FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LDC/2023/0118**
Property	**:**	**Clive Court, 75 Maida Vale, London W9 1SF**
Applicant	**:**	**Clive Court (Maida Vale) Freehold Ltd**
Representative	**:**	**Willmotts**
Respondents	**:**	**The Leaseholders of Clive Court**
Type of application	**:**	**Dispensation from statutory consultation requirements**
Tribunal	**:**	**Judge Nicol** **Mr SF Mason BSc FRICS**
Date and venue of Hearing	**:**	**19th June 2023** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20th June 2023**

DECISION

The Tribunal grants the Applicant dispensation under section 20ZA of the Landlord and Tenant Act 1985 from the statutory consultation requirements in relation to urgent works to address water and asbestos removal and leaks into the basement.

Reasons

1. The Applicant is the lessee-owned freehold owner of the subject property, a purpose-built block of 152 flats. The Respondents are the lessees of the flats.

2. The Applicant seeks an order granting them dispensation (pursuant to section 20ZA of the Landlord and Tenant Act 1985) from the consultation requirements under section 20 of the same Act and the

Service Charges (Consultation Requirements) (England) Regulations 2003. The application was heard by the Tribunal on 19th June 2023. The Tribunal had the benefit of an 88-page bundle provided in electronic form by the Applicant. The hearing was attended by:

- Dr Nandar Baghaei-Yazdi, chairman of the Applicant's board
- Dr Hossein Shiruani, a director and a structural engineer, who did most of the speaking on behalf of the Applicant
- Ms Rita Mansoor, also a director
- Mr Hilary Kearney, partner to the lessee of Flat 726 and a former local authority surveyor who spoke on behalf of several lessees
- Ms Ruth Morgan, the lessee of Flat 7A
- Ms Audrey Morrison, another lessee who took notes on her laptop

3. The property is 100 years old this year. In or about 2021 the water supplier to the property, Thames Water, approached the Applicant to say that they had identified a daily loss of 345,000 litres of water at the property. After identifying and resolving a couple of leaks in the driveway area, this had reduced to 128,000 litres but this was still too much. A report from Thames Water's contractor, HydroCura, put the daily loss at over 180,000 litres.

4. In or about March 2022, they further identified that there was at least one leak in the basement area. The relevant pipes run through a tunnel in which there is also a culvert carrying a stream under the property to the local canal. Unfortunately, there is asbestos in that area. Thames Water refused to address the leaks unless and until excess contaminated water and the asbestos were removed.

5. The Applicant did not realise the magnitude of the problem with the leaks in the basement area until around April 2023. They supplied a video, taken in April, which showed a significant quantity of water free-flowing through the basement.

6. Following the HyrdroCura report and a report from the Applicant's boiler maintenance contractor, Air Cool Engineering, the Applicant obtained a report dated 22nd May 2023 from GCS Consulting in which they stated,

> Although the basement plantroom is not in immediate danger of suffering structural damage due to the ingress of water but the leak should be repaired urgently to avoid structural damage and damp issues to the main building and the plantroom structure.

7. From this information and quotes from two asbestos removal contractors, the Applicant concluded two things. Firstly, the remedial works would be subject to consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 because the costs would exceed the threshold of £250 per flat. Secondly, the works

were sufficiently urgent that there would not be enough time to complete the consultation process.

8. Under section 20ZA(1), the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

   (a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42]

   (b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

   (c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]

   (d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

   (e) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

   (f) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

   (g) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

   (h) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

   (i) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

   (j) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

9. With all due respect to Mr Kearney's careful and considered submissions, they may be summarised as follows. He and the lessees he represents believe that the Applicant does not want to consult and cannot be trusted with the process of remedial works. The consultation process, he says, is essential in order to oblige the Applicant to go through the proper process which is the best opportunity to ensure that they achieve value for money. He said that, if allowed to get away without consulting on this occasion, they would be emboldened to do so whenever they could. Further, he said that the excess water and asbestos issues had been known about for some years and they could and should have been addressed earlier – if they had, access to the basement and, therefore, the leak repairs, would have been a simple and quick matter.

10. The Applicant denies that Mr Kearney's analysis is correct but, in any event, the Tribunal is bound by the considerations laid down by the Supreme Court, as set out above. Mr Kearney could not make any submissions, let alone show any evidence, that the lessees would or could suffer any financial prejudice if the dispensation were granted, unconditionally or not. Instead, the only indication of possible prejudice would be that, if works were delayed by the refusal of the grant of dispensation, the structure of the basement would be at risk, leading to the possibility of further costly remedial works later.

11. The Tribunal put this to Mr Kearney. His response was that the lessees had had only 7 days to put in their objections to the Tribunal and then had not received essential information until the provision of the Applicant's bundle. Unfortunately, Mr Kearney had been unaware of the Supreme Court's guidance and had not considered whether the objecting lessees could have obtained relevant evidence of their own. They Tribunal's 7-day time limit only related to setting out a statement of case, not to the provision of further evidence.

12. The Tribunal is satisfied, on the evidence, that the proposed works are sufficiently urgent that it would not have been possible to comply with the statutory consultation requirements in a suitable timescale. Further, none of the lessees have been able to provide any evidence that they would suffer any form of financial prejudice in the event that dispensation were granted.

13. The Tribunal's role at this stage is limited to determining only if the statutory consultation requirements may be dispensed with. This application does <u>not</u> concern the issue of whether any service charge costs will be reasonable or payable.

14. Given the need for urgency and the lack of any evidence of prejudice, the Tribunal has determined that it is reasonable to dispense with the statutory consultation requirements.

Name: Judge Nicol **Date:** 20th June 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).