



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

Case Reference : BIR/41UB/LDC/2023/0030

Property : 10-12 Upper Brook Street, Staffordshire, WS15 2DN

Applicant : S Sanghera

Representative : R Floriani
BPS Chartered Surveyors

Respondents : The leaseholders of Flats A,B and C 10-12 Upper Brook Street:
Richard Cross Flat A
Adrian Pearson Flat B (represented by Paul Pearson)
Helen Willis Flat C

Type of Application : An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying works.

Tribunal Members : Judge T N Jackson
Mr W Jones FRICS

Date of Video Hearing : 15 April 2024

Date of Decision : 30 April 2024

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to gain access to the internal manhole, vacuum the blockage, flush out and jet the drains to leave the drains flowing free of obstructions.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 25 October 2023, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to carry out drainage works at the Property.
3. Directions were made on 17 November 2023. Direction 6 required any Respondent who objected to the application to submit a statement to the Tribunal and the Applicant stating the reason and justification for the objection.
4. The Tribunal has received objections to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be payable or reasonable.**

Property

6. The Property is a mixed -use building with four commercial units on the ground floor (two to the front and two to the rear) with three residential flats on the first floor. The Landlord purchased the Property in early 2022.

Leases

7. We have been provided with a copy of the Leases for three of the four shops, the fourth shop being vacant. Two of the Leases are in the format of the Law Society Business Lease (Part of Building) (Registered) 2008, and the other is in the form of a Commercial Lease Agreement.

Unit 1- let from 1 November 2022 to 31 October 2025 as a retail store;
Unit 2- let from 1 December 2020 to 1 December 2023 as a retail store;
Unit (unknown) - let from 1 May 2023 to 30 April 2030 as a retail store. (We cannot tell from the papers whether this is Unit 3 or 4 but it is not relevant for the purpose of this application.)

The three flats within the Property owned by each of the Respondents are the subject of long leases. The three Leases are in the same format and contain service charge provisions.

Flat A- Lease dated 25 February 2011 for a term of 125 years from 25 February 2011 to 24 February 2136 at a rent of £100 per annum;

Flat B- Lease dated 15 March 2011 for a term of 125 years from 15 March 2011 to 14 March 2136 at a rent of £100 per annum; and

Flat C- Lease dated 22 February 2011 for a term of 125 years from 22 February 2011 to 21 February 2136 at a rent of £100 per annum.

Background

8. On 1 February 2023, Mr Floriani, the Applicant's agent, sent to the Respondents a Section 20 Notice of Intention to Carry out Work. The Notice set out the Scope of Works and stated that the leaseholders had a consultation period of 30 days which ended on 6 March 2023. The Scope of Works document did not include any reference to drainage works.
9. In June 2023, a significant sewer blockage was identified at the Property leading to sewage backing up into sinks and overflowing from a manhole at the Property. Due to the urgency of the situation and potential health hazards, Mr Floriani, instructed contractors to initiate emergency action to promptly address and rectify the issue. These works were carried out by And E Man Home Services at a cost of £2500. That contractor was instructed following informal consultation with the Respondents by Mr Floriani. The contractor issued an advisory note stating that the water authority should be contacted. Following inspection, the water authority identified that the blockage was specific to the Property only.
10. On 12 October 2023, further issues arose with sewage as a manhole was starting to fill up and needed clearing. Sewage was found in the manhole located in the empty shop unit in the Property but it had not yet breached the manhole cover.
11. On 12 October 2023, Mr Floriani rang Mr Paul Pearson, (who acted on behalf of his brother who was the leaseholder of Flat B), to advise him of the need to carry out further drainage works. Mr Floriani did not contact the other Respondents as Mr Paul Pearson was his contact. Mr Paul Pearson asked Mr Floriani to contact And E Man Home Services again. Mr Floriani spoke to the company and pointed out that the work they had previously carried out did not appear to have resolved the problem and asked them to return. And E Man Home Services said they were booked up for the week. Mr Floriani advised Mr Paul Pearson that he would use a different contractor and had one in mind. Mr Paul Pearson did not suggest any potential contractor names to Mr Floriani.
12. Elite Building Maintenance were on site carrying out a refit of the vacant retail unit. The company were general building contractors that BPS had previously used and who had done this type of work before. Mr Floriani instructed them to carry out the drainage works the subject of this application. The work was completed on 14 October

