FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00FN/LDC/2023/0017**
Properties	:	**Flats 23, 27, 29, 31, and 33 Sidney Court, Norwich Road, Leicester LE4 0LR**
Applicant	:	**Mr Nicholas Rowarth**
Representative	:	**None**
Respondents	:	**Mr Farid Rajabali (1)** **Mr Peter Lott (2)** **Ms Melanie Wyatt (3)** **Mr Raj Pandya (4)** **Mr Mayank Patel (5)**
Representative	:	**Mr Manish Patel (for Respondents 1-3)**
Type of application	:	**An application under section 20ZA of the Landlord and Tenant Act 1985 for the dispensation of the consultation requirements in respect of qualifying works**
Tribunal members	:	**Judge C Goodall** **Mr M. Alexander BSc(Hons) MRICS**
Date and place of hearing	:	**26 January 2024 at Leicester Tribunal Hearing Centre, New Walk, Leicester**
Date of decision	:	**6 February 2024**

DECISION

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Decision

The application for dispensation from consultation in respect of proposed works on the garages belonging to flats 23, 27, 29, 31, and 33 Sidney Court, Norwich Road, Leicester LE4 0LR is dismissed.

Background

1. The Applicant has applied for a decision by this Tribunal that it may dispense with the consultation requirements contained in section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") in respect of works to the Property ("the Application"). These legal provisions are explained in more detail below.

2. The Applicant says that the required works are works to five garage units situate at Sidney Court to remove asbestos roofs, cross timbers, wooden lintels, doors and fittings, to lay new bricks / blocks as required, top off front profile with new blockwork, supply and fit new concrete lintels to garage top aperture, and new timbers to support a box profile roof. Supply and fit new box profile PVC coated metal roofing in goose grey and seal. Supply and fit new light weight manual roller shutters ("the Works").

3. The Applicant would normally expect to recover the costs incurred in carrying out the Works from the leaseholders at the Properties under the service charge provisions in their leases.

4. Unless there is full compliance with the consultation requirements, or a dispensation application is granted, the Applicant is prevented by law from recovering more that £250.00 from each Respondent. Therefore it has made the Application, which was dated 25 May 2023.

5. Directions were issued on 5 July 2023 requiring the Applicant to serve all the Respondents with full details of the Works and to explain why he had decided to seek dispensation rather than carry out a full consultation.

6. The Respondents were all given an opportunity to respond to the Application and make their views known as to whether the Tribunal should grant it. Respondents 1 – 3 ("the Objecting Respondents") shown on the front page of this decision objected to the application. Respondents 4 and 5 have not responded at all.

7. The application was set down for a paper determination in October 2023, but at a very late stage, the Objecting Respondents asked for an oral hearing. That application was granted. A hearing was arranged which took place in Leicester on 26 January 2024. The Applicant appeared on his own behalf. Mr Peter Lott attended with his representative, Mr Manish Patel. No other Respondent attended.

8. This is the decision on the Application following the oral hearing.

Law

9. The Landlord and Tenant Act 1985 (as amended) imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a "relevant cost" under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19).

10. Section 20 imposes an additional control. It limits the leaseholder's contribution towards a service charge to £250 for works, and to £100 for payments due under a long term service agreement unless "consultation requirements" have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for either works on the building or other premises costing more than £250 or payments for services under a long term agreement (i.e. for a term of more than 12 months) costing more than £100. The two options are: comply with "consultation requirements" or obtain dispensation from them. Either option is available.

11. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)) ("the Regulations").

12. Part 2 of Schedule 4 of the Regulations applies to qualifying works for which public notice is not required, which would be the position for the types of works in issue in this case. Broadly, this schedule requires:

    a. that notice of intention to carry out the proposed works, describing them in general terms, setting out the reasons for them being required, and inviting observations and the names of people from whom the landlord should seek an estimate of cost, should be given to tenants;

    b. tenants have 30 days to make observations and propose their own contractor;

    c. the landlord is under a duty to have regard to the tenant's observations. He must try to obtain an estimate from any contractor suggested by the tenants;

    d. at least two estimates must be obtained, one of which should be from a person wholly unconnected with the landlord, on which the tenants are entitled to make observations to which the landlord must have regard;

    e. when estimates have been obtained, the landlord must provide a statement to the tenants setting out the amount specified in the estimates as the estimated cost of the works, and summarising the

tenants observations and the landlords response. The estimates must be made available for inspection;

f. tenants then have a right to make observations on the estimates to which the landlord is to have regard;

g. when a contract is awarded by the landlord, within 21 days notice must be given to the tenants with a statement of reasons for awarding that contract.

