FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/LDC/2023/0011**
Property	**:**	**9 & 11 Alston Gardens, Manchester M19 1DW**
The Applicant	**:**	**Southway Housing Trust (Manchester) Limited**
The Applicant's Representative	**:**	**E. Sawford, its Commercial and Homeownership Manager**
Respondents	**:**	**Mr LE Phillips & Ms IP McQuillan of 9 Alston Gardens and Ms C McPhillips of 11 Alston Gardens ("the Flat Owners")**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge J M Going** **A Davis MRICS**
Date of decision	**:**	**14 February 2024**

DECISION

The Decision

The Application is refused. The Tribunal is not satisfied that it is reasonable to dispense with the consultation requirements.

Preliminary

1. By an Application dated 25 January 2023 ("the Application") the Applicant ("Southway") applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of repairs already undertaken to parts of the property's roof ("the works").

2. The Tribunal issued Directions ("the Directions") on 4 April 2023 confirming (inter-alia) that it considered that the Application could be dealt with by a determination on the papers and written submissions, unless any of the parties requested an oral hearing. The Directions also set out the timetable for documents to be supplied allowing for responses.

The facts and background to the Application

3. The Tribunal has not inspected the property but understands from the papers that it contains 2 "cottage flats" being 11 Alston Gardens a ground floor flat owned by Ms McPhillips, with 9 Alston Gardens a first floor flat owned by Ms McQuillan and Mr Phillips, above. It forms part of what was a Manchester City Council housing estate and is described in the Application as being of "traditional brick construction from the 1920s with a pitched tiled roof covering". There are references to the roof having been renewed in 2000. The Tribunal has also been able to gain valuable impressions from Google's Street View and satellite images.

4. Each Flat Owner has a separate lease. Each was completed by the Council under the Right to Buy legislation introduced in the 1980s. One was completed with Ms McQuillan and Mr Phillips' predecessor in title in 1991, the other with Ms McPhillips in 2005. Each lease contains compatible, and materially the same, provisions confirming that the each Flat Owner has a long leasehold interest (being the balance of a 125-year term) and is due to pay ".. during each year of the said term a reasonable part of the costs of repairs and services for which the Lessor is herein responsible" which include "the cost of exterior repair and maintenance to the premises and to the building so far as the premises are affected" and where "exterior repair and maintenance" is defined as meaning in relation to the structure and exterior of and ancillary to the building including the premises… roofing repairs and reroofing".

The parties' written submissions and evidence

5. Southway stated in the Application "The leaseholder of flat 9 recently reported significant issues with water ingress from the roof of the building.

Water has leaked in and damaged the ceiling & walls both plaster and decoration.
It could not be stemmed when heavy rain was falling of which we had a lot over winter 2022-23. The water ingress was also causing damp and mould inside the flat which meant the works were more urgent. The works involve 3 elements all with a cost associated with them;
Scaffolding estimated £500 +VAT.;
Roof repairs £775 +VAT,;
Solar Maintenance (to temporarily remove the solar panels) £250 +VAT:
The roof repairs are described as; stripped all the tiles around the valley and chimney, including the ridges and hips, installed some new felt and batten between the chimney and the valley where we found good evidence of the leak: replace all the tiles, ridges and hips back on along with a small repair to the lead valley. Repoint all the valley back up again as in the process of the repair all the old cement falls out. We also raked out and repointed any lead flashings on the chimney that was needed….
A S.20 letter has now been sent but obviously to wait so long for the consultation to conclude would be too long due to the danger of heavy rain again and water leaking into the property; It is not possible to carry out an adequate temporary repair due to the different areas the water is leaking in. It is also not cost effective as scaffold would probably be required to carry out even a temporary repair and scaffold is a significant cost element. We are also required to mitigate losses which could be incurred to our buildings insurance provider and carrying out the essential work at the earliest opportunity is the best way to mitigate risk and loss being incurred;…
You can see from the evidence presented by the leaseholder in 9 Alston Gardens that the works were of an urgent nature. Our roofer and surveyor have agreed they were urgent…".

6. Both Flat Owners have objected to the Application.

7. On 18 April 2023 Ms McQuillan and Mr Phillips, the owners of 9 Alston Gardens the first floor flat, wrote
"…We are supplying evidence for why the claim for costs is unreasonable, and incorrect.
We have not received copies of any quotes for the work carried out. According to quotes we have received ourselves, the work seems expensive for what was done.
The scaffolding was on hire for way too long, we kept asking for it to be removed but it stayed up for months…
We were told when Southway visited our attic in the past 6 months that they were shocked at how bad it was. We were also told the issue was due to the previous roof being put on inappropriately, as the flashing had not been installed… showing this is a legacy issue caused by poor workmanship in the past.
The timescale to get all of these issues fixed is substantial, with it ultimately taking well over a year, and costing us thousands of pounds of damage to our property. The leaks have caused damage that will require extensive works and costs to repair. The works were delayed by Southway, I had multiple emails ignored, I had calls hung up on and have wasted hours of my life on hold trying to get this fixed. We had some roof tiles fixed last year and were told the

issue was resolved, but they did not check properly to realise that the issue was due to the flashing.
We had someone come around to check the damp by Southway, and he told us it was simply because the building was old and that we just needed to get a dehumidifer. He did not report the issue further, check the attic, or actually realise that the damp was being caused by the roof state. At this point the attic beams were streaming, mouldy and soft to the touch. This was last year and was a safety hazard.
We are also being charged for specialist solar panel removal, when we do not have solar panels on the roof. We have still not received a survey, so we can not confirm 100% that all of the issues are resolved. … Southway have told us twice over the phone that Southway would cover the costs of this repair…
The PDF attached includes emails, texts .. and photos of damage. It has been ordered chronologically and displays just how long it took to get this issue fixed…"
The emails show that Ms McQuillan had been complaining to Southway about leaks and the escalating consequent damage from more than a year beginning in December 2021, and that there was a litany of cancelled and rescheduled appointments, and difficulties in accessing and registering requests for action and repairs through Southway's online portal.

8. Ms McPhillips of 11 Alston Gardens wrote, on 27 April 2023, stating " I do not consent to paying for repairs that I was not consulted about, and are completely unreasonable in costs. Leaseholders need to be consulted and this could easily have been done at the time by telephone call or calling in person if the matter was urgent. The repairs *must be* agreed to by leaseholders, and therefore I think the tribunal *should not* allow Southway.. to dispensate the consultation period. I was not informed at all the repairs were being carried out. I do not agree with requesting the costs of the roof repairs from leaseholders. I was told by the previous post holder… that I was not responsible for any roof repairs that the tenants at number 9 were responsible for this…. I also note … the costs for repairs are fraudulent and do not exist, namely the solar panels described in the papers. I do not believe this to be a lawful application based on facts, therefore should not be heard at tribunal… The work listed in the application is not what actually happened, 4 tiles were replaced, the work listed does not match what was carried out…

9. Southway did not comply with the timetable set by the Directions for the submission of its statement of case and supporting documentation.

10. Consequently, the Tribunal issued an email on 27 July 2023 confirming that, if it wished to continue with the Application, it must comply with the relevant parts of Directions, (which had been issued on 4 April) within 14 days, failing which the file would be sent to a legal officer to initiate the process for striking out the Application.

11. Under the Directions Southway had been mandated to submit, before 19 April 2023, " a bundle of documents consisting of; a. A statement of case… b. Any correspondence sent to the leaseholders in relation to the works. c. Detailed reasons for the urgency of the works … d. Any quotes or estimates for

the works and relevant reports. e. Copies of any other documents the Applicant seeks to rely on..".

12. Southway confirmed that it did wish to proceed with the Application and on 9 August 2023 submitted its statement of case reiterating that the Application had been made because urgent roof works were required because of the water ingress badly affecting and damaging 9 Alston Gardens, stating temporary repairs were not considered appropriate, and "that by completing the works at the earliest opportunity enabled us to protect the building and occupants". It also exhibited a letter sent to both Flat Owners dated 27 January 2023 by way of response to paragraphs b and c in the Directions. The sole response to paragraph d was the confirmation that the "works have been completed by our in-house team".

13. On 30 October 2023, following a review, the Tribunal's case officer emailed Southway stating "a Tribunal judge has noted that your case papers anticipate that the Tribunal will consider the reasonability of costs incurred. The nature of this application relates solely to dispensation of consultation requirements. You are directed to respond within 14 days clarifying the application you wish to pursue". There was a response on the same day stating "apologies if there was any confusion, we are only seeking dispensation to the consultation requirements."

14. The Tribunal convened on 12 February 2024 to determine the application.

The Law

15. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

16. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to: –

- give written notice of its intention to carry out qualifying works, invite leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought;
- obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders;
- make all the estimates available for inspection; invite leaseholders to make observations about them; and then have regard to those observations;
- give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, if that is not the person who submitted the lowest estimate.

17. Section 20ZA(1) states that: –
"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… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

18. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others (2013) UK SC 14* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;
- The purpose of the consultation requirements which are part and parcel of a network of provisions, is to give practical support is to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
- In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
- The financial consequences to the landlord of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord;
- The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
- The more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that tenants had suffered prejudice;
- Once the tenants have shown a credible case for prejudice the Tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenant's reasonable costs incurred in connection with the dispensation application;
- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed to compensate the tenants fully for that prejudice.