2023 and on 16 October 2023, an invoice for £2653 was issued. The invoice described the works done as

'Drainage clearance and disposal of waste to both blocked main sewage drains servicing shop. Drains unlocked (sic) flushed and cleared of waste by vacuum. The blocked drains in thus (sic) property service both this shop and the other 2 as well as properties above these were causing issue and backing up in the other shop too'.

13. Through email correspondence between 24-26 October 2023, two of the Respondents raised the costs of the invoice and choice of the contractor with Mr Floriani. The Respondents assert that whilst a response was received, it did not address the issues raised. On 8 November 2023, via email, Mr Cross submitted a complaint and sought further clarification of the criteria for selecting Elite Building Maintenance and confirmation of details of the company.
14. Sewage started to build up again. Mr Floriani contacted the Respondents to consult on any recommended local drainage companies and also contacted the local authority. Mr Cross had compiled a list of local drainage contractors and suggested a company called Happy Drains Ltd. That company attended on 14th November 2023 and invoiced the sum of £450 including VAT. The description of the works carried out was:

'Called to blocked internal manhole in shop all way up and down multiple times at approx. 30m absolutely packed solid with wipes and sanitary ware (sic) unable to fully clear requires Severn Trent to attend and check there (sic) sewers if all clear we would then return to carry on jetting to clear the remaining blockage'

15. There was agreement from the Council that once the sewage was cleared, the Council, (at its cost), would conduct a CCTV survey with a contractor and all the drains of the Property and neighbouring properties would be surveyed. However, all the sewage was not cleared. On the same day, following discussion with Mr Paul Pearson, Mr Floriani called a further company, Burntwood Road Sweepers Ltd, but they did not manage to clear the sewage from the rear man hole. Their costs were covered by the Council.
16. On 28 November 2023, Mr Floriani again called Burntwood Road Sweepers, who jetted the manhole and identified a blockage at 8.5 metres that required access into the shop next door which they could not gain. This work was invoiced at £540.
17. A site visit was due to take place in w/c 4 December 2023 with the Council's maintenance team.

Proposed Works

18. In October 2023, Mr Floriani proposed to carry out the following qualifying works to the Property ('the Works'):

'Gain access to the internal manhole, vacuum the blockage, flush out and jet the drains to leave the drains flowing free of obstructions.'

Inspection/ Hearing

19. We did not consider an inspection to be necessary. A video hearing was held on 15 April 2024. Riccardo Floriani from BPS attended on behalf of the Applicant. Richard Cross (Flat A) and Paul Pearson (representing his brother, Adrian Pearson the lessee of Flat B) attended. Helen Willis (Flat C) did not attend.

The Law

20. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to 'qualifying works' (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements **'if it is satisfied it is reasonable'** to do so.
21. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:
 - i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).
 - ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' that they would or might have suffered is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult.
 - v. The court considered that 'relevant' prejudice should be given a narrow definition: it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
 - vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord application under section 20 ZA (1).