13. The Tribunal should stress this is only a broad outline, and is no substitute for a detailed consideration of the schedule.

14. To obtain dispensation, an application has to be made to this Tribunal. We may grant it if we are satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

15. The Tribunal's role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

16. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; if so, it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

17. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised in paragraph 17 of the judgement of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

> "The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered."

Site description

18. Sidney Court is a purpose built block containing nine units. Three are ground floor commercial premises, and the remaining six units are residential units, three on the first floor and three on the second floor. Next to Sidney Court is Brian Court; another purpose built block consisting of 2 ground floor commercial units and four residential flats located on a first and second floor.

19. Behind Sidney Court and Brian Court are twenty six garages ("the Garage Block") constructed as tandem garages – double length with a door at each end and a dividing wall. Thirteen are thus accessed from the south side and the other thirteen from the north. Beyond these garages is a further row of garages. Thus, there are in excess of 40 garages on the site altogether, the freehold of which is owned by the Applicant.

20. This application concerns the 13 garages situate on the south side of the Garage Block. The four garages at the western end are leased to lessees of Brian Court. The three garages at the eastern end are owned and let directly by the Applicant (and these garages have already been refurbished and re-roofed by the Applicant). This leaves six garages between these ends.

21. Five are let to the Respondents as part of the demises in their leases. The remaining garage was included in the lease of flat 25, but the Applicant purchased this garage directly in around 2018/19. This garage is located between the garages for flats 23 and 27.

The application

22. In the Directions dated 5 July 2023, the Applicant was directed to provide to each Respondent "a brief statement explaining the purpose of the application and the nature of the works and the reason why they were urgent. Copy invoices should also be provided to give an indication of the likely cost per leaseholder of the works."

23. The Tribunal has a copy of that statement, which states:

    "The "major works" are to the garage block at the rear of the flats. I have attached by way of service an estimate for these works.

    The completion of these works will replicate the works that have already been carried out on the first 3 garage units belonging solely to the freeholder and are not included in the costing for the works"

    Note: the roller shutters to be used are not commercial shutters as fitted to the garages they are a lightweight aluminium equivalent.

    These works are deemed necessary and urgent by the nature of the hazardous roofing materials and potential for cross wind contamination.

A report into the roofs was completed by Croft Environmental concurring my findings."

24. At the hearing, the Applicant told us that the Croft Environmental report was in an email chain that commenced (in relation to the garages) on 11 August 2020. The email exchange concerned a report by Croft Environmental into issues at the main Sidney Court building itself, but the Applicant then asked:

 "Did you have a quick look at garage roofs, and are they serviceable."

25. No direct reply was given, so the Applicant asked again on 12 August 2020:

 "Hi Steve, thank you for the quotation, as per your opinion are they serviceable or is the condition beyond repair as garages are leaking, cracked in places, and the cement fibre sheets seem to be soft and putty like when wet and brittle when dry."

26. The reply, also on 12 August 2020 was:

 "In our opinion the roof is beyond repair."

27. The quotations provided with the statement are from two sources. The first is from a commercial garage door company, quoting £11,440 plus Vat for 10 roller shutter doors. Ten are quoted for (we were told at the hearing) because the Applicant intends to refurbish the corresponding tandem garages to the five owned by the Respondents at the same time.

28. The second quote is from Lansdowne Properties, to carry out all other elements of the Works apart from the shutter doors for an estimated cost of between £3,800 - £4,000 per unit, with a total estimated cost of £19,000 - £20,000. It is not in dispute that Lansdowne Properties is a building business owned by the Applicant.

29. In his written statement received by the Tribunal on 22 January 2024, the Applicant explains that it is his understand that only Mr Peter Lott objects to the carrying out of the Works. He considers that the works are urgent because the garage roofs are constructed of low grade asbestos profile garage roofing materials, the outer layer of which is flaking, caused by build-up of mould. When dry, he suggests that wind gusts will blow microscopic particles of asbestos into the general area. His view is that delay would also result in cost increase.

The Objections

30. The objections raised are contained in two letters written by Mr Manish Patel dated 16 and 25 October 2023. Unfortunately, much of the content of these letters concerned procedural wrangling and comment on the attitudes and behaviour of the Applicant.

31. The key points on the merits of the application itself are:

    a. The proposed contractor is the Applicant himself;

    b. Difficulty in understanding the merits of carrying out work on just ten garages in one go when the understanding is that work on the Brian Court garages will also need to be done;

    c. Failure to provide a copy of the Croft Environmental report referred to in the statement of case;

    d. The price is extortionate;

    e. Commercial roller shutter doors are inappropriate. Up and over doors would be the best solution, which should cost no more that £600 per door;

    f. The work is not urgent;

    g. Liability for carrying out the works is in any event the responsibility of the lessees, not the Applicant.

