FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LDC/2022/0112
Property	**:**	26 Eversfield Place, St.Leonards-on-Sea, East Sussex, TN37 6BY
Applicant	**:**	Eversfield Property Management Limited
Representative	**:**	Mr Cahill
Respondent	**:**	Mr Barry Fox
Representative	:	Mrs Sue Fox
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Mrs J Coupe FRICS Ms C Barton MRICS Ms T Wong
Date of Hearing	**:**	23 February 2023
Date of Decision	**:**	28 February 2023

DECISION

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Background to the Application

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The application was received on 21 December 2022. Tribunal directions were issued on 9 January 2023.

2. The Respondent objected to the application, following which further Tribunal directions were issued on 2 February 2023 listing the application for an oral hearing on 23 February 2023.

3. On 15 February 2023 the Respondent submitted a Case Management Application ("CMA") which was put before a Procedural Judge on 20 February and who determined that the application would be heard as a preliminary matter at the outset of the hearing.

4. The Property is a substantial mid-terraced Victorian building located within a predominantly residential area close to the sea front. The Property has been converted into eight flats.

5. The Tribunal was supplied with an electronic bundle of 77 pages. References in this determination to page numbers in the paginated bundle are indicated as [ ].

6. These reasons address in summary form the key issues raised by the application. They do not recite each and every point raised or debated. The Tribunal concentrates on those issues which, in its view, go to the heart of the application.

7. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is confident that on the available evidence that fact is established or proven on the balance of probabilities.

The Hearing

8. The hybrid hearing was held at Havant Justice Centre with the Tribunal Chairman sitting in Court Room 4 and Ms Barton and Ms Wong both joining remotely.

9. Mr Cahill representing the Application attended the hearing in person. Mrs Fox, on behalf of Mr Fox, joined the hearing remotely. The hearing was delayed for a short time at the outset due to microphone difficulties in the court room. However, once the hearing resumed, a good connection to those attending remotely was maintained throughout.

Case Management Application

10. The Respondents' CMA dated 15 February 2023 was in three parts:

    i. Application to postpone the Tribunal
    ii. Application to debar evidence
    iii. Application to extend directions

11. Mrs Fox stated that, contrary to paragraph 12 of the Tribunal directions dated 9 January 2023, the Applicant had failed to provide the Respondent with copies of the estimates or quotations for the proposed works.

12. Mrs Fox stated that, to her understanding, lessees were entitled to *"challenge works & not to be unduly pressured or intimidated in the process"* [Page 2 CMA]. Further, that the Applicant's submissions contained historic and confidential information which, the Respondent asserted, was intended to intimidate and *"slur my good character"* [Page 2 CMA].

13. Mrs Fox asserted that the Applicant management company had failed to register with any regulatory body as required by statute and provides no formal complaints procedure for lessees.

14. Finally, Mrs Fox asserted that, in 2017, the Applicant charged the Respondent £2,154 for the Applicant's time in preparing Court documents, a sum deemed *"illegal"*.

15. The Tribunal required Mrs Fox to identify within the bundle which documents she considered confidential and prejudicial, and was therefore inviting the Tribunal to debar. It soon became evident that Mr Cahill had produced two sets of documentation, of which only the first version, as provided to the lessees, included the evidence to which Mrs Fox objected. However, the Tribunal only had before it the second version of the bundle, which omitted the disputed evidence. Mrs Fox stated that this second version had not been sent to the Respondent by Mr Cahill.

16. In response, Mr Cahill stated that the Respondent, in common with all lessees, had been provided with all documentation thus far available and that, to date, the Applicant was not in receipt of any quotations. Further, Mr Cahill considered that the Respondent has misinterpreted paragraph 12 of the Tribunal's directions by suggesting that such quotations *"**must** be received by the Respondent's by 13 January*" (our emphasis).

17. Mr Cahill argued that, as a non-profit entity, the management company was not statutorily obliged to register with a regulatory body and that lessees were able to submit complaints through an in-house process.