Submissions

The Applicant

- 22. Mr Floriani provided a written submission. He submits that at the previous blockage in June 2023, sewage emerged from the drains on the Property, overflowed manholes and infiltrated sinks and bathroom waste and therefore posed a potential threat to public welfare. Whilst in October 2023, the sewage was still contained within the manholes, it was rising and he wished to prevent a recurrence of the previous occasion. He considered that it created a significant health and safety hazard that demanded immediate attention to ensure a safe living environment.
- 23. Mr Floriani says that he consulted with Mr Paul Pearson re getting And E Man Home Services back as he was conscious of the cost on the previous occasion in June 2023 and that after 4 days work, it did not appear to have resolved the matter. He did not speak to the other Respondents as Mr Paul Pearson was his contact with the Respondents. As he considered the works to be urgent, And E Man Homes Services were not able to carry out the work, Mr Paul Pearson had not suggested any other contractors and a general building contractor, Elite Building Maintenance, were on site, and who had previously worked for BPS and were able to carry out the work immediately, he instructed them to carry out the Works the subject of this application.
- 24. Mr Floriani's evidence was that on 13 October 2023 he had posted to the home addresses of the three Respondents a section 20 Notice of Intent regarding drainage works with a consultation period expiring on 14 November 2023 and that there was no chance to complete the formal consultation process due to the urgency of the matter. We have not been provided with a copy of that Notice.

The Respondents

- 25. The Respondents provided written submissions. On 8 April 2024, Mr Paul Pearson, (representing Adrian Pearson, Flat B) submitted further documentation updating

events since 8th December 2023. However, this had not been sent to Mr Floriani and the Tribunal therefore did not admit the documentation into evidence.

26. Mr Paul Pearson objects to the application for a number of reasons:

- i. He is unclear why the application covers only the 3 flat owners and does not include the 4 shop owners;
- ii. The section 20 Notice issued on 1 February 2023 has not been progressed;
- iii. Although the drainage problem started before June 2023 and 4 drainage companies had been called on 4 separate occasions, the works were not completed to ensure the drains were free flowing. The correct root cause has not been found and so the problem re-emerges. The cause of the problem may not relate to the Property but rather neighbouring properties. Therefore, the Respondents should not be required to pay.
- iv. He asserts that the Council's view was that the matter required a company with expertise in commercial sewage drainage rather than domestic. He asserts that Mr Floriani's preferred supplier was Elite Building Maintenance but that the Respondents did not consider it appropriate to use them due to the complaint previously submitted to Mr Floriani. He says that Burntwood Road Sweepers Ltd, who had commercial experience, were a local company and were used by the Council.
- v. The Respondents would prefer to use a local company, whereas it appears that Mr Floriani prefers Elite Building Maintenance who are based 170 miles away. And E Man Home services, Happy Drains Ltd and Burntwood Road Sweepers Ltd are within 15,5, and 7 miles respectively of the Property.

27. Mr Cross objects to the application for a range of reasons:

- i. He does not accept that Mr Floriani did not have time to contact the Respondents prior to instructing Elite Building Maintenance. Mr Floriani had been able to contact the Respondents on the previous occasion in June 2023 and on subsequent occasions. Further, on this occasion, the sewage had not yet breached the manhole and yet in June 2023, when the situation was worse, Mr Floriani had been able to contact the Respondents and had been given the name of a local drainage contractor by them.
- ii. Elite Building Maintenance were not competent in carrying out the work.
- iii. The Works should have been carried out more economically and were not carried out as instructed.

28. Ms Willis objects to the application as she says she was not consulted re Elite Building Maintenance being asked to undertake the Works. Regardless of whether she would have chosen them, or an alternative professional drain cleaning company, she says she should have been involved in the decision and given the opportunity to make a choice.

29. Mr Paul Pearson, (on behalf of his brother Mr A Pearson) and Mr Cross denied having received the section 20 Notice Mr Floriani says was sent on 13 October 2023 regarding the drainage works.