The Leases

32. The Applicant supplied copies of the leases of the flats owned by the Respondents, with the Application.

33. The lease supplied for flat 23 was the wrong lease. It was a 2 year lease at a rack rent granted in 1972. However, Mr Patel had a copy of the freehold title, which referred to a long lease for 999 years for flat 23 granted in the 1980's. It is a reasonable assumption that this lease is on the same terms as the leases for flats 27, 29, 31, and 33, though the Applicant should verify this for his own benefit.

34. The five Respondents therefore, we consider it safe to assume, each hold a lease of their residential flat in Sidney Court which includes one garage unit as shown on the plans attached to their leases.

35. The leases each demise firstly one of the flats in Sidney Court, which is then defined as "the Building", which expression includes the garages thereon, and secondly one of the garages as is shown on the plan attached to the lease.

36. The lessees then enter into certain covenants, including a covenant to pay one ninth of the landlord's expenditure incurred in performing the covenants entered into by the landlord for providing services and facilities and carrying out works or otherwise incurring expenditure for the general benefit of the building.

37. The landlord then covenants to maintain all the roofs and outside walls of the Building.

38. The leases for the three commercial units were not provided to the Tribunal.

The hearing

39. The Tribunal was informed at the hearing by the Applicant that:

    a. He had spoken to the Respondents who all seemed quite happy for the Works to be carried out. In particular, Melanie Wyatt was looking forward to having a refurbished garage;

    b. He fully accepted that the garage that had been included in the lease of flat 25 was his sole responsibility to refurbish, but he was not clear on whether he would include the cost within the main contract (i.e. a contract for six garages) and simply pay a proportionate part himself, or whether the proposed contract was just for five garages;

    c. It was all very well requiring competitive quotes, but it was not easy to persuade potential contractors to quote for works such as those contemplated;

    d. He intended to charge the Respondents one fifth each of the cost of carrying out the Works;

    e. He is the sole proprietor of his building firm, Lansdowne Properties. It is a small business with a turnover of c£25 – 30,000 pa. There are no employees, but he has good contacts with tradesman to whom he sub-contracts elements of the works he carries out;

    f. He has previously tried to conduct a consultation exercise for works on the residential flats through a professional agent, but the process was made so difficult by the lessees that the agent advised him to abandon the process;

    g. He is in dispute with the lessees regarding payment of service charges, which he says are substantially in arrears. For that reason, he has been advised not to accept rent (presumably to preserve the possibility of future forfeiture proceedings), but the lessees nevertheless continue to pay rents directly into his bank account without being asked to, meaning he has to return their money;

    h. He received a challenge to his purchase of the freehold in 2014 from solicitors for some of the lessees which was still hanging over him;

    i. Relations with the lessees were therefore not in a good state presently.

40. Mr Patel made submissions to say that the Respondents recognised that the Works were needed; they just wanted to be properly consulted on them. The Applicant had failed to disclose the Croft Environmental report.

Without that report the Respondents could not be satisfied that there was a need to carry out the Works.

41. He said that prejudice would be caused to the Respondents by the grant of the application because:

    a. There was no clarity on what work was to be carried out and why;

    b. In particular, if the application were to be granted, the Respondents would not be able to make observations on the methodology to be used in carrying out the Works – particularly the extent to which the Works would be integrated with works to the garages of the Brian Court lessees;

    c. The prices were not competitive, the only contractor for the main works was the Applicant himself, and the Respondents would be denied the opportunity to propose their own contractors.

42. Mr Lott addressed the Tribunal directly and said that he did not consider the carrying out of the Works was necessary. He did not consider there was any damage to his garage.

Discussion and decision

43. Our task in this case is to consider whether the grant of dispensation from consultation will cause prejudice to the Respondents to the extent that the advantages in speed and economy of granting dispensation are outweighed by that prejudice.

44. Two clear areas of prejudice have emerged during our consideration. Firstly, whether the Respondents have adequate information about the Works to allow them to understand what is proposed and make an informed response to the Applicant as to their views on need and process. Secondly, whether the grant of dispensation may result in an inadequate process to obtain value for money when the contract for the Works is placed.