18. Finally, Mr Cahill considered the Respondent's payment in 2017 to be irrelevant to this application.

19. The Tribunal adjourned for fifteen minutes to consider the CMA during which time Mr Cahill was directed to provide the Respondent with the second version of the bundle. Upon resumption of the hearing Mr Cahill had failed to do so. The Chairman paused the hearing whilst Mr Cahill emailed the bundle to Mrs Fox and whilst Mrs Fox was afforded an opportunity to consider the content thereof. Mrs Fox thereafter confirmed that the information she objected to had been removed from the bundle version before the Tribunal.

20. The CMA was refused on the following grounds:

i. The Respondent had been provided with two structural engineer's reports which comprised the entirety of the documentation available at the relevant date. The Applicant was not in receipt of any quotations or the specification of works at such time.

ii. The Respondent, in common with all lessees, was afforded the statutory protection of s.27A Landlord and Tenant Act 1985 under which the Respondent can challenge the reasonableness and payability of costs arising from relevant work.

iii. The Tribunal had no visibility of the documentation which the Respondent considered confidential or which, the Respondent argued, had been submitted with the intention of besmirching his reputation.

iv. Regulation, or otherwise, of the management company did not preclude an application under s.20ZA. The Respondent advised the Tribunal that legal advice was being sought in relation to alternative redress on this point.

v. Disputed historic remittance was not relevant to this application. The Respondent advised that legal advice was being sought on said point.

The Hearing

21. The Tribunal explained to the Applicant that it considered the application vague and that Mr Cahill was required to particularise the precise grounds upon which dispensation was sought. Mr Cahill was advised that dispensation would only be considered on specific, identifiable, works and that an application for *"anything else necessary"* was considered too wide.

The Applicant

22. Eversfield Property (Holdings) Limited, previously known as Eversfield Place 26 Limited, is the registered proprietor of the Property.

23. Eversfield Property Management Limited ("Eversfield PM") is tasked with carrying out the management responsibilities of the Property. Eversfield PM is a non-profit entity which reinvests income generated from management responsibilities into the Property.

24. Mr Cahill is the registered proprietor of two flats within the property; Flat 1C where he lives and Flat 3. Mr Cahill has lived in the Property since September 2001.

25. The Property is registered as a House in Multiple Occupation ("HMO") with Hastings Borough Council. Individual flats within the Property have been subject to a Selective Licensing Scheme operated by Hastings Borough Council.

26. Further to a Chartered Structural Engineer's report prepared by Malcolm Tree B.Sc., C.Eng., M.I.Struct. E. in March 2021, the Applicant undertook statutory consultation and completed reparatory works to the front elevation of the Property in 2021/2022. Whilst undertaking said works, additional disrepair was identified.

27. On 8 November 2022, a second commissioned report was provided by Malcolm Tree (the "Tree report") which identified structural deficiencies to the bay window of Flat 2.

28. On 8 December 2022, Eversfield PM issued a Notice of Intention to carry out works entitled 'Structural Repair, Remedial & Redecoration Leasehold Demise – Flat 4, 26 Eversfield Place, St Leonards on Sea, East Sussex, TN37 6BY'.

29. In addition to the Tree report, the Notice of Intention referenced a report dated 8 September 2022 as prepared by Jason Day MEng (Hons) CEng MICE of Romala Design Ltd (the "Day report") prepared on behalf of Mr Andrew Lancaster of Flat 2, 26 Eversfield Place.

30. In so far as it is relevant to this application, the Day report finds that a masonry wall in Flat 2 had been removed and that said wall would have been *"in contact with the floor joists over within Flat 3"* and that no remedial strengthening was evident. The report recommends the strengthening of over stressed floor joists.

31. Mr Cahill explained that dispensation was sought on two points.

32. Firstly, to effect structural repairs to the bay of Flat 2 by reducing the load on, and, reinforcing, the bay structure. Part of such work to include replacement of the existing mouldings with polystyrene coated mouldings. Such works to take advantage of scaffolding which remains in-situ following the earlier works.

33. Secondly, to carry out remedial works within Flat 2 as a consequence of the removed internal wall, as per recommendations contained within the Day report.

34. Mr Cahill argued that the proposed works were deemed urgent and, accordingly, insufficient time was available to undertake consultation with the lessees. Mr Cahill stated that the Respondent was the only lessee to object to the proposed works and that consent had been provided by the lessees of Flats 2, 1a and 5. As lessee of Flats 1c and 3 he had no objection. No responses had been forthcoming from the remaining lessees.