Deliberations

30. In relation to the concern regarding why the section 20 application covers only the flat owners and not the shop owners, section 20 of the 1985 Act relates to service charges payable by a tenant of a dwelling and therefore does not apply to retail premises.
31. The Tribunal cannot address the concern re the lack of progress on the Scope of Works set out in the section 20 Notice dated 1 February 2023 as it is not relevant to the drainage works the subject of this application.
32. We note that the Respondents consider that as the cause of the problem has not yet been determined, they should not be required to pay the cost of the Works. However, questions as to the payability of service charges are not matters to be addressed under an application for dispensation (see paragraph below).
33. The majority of the Respondents submissions appear to relate to the quality of work undertaken by Elite Building Maintenance and the cost, as opposed to the prejudice (if any) caused to the Respondents by the Applicant's failure to comply with section 20 consultation. Issues as to the reasonableness of the cost of works, quality of workmanship carried out and the payability by the Respondents of any service charges are matters to be considered under an application by the Respondents under section 27A of the Landlord and Tenant Act 1985 as opposed to a response to the current application for dispensation of consultation requirements under section 20ZA of the 1985 Act.
34. We are not persuaded that a section 20 Notice of Intent was issued on 13 October 2023. One was not included in the Applicant's bundle and both Mr Paul Pearson on behalf of his brother and Mr Cross say they never received such a Notice.
35. We have no evidence from the Council to support Mr Paul Pearson's assertion that a commercial drainage contractor was required. We have no evidence to support Mr Paul Pearson's assertion that Mr Floriani preferred to use a company based 170 miles away rather than a local company. Indeed, Elite Building Maintenance were on site at the time the Works were required.
36. The concerns regarding Elite Building Maintenance appear to be with the benefit of hindsight and are more properly to be considered in an application under section 27A of the 1985 Act as to reasonableness of charges.
37. We have to consider if the Respondents were prejudiced by the lack of consultation under section 20 of the 1985 Act. Mr Paul Pearson accepts that the Works were urgent, although says that the problem goes back before June 2023. Mr Cross accepts that the Applicant could not have carried out the formal section 20 consultation process but says there was time to have informal consultation.
38. Based on the evidence of Mr Floriani and Mr Paul Pearson, we are satisfied that Mr Floriani contacted Mr Paul Pearson on 13 October 2023 regarding the need to carry

out further drainage works as a matter of urgency and there was a discussion re And E Man Home Services and the need for another contractor for reasons previously stated. We are also satisfied that Mr Paul Pearson did not suggest any other drainage contractors to Mr Floriani.

39. Even if no such informal consultation had taken place, having had regard the June 2023 incident, we find that it was reasonable for Mr Floriani to take emergency action despite the fact that the sewage was not at that precise time yet breaching the manhole. In the absence of any recommendations as to contractor from the Respondents, it also appears reasonable to instruct building contractors who were on site who had carried out this type of work in the past.
40. The Respondents do not suggest that the Works did not require to be carried out as a matter of urgency. The Respondents have not detailed what alternative Works to those that were carried out they would have requested, based on their knowledge of the problem at that time and how they would differ from the Works the subject of the application. As there were no alternative Works suggested, the Respondents cannot satisfy us that any such alternative Works would likely have been at a lesser cost and that they have been prejudiced by the lack of section 20 consultation.
41. Whilst we accept that the Respondents may have suggested local contractors if a section 20 consultation had taken place, we note that two local contractors preferred by the Respondents were subsequently used on two further occasions following the October 2023 incident the subject of this application and yet those contractors were also unable to resolve the problem. This suggests that there was no prejudice suffered by the Respondents from the formal lack of opportunity to provide details of preferred local contractors as the evidence shows that they also were unable to resolve the problem.
42. As at w/c 4 December 2023, the cause of the blockage had not been determined. We consider that to be evidence of the complexity of the drainage problem itself.
43. For the reasons above, we are not satisfied that the Respondents have demonstrated they were prejudiced by the failure to consult in accordance with section 20 of the 1985 Act.
44. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:
 - i. The Works relate to drainage works and were required for health and safety purposes to ensure the safety of the Property, the residents and users.
 - ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements. Their concerns relate mainly to matters which would be more appropriately considered in an application under section 27A of the 1985 Act.

Determination

45. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.

46. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Costs

47. Neither party made an application for costs and no such order is made.

Appeal

48. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson