a fairly short space of time, they are experiencing the extremely unpleasant effects of sewage coming up through drains and sanitary appliances, the remedying of which they are being asked to pay for, and, at short notice.

(50) However what the tribunal needs to decide is whether the leaseholders have suffered from prejudice which, had the statutory consultation process been followed, the leaseholders would not have done.

(51) There is no suggestion that the drains should have been left blocked or that the work done was excessive. Rather there is a complaint that more CCTV investigation of the drains should have been done.

(52) There is a complaint that the cheapest quote was accepted – which the landlord justified based on the quote being from a company that knew the development. Ultimately it is for the landlord to decide who to employ – and a justification is only required if the cheapest quote is not accepted. At no point do leaseholders dispute the actual costs of the works or supply alternative quotes.

(53) There was confusion on the part of the landlord in respect of consultation and the tribunal do not necessarily accept their claim in their letter of 6 September (see para 7) that the work had done ahead with the 'support of the leaseholders'.

(54) However, the tribunal's directions were sent to leaseholders and whilst they had a fairly limited period of time to respond (generally expressed at 4 working days or 6 days – although the tribunal notes that in some cases they had to collect the letters from High Wycombe), the original directions only gave 10 days and there was a subsequent oral hearing which 5 of the leaseholders attended.

(55) It appears to be correct that the information provided regarding the quotes was the total amount and the names of the contractors. However, those leaseholders who asked for more information were provided with a schedule with a more detailed breakdown of the respective quotes.

(56) Taking all this into consideration, the tribunal is not persuaded that the leaseholders have been able to demonstrate any actual prejudice and is therefore satisfied that it is reasonable to dispense with the consultation requirements in relation to works to replace damaged pipework to the development.

(57) It therefore determines under section 20ZA of the 1985 Act to dispense with all relevant consultation requirements in relation to these works.

(58) **Parties should understand that this is not an application for the tribunal to approve the reasonableness of the works or the reasonableness, apportionment or payability of the service**

charge demand.

(59) **I make no finding in that regard and the leaseholders will continue to be able to make an application under section 27A of the Act in respect of the reasonableness of the works and/or the reasonableness, apportionment or payability of the service charge demand for them.**

(60) There was no application to the tribunal for an order under section 20C of the 1985 Act.

(61) The Applicant shall be responsible for serving a copy of this decision on all leaseholders.

Mary Hardman FRICS IRRV(Hons)
15 December 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).