FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AF/LDC/2023/0286**
Property	**:**	**Flats 27 – 67 Greenbank Lodge, Forest Close, Chislehurst, Kent BR7 5QS**
Applicant	**:**	**Blencare Limited**
Representative	**:**	**Warwick Estates Property Management Limited**
Respondents	**:**	**The leaseholders of Flats 27 – 67 Greenbank Lodge, Forest Close, Chislehurst, Kent BR7 5QS**
Type of Application	**:**	**Application for the dispensation of consultation requirements pursuant to S.20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Hugh Lumby** **Mr Stephen Mason BSc FRICS**
Venue	**:**	**Paper determination**
Date of Decision	**:**	**29th April 2024**

DECISION

Decision of the Tribunal

The Tribunal grants the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (Section 20ZA of the same Act).

The background to the application

1. The Property is a purpose built block of 41 flats constructed in 1987 for independent senior living.

2. The Applicant has applied for dispensation from the statutory consultation requirements in respect of repairs to the mains cold water pipework and manholes. The cost of the works is £36,624.48 including VAT.

3. The Applicant originally applied for dispensation on 14 September 2023, on the basis that the works in question cost £19,740 including VAT. On 15 January 2024 the Applicant applied to vary that application, by providing an update to the cost of the works. The Tribunal agreed to the amendment application on 17 January 2024.

4. The Applicant's managing agents received a report on 13 March 2023 that the cold water supply into Flat 60 in the Property contained silt deposits. This was investigated by two contractors, most notably by Burnside & Son, who are plumbing contractors. This identified that the cold water tank was contaminated with sand, silt and dirt, indicating a leak into the mains supply. The cold water mains, stopcock and pits were found to be submerged and a pump out recommended to check for further signs of burst pipes and to pressure test the pipework serving identified flats.

5. As a result of the contaminated water, the managing agents recommended residents not to drink the mains water until contamination tests had been carried out. Bottled water was provided instead. On 12 July 2023 a report was received confirming that the water was not contaminated.

6. The managing agents contacted the insurers to see whether the cost of repair was covered but were rejected on the basis that the design of the mains system was defective. Thames Water were also contacted to assist but stated that the defective pipework was on the landlord's land and so not their responsibility.

7. Two contractors were invited to investigate the mains system, being Burnside & Son (who had carried out the initial investigation) and Elan Building & Maintenance Limited ("Elan") who carried out an inspection on 5 June 2023. This revealed that the mains cold water pipework serving all flats at the Property was in very poor condition with the majority of

stop valves in access pits leaking and beyond repair. In addition, pipework had been leaking in several places in multiple access pits due to the tension of the pipework and the overall condition of the fittings themselves. There were three manholes showing signs of imminent collapse, with severe cracks and supporting walls being out of shape caused by ingress of water. The works proposed to rectify this included excavation and replacement of manholes, replacement mains water pipework, stopcocks and pipe joints.

8. Burnside & Son quoted £44,406.35 plus VAT to do the works. Elan were unable to provide a quote in advance but were ultimately substantially cheaper at £16,450 plus VAT. They were invited to carry out the works which were completed on 21 August 2023.

9. The Applicant acknowledges that the cost of the work triggers the requirement for a consultation pursuant to section 20 of the Landlord and Tenant Act 1985 (the "1985 Act") and that no consultation occurred. It states that it wrote to the leaseholders in 26 April 2023, 7 June 2023, 11 July 2023 and 27 July 2023, proving updates. It proceeded with the works even after receiving confirmation that the mains water was safe to drink on the basis that they were clearly necessary.

10. Three objections were received to the original application, including on behalf of the Greenback Lodge Residents Committee. Two of the three objectors lodged further objections to the amended dispensation application, on behalf of the Greenback Lodge Residents Committee.

11. By Directions of the Tribunal dated 7 December 2023 (as amended on 17 January 2024) it was decided that the application be determined without a hearing, by way of a paper case. No parties have objected to this decision.

12. The Tribunal did not inspect the Property as it considered the documentation and information before it in the set of documents prepared by the Applicant enabled the Tribunal to proceed with this determination.

13. This has been a paper determination which has been consented to by the parties. The documents that were referred to are in a bundle consisting of 320 pages, comprising the Applicant's application and the amendment to it, the submissions by the parties, the specimen leases provided with the application, plus the Tribunal's Directions (as amended) together with copy correspondence and invoices, the contents of which has been recorded.

The issues

14. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements. This

application does not concern the issue of whether or not service charges will be reasonable or payable.

Law

15. Section 20 of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.

16. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by an application such as this one before the Tribunal. Essentially the Tribunal must be satisfied that it is reasonable to do so.

17. The Applicant seeks dispensation under section 20ZA of the 1985 Act from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act.

18. Section 20ZA relates to consultation requirements and provides as follows:

"(1) 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 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.
....
(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.

19. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14, by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.

20. The Supreme Court came to the following conclusions:

a. The correct legal test on an application to the Tribunal for dispensation is: "Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

c. In considering applications for dispensation the Tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

d. The Tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

f. The onus is on the leaseholders to establish:

i. what steps they would have taken had the breach not happened and

ii. in what way their rights under (b) above have been prejudiced as a consequence.