45. In our view, neither the Applicant nor the Respondents have made their respective positions sufficiently clear.

46. We do not consider that the Applicant has provided enough information regarding the Works. It is apparent that the Croft Environmental report was not a professionally produced report to support the need for the Works to be carried out. It was not a report at all; it was no more than a one sentence email that did not disagree with the Applicant's own assessment of the position. And the Applicant failed to provide it to the Respondents. At this stage, therefore, the evidence to support the need for and the extent of the Works is weak.

47. We also take the view that the Applicant has failed to explain how he intends to carry out the Works, bearing in mind that he appears to be proposing to refurbish five garages which are not adjoining each other in

a block of 26 garages, of which it appears 20 are not yet refurbished. If the roofs of the garages really do require complete replacement, then this would also apply to all of the un-refurbished roofs of the Garage Block.

48. The Applicant appeared to insist that he proposed only to carry out the Works to the five garages belonging to the Respondents, but it is difficult to see how that could be the most effective and efficient way of proceeding. There would be dust and disruption caused when five of the twenty two un-refurbished roofs were taken down. Much the more obvious process would be to re-furbish garages that were adjoining as well, and ideally in one phase. That would also minimise the risk arising from asbestos dust.

49. The Tribunal's direction of 5 July 2023 to explain the "nature of the works" for which dispensation is sought has therefore, in our view, not been complied with.

50. The point of the right to make observations on proposed works is to allow lessees to raise questions such as these so that to the extent that their observations are sound, the methodology can be improved, and presumably the cost can be better controlled or the scope of the Works can be varied. Our view is that the Respondents may well be prejudiced as the lack of clarity on how the Works are to be carried out means they may be carried out unnecessarily or inefficiently or at a higher cost and they would be denied the opportunity to have these points considered and addressed if dispensation is granted.

51. We also take the view that the Respondents may well be prejudiced by lack of competitive quotations for the Works. This point is particularly important because the Applicant proposes to carry out the Works using his own building firm, so there would be no independent supporting evidence that the cost was reasonable. There is prejudice to the Respondents if dispensation is granted, if there is a real risk that a more expensive contractor may be employed than would have been the case had statutory consultation taken place and competitive quotations had been obtained.

52. Finally, we consider the question of urgency. Our view is that, certainly in the absence of any professional report on the garages, the carrying out of the Works is not obviously urgent. The garages have been in place probably for in excess of forty years. Asbestos is well known to be dangerous if inhaled, but it is generally stable if left undisturbed. If there is any real danger of airborne asbestos particles circulating at present, the Applicant should provide clear evidence of that danger so that the question might be reconsidered. But currently, the Applicant has failed, in our view, to establish urgency.

53. Turning to the Respondents' position, we have to take account of the fact that only Mr Lott has clearly expressed his view that the Works are not necessary. Mr Patel seemed to us to be insisting that the Respondents recognised that some works were needed, whilst at the same time arguing on behalf of Mr Lott that they were not. We noted that he did not represent

two of the Respondents and it was unclear to us exactly what Mr Farid Rajabali and Ms Melanie Wyatt's (who he did represent) position was. Certainly, we found it difficult to reconcile the Applicant's evidence of his conversations with Ms Wyatt, which we had no reason to disbelieve, with her apparent objection to the carrying out of the Works.

54. We also considered it to have been unhelpful that Mr Patel spent so much energy in his correspondence on procedural issues (none of which in our view had any merit) and on addressing the poor personal relationship that his clients have with the Applicant, rather than the merits of the application itself.

55. Having made the observations we have in this section of this decision, our determination is that the application for dispensation must be rejected as we consider that the Respondents would be prejudiced by the grant of dispensation in the ways we have explained above.

56. The Applicant may well wish to continue with his plans to carry out the Works, but he should carry out a proper statutory consultation. His first task will be to obtain a report on the state of the garages and prepare a statement of intention that is fully compliant with paragraph 8 of Schedule 4 of the Regulations, and then comply with the further requirements of the Regulations. He would be well advised to obtain professional assistance.

57. At the same time, he should develop a clear plan for all the works he wishes to carry out on all the garage roofs (including timing) so that all those affected will understand the proposals. Whether the Applicant wishes to include the Brian Court garages in the plan is a matter for him, but it would be likely that whatever he decides will be a matter he will be required to explain in due course, and to justify if works are to be carried out in phases.

58. Whilst any consultation is being carried out, the Applicant may wish to seek legal advice on recoverability of the costs of the Works from the Respondents, as at first sight, they only have to contribute one ninth of the cost each, unless there is a different interpretation to the leases. Whether the three commercial unit lessees also have to contribute is a matter for further research. We make no ruling on the correct interpretation of the leases; that is a matter for a future application if necessary.

Appeal

59. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)