FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	LON/OOAH/LDC/2023/0253
Property	**:**	Heronsgate, 3 The Avenue, Croydon, Surrey, CRO5BW
Applicant	**:**	Bowlwonder Limited
Respondent	**:**	Leaseholders of Heronsgate
Type of Application	**:**	For dispensation from consultation requirements.
Tribunal Members	**:**	Judge Shepherd Sarah Phillips MRICS
Date of Determination	**:**	9th January 2024

Determination

Decision: Dispensation is granted unconditionally.

Reasons

1. In this case the Applicant seeks dispensation from the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985. The Applicant is the freeholder of premises at Heronsgate, 3 The Avenue, Croydon, Surrey, CRO5BW (" The premises").

2. The necessary Respondents to the application are the leaseholders of the premises.

3. **The application does not concern the issue of whether any service charge costs are reasonable or payable. The sole issue being dealt with here is that of dispensation from the consultation requirements under s.20 Landlord and Tenant Act 1985. The leaseholders retain the right to challenge the reasonableness and payability of the service charges under s.27A Landlord and Tenant Act 1985.**

4. The premises consist of 6 flats in a purpose-built block of flats.

5. The premises are served with a sewerage tank which is fed by two pumps with a control panel. The pumps/control panel failed which necessitated urgent works because the tanks were filling with sewerage that could not be pumped out. The smell of sewerage was detected in the common areas and reported to the Applicant in September 2023. The Applicant carried out temporary works to empty the tank and new pumps and a control panel was fitted. The Applicant says that the works were necessary in the interests of Health and Safety or to avoid damage to the building by the ingress of sewerage. It is understood that the new pumps were installed on 7th October 2023. The Applicant says that consultation was not possible because the works were urgent. The works cost £624 for a tanker, investigations at £440 and the replacement works at £5900.

6. The leaseholders have raised a number of objections to the works. In broad terms these can be summarized as follows:

- Similar works were carried out in 2018 at a lower cost.
- There was a delay in dealing with the issue once it was reported in September 2023.
- Two quotes should have been obtained before the work was carried out.
- The pumps should have been under warranty or covered by building insurance.
- The pumps should have been funded by the reserve fund.

7. In response the Applicant says:

- That the 2018 works were solely to unblock the pumps.
- The warranty for the original pumps was only a year and the new pumps had the same warranty.
- Insurance did not cover the pump replacement.
- The reserve fund was being used to finance the works.
- Leaseholders did not suffer prejudice as a result of the failure to consult.

The law

Landlord and Tenant Act 1985,s.20ZA

20ZA Consultation requirements: supplementary

(1) 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 or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—
(a) may make provision generally or only in relation to specific cases, and
(b) may make different provision for different purposes.
(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Daejan

8. In *Daejan Investments v Benson* [2013] UKSC 14, the landlord was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants under long leases which provided for the payment of service charges. The landlord gave the tenants notice of its intention to carry out major works to the building. It obtained four priced tenders for the work, each in excess of £400,000, but then proceeded to award the work to one of the tenderers without having given tenants a summary of the observations it had received in relation to the proposed works or having made the estimates available for inspection. The tenants applied to a leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985, as inserted, for a determination as to the amount of service charge which was payable, contending inter alia that the failure of the landlord to provide a summary of the observations or to make the estimates available for inspection was in breach of the statutory consultation requirements in paragraph 4(5) of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 so as to limit recovery from the tenants to £250 per tenant, as specified in section 20 of the 1985 Act and regulation 6 of the 2003 Regulations in cases where a landlord had neither met, nor been exempted from, the statutory consultation requirements. The landlord applied to the tribunal under section 20(1) of the Act for an order that the paragraph 4(5) consultation requirements be dispensed with, and proposed a deduction of £50,000 from the cost of the works as compensation for any prejudice suffered by the tenants, which offer they refused. The tribunal held that the breach of the consultation requirements had caused significant prejudice to the tenants, that the proposed deduction did not alter the existence of that prejudice, and that it was not reasonable within section 20ZA(1) of the Act, as inserted, to dispense with the consultation

requirements. The Upper Tribunal (Lands Chamber) dismissed the landlord's appeal and the Court of Appeal upheld the Upper Tribunal's decision.

9. The Supreme Court , allowing the appeal (Lord Hope of Craighead DPSC and Lord Wilson JSC dissenting), held that the purpose of a landlord's obligation to consult tenants in advance of qualifying works, set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 , was to ensure that tenants were protected from paying for inappropriate works or from paying more than would be appropriate; that adherence to those requirements was not an end in itself, nor was the dispensing jurisdiction under section 20ZA(1) of the 1985 Act a punitive or exemplary exercise; that, therefore, on a landlord's application for dispensation under section 20ZA(1) the question for the leasehold valuation tribunal was the extent, if any, to which the tenants had been prejudiced in either of those respects by the landlord's failure to comply; that neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation was a relevant consideration for the tribunal; that the tribunal could grant a dispensation on such terms as it thought fit, provided that they were appropriate in their nature and effect, including terms as to costs; that the factual burden lay on the tenants to identify any prejudice which they claimed they would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted; that once a credible case for prejudice had been shown the tribunal would look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice; and that, accordingly, since the landlord's offer had exceeded any possible prejudice which, on such evidence as had been before the tribunal, the tenants would have suffered were an unqualified dispensation to have been granted, the tribunal should have granted a dispensation on terms that the cost of the works be reduced by the amount of the offer and that the landlord pay the tenants' reasonable costs, and dispensation would now be granted on such terms. Per Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord

Sumption JJSC. (i) 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 (post, para 45). (ii) Any concern that a landlord could buy its way out of having failed to comply with the consultation requirements is answered by the significant disadvantages which it would face if it fails to comply with the requirements. The landlord would have to pay its own costs of an application to the leasehold valuation tribunal for a dispensation, to pay the tenants' reasonable costs in connection of investigating and challenging that application, and to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal would adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue (post, para 73).

10. Lord Neuberger giving the leading judgment stated *inter alia* the following:

56. More detailed consideration of the circumstances in which the jurisdiction can be invoked confirms this conclusion. It is clear that a landlord may ask for a dispensation in advance. The most obvious cases would be where it was necessary to carry out some works very urgently, or where it only became apparent that it was necessary to carry out some works while contractors were already on site carrying out other work. In such cases, it would be odd if, for instance, the LVT could not dispense with the requirements on terms which required the landlord, for instance, (i) to convene a meeting of the tenants at short notice to explain and discuss the necessary works, or (ii) to comply with stage 1 and/or stage 3, but with (for example) five days instead of 30 days for the tenants to reply.

Determination

11. On balance the Tribunal considers that the application has merit. The works had to be carried out quickly in the interests of health and safety. If the

Applicant had carried out a full consultation pursuant to s.20 Landlord and Tenant Act 1985 it would have added a minimum of 60 days delay. We do not consider that the Applicant's response to the complaints in September 2023 were tardy as alleged. The lead in times to obtain the pumps are expected. The reserve fund was used to fund the works and it is a given in a dispensation case that the Applicant failed to follow the formal procedure in s.20 Landlord and Tenant Act 1985 including obtaining sufficient quotes.

12. The remaining issues raised by the leaseholders in objection to the application do not evidence prejudice of the type envisaged in *Daejan*. There was no evidence put forward by the leaseholders to demonstrate that the consultation would have led to lower costs to them for example. In any event the issues raised are largely dealing with the payability and reasonableness of the service charges which can still be challenged by them under s.27A Landlord and Teant Act 1985. As emphasized above this application solely deals with the issue of dispensation from the consultation requirements.

Judge Shepherd

9th January 2024

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.