16. Accordingly, the Tribunal had to consider whether there was any prejudice that may have arisen out of the conduct of the applicant and whether it was reasonable for the Tribunal to grant dispensation following the guidance set out above.

Consideration

17. Having read the evidence and submissions from the parties and having considered all of the documents and grounds for making the application provided by the applicant, the Tribunal determines the dispensation issues as follows.

18. Three leaseholders objected to the original application and two of the objectors objected when the application was amended. Their claims are that the leaseholders were prejudiced by the lack of consultation for the following reasons:

- The applicant's failure to arrange for the fault at the property to be investigated by a suitably qualified professional, who would have independently clarified the requirement for any works that were necessary and possible insurance claim; ("Ground 1")

- The applicant's failure to properly assess the validity of a suitable insurance claim, including the likelihood of a successful claim under Subsidence or Trace and Access cover and representing a potential cost saving of around £20,000; ("Ground 2")

- The applicant's failure to prepare a suitable specification for works, which would have confirmed exact requirements and potentially reduced both the scope and cost of the works undertaken; ("Ground 3")

- The applicant's failure to consult as prescribed under S.20 legislation, thus preventing leaseholders to comment and / or nominate suitably qualified contractors for the works; ("Ground 4")

- The applicant's failure to undertake a suitable tender exercise, to include Leaseholder nominated contractors, thus providing a fair and competitive environment and likely lower overall cost to Leaseholders; ("Ground 5")

- The applicant's decision to continue with a programme of works with unknown costs, despite being notified by a professional testing facility (LATS) that the urgency, associated with potentially unsafe water, was no longer valid; ("Ground 6")

- The applicant's failure to independently inspect or sign off works, thus leaving leaseholders unaware of either the quality or likely lifespan of repairs and if further repairs are required; ("Ground 7")

- The applicant's reluctance to provide leaseholders with the full cost of works, until months after completion and an amended Tribunal application, with a further lack of clarity over professional fees or charges. ("Ground 8")

19. The Tribunal considered each of these grounds. In doing so, it was cognisant that it was considering whether the Respondents had demonstrated that they had suffered prejudice by the failure of the Applicant to consult with them. It was not to determine whether the costs would be reasonable or payable as service charge. The Respondents will need to make an application pursuant to section 27A of the 1985 Act if they wish to bring complaints on those grounds.

20. Taking each of the grounds in turn, the Tribunal determined as follows:

- Ground 1 – the fact that the Applicant did not hire a "suitably qualified professional" is irrelevant to whether there should have been a consultation. Investigations were in any event carried out. A failure to have such a professional investigate may be relevant to a Section 27A claim. No prejudice by not having a consultation has been identified.

- Ground 2 – the issue of whether the costs of the works could have been recoverable pursuant to the insurance policy is irrelevant to the consultation process and is a matter for a Section 27A application.

- Ground 3 – the Respondents have not identified why a failure to provide a suitable specification for the works has caused them prejudice which would have been avoided by a consultation. The scope and cost of the works are both matters for a Section 27A application.

- Ground 4 – by not consulting with the leaseholders, the Respondents did lose the right to propose contractors for the works. However, no evidence has been provided that the leaseholders had alternative proposals for the contractors and so no prejudice has been demonstrated.

- Ground 5 – the Applicant did conduct a tender exercise but in any event the Respondents' complaint goes to the reasonableness and payability of the actual costs. No prejudice by failing to consult has been identified.

- Ground 6 – it was for the Applicant to decide whether to proceed with the works without consultation once it had received confirmation that the water was safe to drink. It considered that there was still a necessity to proceed with the works. No prejudice to the Respondents by not carrying out a consultation has been demonstrated, indeed no objections to the principle of the works has been provided to the Tribunal.

- Ground 7 - the suggestion that the Applicant did not independently inspect or sign off the works is irrelevant to whether there should have been a consultation. The quality of the workmanship may be relevant to a Section 27A claim but no prejudice by not having a consultation has been identified.

- Ground 8 – the alleged reluctance to provide leaseholders with the full cost of the works is irrelevant to whether there should have been a consultation or not, any challenge to the costs incurred lies through a Section 27A application.

21. Accordingly, the Tribunal is of the view that no prejudice to the leaseholders by dispensing with the need for a consultation has been demonstrated. It is noted that there has been no submissions received

that the works should not be carried out, instead concerns about cost, extent and quality of workmanship. All these can be raised in a Section 27A application.

22. The Applicant reached a professional view that the condition of the pipework meant it was still necessary to press on with the works, even though the water was safe to drink. On the evidence before it, the Tribunal agrees that this was a reasonable conclusion. The Tribunal considers that the build up of silt, the presence of leaks and the risk of a greater collapse all meant it was sensible to proceed. It therefore determines that it is reasonable to allow dispensation in relation to the subject matter of the application.

23. The Applicant shall be responsible for formally serving a copy of the Tribunal's decision on the leaseholders. Furthermore, the Applicant shall place a copy of the Tribunal's decision on dispensation together with an explanation of the leaseholders' appeal rights on its website (if any) within 7 days of receipt and shall maintain it there for at least 3 months, with a sufficiently prominent link to both on its home page. It should also be posted in a prominent position in the communal areas.

Name: Tribunal Judge Lumby **Date:** 29 April 2024

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).