The Tribunal's Reasons and Conclusions

19. The Tribunal began with a general review of the papers, in order to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

20. None of the parties has requested an oral hearing and having reviewed the papers, the Tribunal is satisfied that this matter is suitable to be determined without a hearing.

21. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –

- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.
- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Flat Owners retain the ability to challenge the costs of the works under section 27A of the 1985 Act.
- The consultation requirements are limited in their scope and do not tie Southway to follow any particular course of action suggested by the Flat Owners, and nor is there an express requirement to have to accept the lowest quotation. As Lord Neuberger commented in *Daejan* "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 done by, and what amount is to be paid for them".
- Albeit, as Lord Wilson in his dissenting judgement in the same case also noted "What, however, the requirements recognize is surely the more significant factor that most if not all of that amount is likely to be recoverable from the tenant."
- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, even in the simplest cases.
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)…."

22. Applying the principles set out in *Daejan* the Tribunal has particularly focused on the extent, if any, to which the Flat Owners have been prejudiced, by not being protected against having to pay for inappropriate works or more than is appropriate due to the failure to comply with the consultation requirements.

23. As the Upper Tribunal has made clear in the case of *Wynne v Yates [2021] UKUT 278 (LC) 2021* there must be some prejudice to the Flat Owners beyond the obvious facts of not having been formally consulted, or of having to contribute towards the costs of works.

24. The Tribunal accepts that by January 2023 the matter was urgent, but also that it had become more so because of delays in Southway properly responding to Ms McQuillan's often repeated and increasingly anguished reports. Some of the delays seem to have been compounded by obdurate and inadequate computer-led reporting mechanisms blocking the messages being properly passed on. However, what is abundantly clear is that if Southway had begun working through the consultation requirements when the problems were first reported, in December 2021, there was more than enough time for all the necessary steps (including obtaining estimates and allowing for

observations) to have been completed months before its decision to instigate the works.

25. The reference in the Application to a "section 20 letter" and the inference that a first step in the consultation requirements had been taken is to misdescribe, probably innocently, the letter which was sent to the Flat Owners on 27 January 2023. The first step in the consultation requirements requires a landlord describe in general terms the proposed works, invite those who will (or maybe) asked to pay for them to the make observations and call for further estimates. There is no evidence that Southway did any of those things.

26. The letter of 27 January 2023 gave notice of the Application having been made to the Tribunal for dispensation. Southway's statement that "The Property chamber will ….make a decision based on the reasonableness of the charges to the service charge account" indicated a further, albeit possibly common, misunderstanding as to the scope of the Application.

27. As the Tribunal confirmed in the Directions "The only issue for the Tribunal to consider is whether or not it is reasonable to dispense with the consultation requirements "*The application does not concern the issue of whether any service charge costs resulting from any such works are reasonable or indeed payable ..*"

28. The Tribunal has had no difficulty in finding that the Flat owners have identified having been prejudiced by Southway's actions and omissions and put at risk of having to pay for inappropriate works, or pay more than would be appropriate. Each has separately complained of being prejudiced. Ms McPhillips says she was "not informed at all the repairs will be carried out" and questioned the extent of the works that were carried out. Ms McQuillan has complained of not receiving any quotes from Southway and according to their own quotes "the work seems expensive for what was done". What is most troubling is that both Flat Owners readily confirmed that the property does not have any solar panels on its roof, something that they would surely know about. This fact has not been subsequently disputed by Southway and is reinforced by Google's Street view and satellite images.

29. It also puts into doubt the accuracy of all of the costs referred to in the Application. Clearly the figures cannot be safely relied upon. The Tribunal did even wonder whether Southway may have confused works undertaken to separate properties in an adjacent block which do appear to have solar panels. The papers include an email on 20 December 2022 from Southway to Ms McQuillan referencing "coming to your property straight after number 7".

30. Southway has not sought to rebut anything said by the Flat Owners or the relevant prejudice which they have identified. The Tribunal has therefore to be sympathetic to the Flat Owners' claims.

31. The Tribunal has considered whether it might be possible to address the prejudice that the Flat Owners have suffered by way of conditions but has concluded that this would not now be either practical or feasible.

32. Southway has not discharged the legal burden of proof in respect of the Application. The Flat Owners have identified that they have suffered relevant prejudice, and this has not been rebutted by Southway.

33. In such circumstances, and for the reasons stated, the Tribunal is not satisfied that it is reasonable to dispense with the consultation requirements.

Judge J M Going

14 February 2024