35. In response to cross examination from Mrs Fox, Mr Cahill argued that as the works within Flat 2 were considered structural, such works, in accordance with the lease, were the responsibility of the freeholder, the costs of which were recoverable under the service charge. However, Mr Cahill stated that he continued to seek legal advice on the point and, if so advised, the costs of the remedial works in Flat 2 would be recharged to the lessees of Flat 2.

36. Mrs Fox enquired as to how, as a resident of the Property and representative of the management company, Mr Cahill had been unaware of the removal of a wall in Flat 2 and why such works weren't identified when Mr Cahill had produced a Leasehold Sales pack for Flat 2 during recent conveyancing? Mr Cahill explained that he had had no reason to internally inspect Flat 2 and had no knowledge that the wall had been removed.

37. In response to judicial questioning, Mr Cahill advised that a specification of works had now been prepared and was submitted for tender on 14 February 2023. Neither a copy of the specification of works nor a list of the contractors invited to tender was provided to the Tribunal.

38. Mr Cahill stated that he was unsure if the Property was a Listed Building, or whether the Property is situated in a Conservation Area. He believed it to be one of the two but couldn't recall which. Mr Cahill advised the Tribunal that neither Local Authority or Conservation Area permission for the proposed reparatory works or replacement of the mouldings in polystyrene form had been sought, as he didn't consider such permission was required and similar works had been affected previously. Mr Cahill confirmed that no Enforcement Notices had been issued in relation to the condition of the balcony.

39. Mr Cahill stated that, despite an email from the lessees of Flat 1a dated 11 December 2022 which raised the point, a Party Wall Agreement had not been agreed with the affected parties. A quotation had been sought from a Party Wall surveyor suggested by the lessees of Flat 1a. However, the Applicant considered the quote to be excessive and no further quotations had been sought.

The Respondent

40. Mrs Fox explained that the Respondent had been dissatisfied with the manner in which the Applicant had operated the service charge account for many years but, in the absence of the Applicant registering with a regulatory body and only offering an in-house complaints procedure, that the Respondents had no official route for recourse.

41. The Respondent was concerned that the dispensation application was too open to interpretation, in particular having regard to the actual wording of the application and that, in granting such wide dispensation, the Applicant would obtain further power over the lessees and use of the service charge. Mrs Fox argued that the Respondent would thereby be prejudiced.

42. Whilst accepting the Tribunal's decision on the CMA, the Respondent stressed the point that the Respondent had no route through which to challenge the Applicant upon his choice of works and, accordingly, use of service charge funds. The Respondent pointed to a pattern of behaviour whereby the Applicant repeatedly sought dispensation from the Tribunal rather than undertake statutory consultation with the lessees.

43. Mrs Fox argued that the Applicant should be investigating action against the lessees of Flat 2 in breach of covenant rather than seeking to expend service charge funds remedying a lessee created defect, albeit carried out

by a predecessor of the current tenant.

The Law

44. The relevant section of the Act reads as follows:

> S.20ZA 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.

Discussion

45. There is only one objection to this application, that being the Respondent's. Irrespective of whether one lessee or no lessees object, the Tribunal must be satisfied under s.20ZA that it is reasonable to dispense with the consultation requirements.

46. In considering this matter the Tribunal has had regard to the decision of the Supreme Court in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 ("Daejan") and the guidance to the Tribunal that in considering dispensation requests, it should focus on whether tenants are prejudiced by the lack of the consultation requirements of section 20. 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 Supreme 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.

47. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and, if so, to what extent, the Respondent would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the Respondent to identify any relevant prejudice which they claim they might suffer.

48. The Tribunal now turns to the facts of this application and addresses the application for dispensation in two parts.

49. Firstly: **To undertake works to the front bay window of Flat 2 in order to reduce the load on the bay structure and to reinforce the bay structure.**

50. The Tribunal accepts the 'Tree report' dated 8 November 2022 and considers that the Applicant has proven that such works are both necessary and urgent. However, the Tribunal is not satisfied that dispensation should extend to "*anything else necessary"* as sought in the application. The Tribunal finds the Applicant's case inadequately thought out and poorly presented, and the Tribunal takes on board the Respondent's concerns that the managing agent is unregulated and refers lessee complaints to an in-house referral process only.

