FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LDC/2023/0006**
Property	**:**	**57 Harrington Gardens, London SW7 4JZ**
Applicant	**:**	**57 Harrington Gardens Ltd**
Respondents	**:**	**The Lessees of flats 1-7 as per the application**
Type of application	**:**	**Section 20ZA L&T Act 1985 – to dispense with the requirement to consult lessees about major works**
Tribunal	**:**	**Judge T Cowen**
Date of decision	**:**	**28 March 2023**

SUBSTANTIVE DECISION

Decision of the tribunal

The application for dispensation under section 20ZA of the Landlord and Tenant Act 1985 is refused.

REASONS

1. This is an application by the Applicant management company under section 20ZA of the Landlord and Tenant Act 1985 to dispense with the consultation requirements under section 20 of that Act.

2. The application is in respect of qualifying works, which had not yet been commenced at the date of the application on 23 December 2022. In the application, the Applicant stated an intention for the works to be carried out between Xmas 2022 and the New Year. It appears from the papers included in the bundle that the works were completed by 9 February 2023 which is the date of an invoice for relevant works in the total sum of £3,348.00.

3. The property is a Victorian building containing seven flats. That means that if dispensation is not granted then the landlord will only be able to recover a maximum of £1,750, being seven times the statutory limit of £250.

4. The only issue for the Tribunal is whether it is reasonable to dispense with the statutory consultation requirements and if so whether to impose any conditions. This application does not concern the issue of whether any service charge costs are recoverable or payable.

5. The application to the Tribunal was received on 23 December 2022 and directions were sent out by the Tribunal on 26 January 2023 directing that the application be decided on paper without a hearing in the week commencing 27 March 2023, unless any party requested a hearing. No party requested a hearing and this therefore is the decision of the Tribunal after considering the matter on paper without a hearing.

6. I have seen sample leases for flats 6 and 7. Clause 4.4 of the lease requires the lessee to pay the Service Charge, which is defined as the lessee's proportion of the total expenditure incurred by the landlord in carrying out its obligations under clause 5(5). That clause requires the landlord to maintain the main structure of the building including the roof and gutters and rain water pipes. The cost of repair of the roof and gutters therefore falls within the service charge covenant and section 20 of the 1985 Act therefore would apply to any works for which each leaseholder would be required to pay more than £250 in service charges.

7. According to the Applicant, there has been water penetration into Flat 6 as a result of faulty gutter design and damaged roof slates. No notices under section 20 have been served on leaseholders. The only consultation which has taken place of any kind is that, according to the Applicant, "conversations have been had with certain leaseholders to explain the necessity to carry out the works as soon as possible".

8. The application form does not state when the leaks took place or when the need for works was identified. It simply states that there have been reports of water ingress into flat 6 and that "dispensation is deemed necessary". The bundle contains an email dated 28 October 2022 from Sandeep Patel of Bishop and Associates, which sets out the work which needs doing. The contents of that email appears to be what formed the basis of the works set out in the application. There is no evidence that a copy of that email was ever supplied to the leaseholders.

9. The necessary inference from that email is that the need for and extent of the works were identified in late October 2022. In the period of the two months before the application was made on 23 December 2022, there was ample time to obtain quotes and to consult in writing with all of the seven leaseholders. But the Applicant only informed some of the leaseholders of the necessity of the works (but not the cost of the works) in "conversations".

10. The works were stated in the application to be urgent. It is self-evident that works to stop rain-water ingress can be urgent, but the works clearly were not urgent on 28 October 2022. Nothing was done for over 2 months. The email of that date expresses a desire to "speed" things up, but there is no mention of any particular urgency. If there was a date when they did become urgent, there is no evidence for that nor any evidence for why it became urgent later.

11. The directions provided an opportunity for the Applicant to supply a statement containing an explanation of the grounds of the application, but it has chosen not to do so.

12. The application has been served on the leaseholders (according to the Applicant). The only responses have been (a) on 7 January 2023 from the lessee of Flat 7 (Leila Sandell) who apparently did not understand the purpose of the application but wants the works to be completed and (b) on 8 January 2023 from the lessee of Flat 2 (James Wyatt-Tilbey) explaining to Ms Sandell that the application is a "procedural requirement" and copying in the Tribunal.