51. The Tribunal noted that, in principle, the Respondent had no objections to these proposed works. However, the Tribunal agreed with the Respondent that were dispensation to be granted on the open ended basis sought, the Respondent would be prejudiced by the Applicant adding further undisclosed works to the project at their discretion.

52. The Tribunal was also surprised that the Applicant had not provided the Tribunal with a copy of the specification of works.

53. Secondly: **To undertake works within Flat 2 in regard to the removed wall.**

54. The Applicant relies, in this matter, on the Day report dated 8 September 2022, as addressed to Mr Andrew Lancaster of Flat 2, 1st Floor, 26 Eversfield Place, Hastings, East Sussex, TN37 6BY.

55. The Tribunal is of the opinion that the Applicant has no contractual relationship with the author of the report upon which he seeks to rely. Further, at [59] the report states:

> *'Notwithstanding what we have said above, this Report must be treated at all times as confidential to the body or person to whom it is addressed. Neither the Company nor its servants or agents can accept any responsibility whatever for loss or damage of whatsoever nature arising in the event of the contents of this Report being copied, disclosed, distributed or published in any manner to any other person, without prior reference to us'.*

56. The Applicant has failed to provide any documentation proving that the contents, and thereby liability, of the Day report have been extended to the Applicant freeholder. Instead, the Tribunal finds that the report is to be relied upon only by Mr Andrew Lancaster, by whom it was commissioned and who, as lessee of Flat 2, is an interested party in the decision as to who funds the remedial works.

57. The Tribunal finds that the Applicant has failed to prove to the Tribunal's satisfaction, by way of an independent report commissioned by the Applicant or extended to the Applicant by the author of the Day report, what works are required and the urgency, or otherwise, of such works.

58. It is the Tribunal's opinion that the Applicant has taken a rather cavalier approach to this second part of the application. Not only does the Applicant rely on a report commissioned for a third party, that party having a financial interest in the outcome of this application, but the Applicant appears to have taken in excess of two months to invite tenders for the works despite advising the Tribunal that the works are considered urgent. Further, the Applicant has failed to make any progress on a Party Wall Agreement which, it is advised by the lessee of one of the affected flats is required, nor has the Applicant appeared to consider the requirement for any Local Authority or Building Regulation approval. Any one of these matters will take a considerable period of time to effect and hence the Applicant's claim of urgency appears misplaced.

59. The Tribunal is therefore satisfied that relevant prejudice to the Respondent has been identified, that prejudice being that costs of these works are, according to the Applicant, due to be met through the service charge and yet the lessees would have no recourse from the expert upon who's advice is relied. Further, that the Applicant has failed to undertake the necessary steps prior to the remedial works commencing, thereby exposing the lessees to additional costs should such challenges later arise. The Applicant advised the Tribunal that he had sought legal advice on the liability for the proposed works within Flat 2 however such advice formed no part of the Applicant's submissions nor had it been shared with the Respondent.

60. The Tribunal is, therefore, satisfied that the Respondent would suffer relevant prejudice if dispensation from consultation was granted on the second part of the application.

DECISION

61. **The Tribunal grants a conditional order dispensing with the consultation requirements in respect of, and limited to, reducing the load on the bay structure of Flat 2 and reinforcing the same bay structure. By way of condition of dispensation, the Applicant is required to serve a copy of the specification of works on the Respondent and each lessee, and, upon receipt, a copy of each tender submission.**

62. **The Tribunal refuses dispensation from consultation in respect of proposed internal works within Flat 2 as a consequence of a removed wall.**

63. The Tribunal directs the Applicant to supply a copy of the decision to all leaseholders and to confirm that that it has done so.

64. In granting dispensation, the Tribunal makes no determination on whether the costs of the works are reasonable or payable. If any leaseholder wishes to challenge the reasonableness of the costs arising from the relevant works, then a separate application under Section 27A of the Landlord and Tenant Act 1985 should be made.

65. For the avoidance of doubt, the granting of dispensation does not override the necessity for the Applicant to seek, where obligatory, the required Local Authority or Conservation Area consent prior to commencing the proposed works.

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.