13. It is important to keep in mind that none of the lessees could have formed a view on the cost of the works because:

    (a) there is no evidence of any quotes or estimates having been obtained and/or sent to the leaseholders at any time;

    (b) the only document which mentions the cost of works is an invoice dated 9 February 2023 which was included for the first time in the determination bundle;

    (c) the directions provided that the determination bundle be served only on those leaseholders who have sent a reply form opposing the application. No leaseholders have done so. Therefore the leaseholders would not need to have been served with the determination bundle.

    (d) there is no evidence that that invoice (or its contents) have been supplied to any of the leaseholders in any other way.

14. I must consider whether to grant dispensation under subsection 20ZA (1) of the 1985 Act under the heading "Consultation Requirements: Supplementary". That subsection reads as follows:

> "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 it is reasonable to dispense with the requirements".

15. According to the decision of the Supreme Court in *Daejan Investments v Benson* [2013] UKSC 14 at para 44 "the purpose of the [section 20 consultation] Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate." The Supreme Court went on to say in that paragraph that "the issue on which the [Tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements".

16. I am satisfied that the works were appropriate, the leaseholders have had an opportunity to consider the works and have not objected and they have not suffered any prejudice in that respect from the landlord's failure to comply with the consultation requirements. The email from Ms Sandell is the only leaseholder communication which expresses a view on that question and seems to be favourable.

17. However, the leaseholders have had no opportunity to comment on whether the amount spent by the landlord was more than would be appropriate. I have no way of assessing whether the cost of the works was appropriate because there are no estimates.

18. This is a case in which there is almost a complete absence of evidence on the issue which I need to consider. Effectively the landlord's application is simply that it wants dispensation.

19. On the question of how to approach evidence of prejudice, I am guided by paragraph 67 of the Supreme Court's decision in *Daejan*:

> "…while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. **However, given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the [Tribunal] views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to 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**. …. Further, the more egregious the landlord's failure, the more readily [a Tribunal] would be likely to accept that the tenants had suffered prejudice." (my emphasis in bold)

20. There are no tenants' arguments in this case, but it seems to me that I should apply that principle in the following way:

(a) The starting point is that Parliament decided that tenants should have the opportunity to be consulted on proposed works so that (amongst other things) they are not at risk of paying more than would be appropriate in respect of works which would cost each leaseholder more than £250. Parliament has identified a risk of prejudice to the leaseholders in respect of works which cost more than that.

(b) The legal burden remains with the landlord throughout to show that the leaseholders suffered no prejudice as a result of the landlord's failure to consult. The landlord has supplied none of the necessary material or evidence to satisfy that legal burden.

(c) Although the lessees usually bear the factual burden of identifying some prejudice, they could not do so here because there was no indication at all how much the works were likely to costs. They therefore have not (even now) had a proper opportunity to make any points about the cost of the works.

(d) The Tribunal is therefore left entirely in doubt as to whether the costs of the works are appropriate. I must (according to paragraph 67 of *Daejan*) resolve that doubt in favour of the leaseholders and find that they were prejudiced by the failure to consult.

21. None of the lessees have submitted any written objections in this case. But it seems to me that the Tribunal must exercise its discretion in each case. It cannot be said that the discretion is only triggered by objections from leaseholders. In other words, the landlord is not entitled to unconditional dispensation in default of objections.

22. Having found that there is prejudice to the leaseholders, I must consider whether that prejudice can be addressed by granting dispensation with conditions.

23. The leaseholders have not incurred any costs in these proceedings. The only prejudice I have identified is that there is a risk that the cost of the works was inappropriately high. I have no way of measuring how much lower they would have been if there had been compliance by the landlord. Given that the invoice is for the sum of about £3,300 and the landlord will be able to recover up to £1,750 of that (subject to any application under section 27A of the 1985 Act) in any event, I have decided that restricting the recoverable sum to £1,750 would be appropriate and that would be served by simply refusing the application. I have therefore decided not to grant conditional dispensation.

24. There were no applications for costs before the tribunal.

25. For all the above reasons, I refuse the application.

Name: Judge T Cowen **Date:** 28 March 2023

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).