FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LDC/2022/0088**
HMCTS code	**:**	**V: CVPREMOTE**
Property	**:**	**Isaac Way, Borough, London, SE1 1EE**
Applicant	**:**	**Lant Street Management Limited**
Representative	**:**	**Vinay Veneik (Houston Lawrence Management)**
Respondents	**:**	**Simon McDermott (Flat 2)** **Seymour Pearman and Paul Wilmott (Flat 3)** **Lucy Thomas (Flat 9)** **Ivan Sebastian (Flat 20)** **Ian Jackson and Sarah Oerkins (Flat 21)** **Julian Lowe (Flat 28)**
Representative	**:**	**In person**
Type of application	**:**	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	**:**	**Judge Robert Latham** **Mr Stephen Mason FRICS**
Date and Venue of Hearing	**:**	**8 November 2022 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**8 December 2022**

DECISION

Decision

The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985. It is a condition of the dispensation that the Applicant shall not seek to recover any of the costs relating to this application for dispensation from these Respondents.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not been objected to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because all the issues could be determined in a remote hearing. The Applicant produced a Bundle of 106 pages in support of their application. A number of additional documents (which are identified in this decision) were produced at the hearing.

Introduction

1. This is an application for dispensation from the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act"). Isaac Way, Borough, London, SE1 1EE ("the Block") consists of 32 flats all but 6 of which are leased to individual leaseholders with whom a consultation exercise has been completed. Six of the flats are leased to Wandle Housing Association Limited ("Wandle") who have granted shared ownership leases which are currently held by the Respondents.

   (i) The 26 leaseholders and Wandle hold their flats pursuant to tripartite leases between: (a) "the Landlord" (initially George Wimpey City Limited and now Damgate Freeholds Limited); (b) "the Management Company" (the Applicant, Lant Street Management Limited) and (c) "the Tenant". All of the tenants are shareholders in the Management Company and appoint a Board of Directors. The Management Company is responsible for repairing and maintaining the Block in respect of which the tenants pay a service charge. The Management Company has appointed Houston Lawrence Management ("HLM") to manage the Block.

   (ii) The six Respondents hold their flats under shared ownership leases between "the Landlord" (Wandle) and "the Leaseholder". The Respondents have no contractual relationship with the Management Company. The Management Company charge Wandle a service charge which Wandle then pass down to the Respondents.

2. In February 2020, in the aftermath of the Grenfell Fire tragedy, HLM embarked upon a statutory consultation process in respect of works to involving the

replacement of insulation to the existing rainscreen cladding systems including the installation of cavity barriers. HLM consulted with the 26 leaseholders and Wandle who have now paid the sums demanded in respect of the proposed works. The works were executed between May and June 2022. Neither the Applicant nor Wandle involved the Respondents in the consultation process.

3. In *Leaseholders of Foundling Court v Camden LBC* [2016] UKUT 3666 (LC); [2017] L&TR 7, the Upper Tribunal held that it is the head landlord who intends to carry out qualifying works who is obliged to consult any sub-lessees. Having learnt of their error, the Applicant issued this application for dispensation.

4. This tribunal has standard procedures for expeditiously dealing with such application which are normally determined on the papers. These are straightforward, provided that the applicant submits the relevant information and complies with the Directions given by the Tribunal. This has not occurred. The application was issued against two tenants who had assigned their leasehold interests more than nine years ago and one tenant was named who had died two years ago. **As a result of these procedural errors, the tribunal grants Lucy Thomas, Julian Lowe and Simon McDermott permission to apply within 14 days of this decision to set it aside should they consider that they have not had an adequate opportunity to oppose this application.** They must specify their grounds for making such an application.

5. On this current application, the tribunal is only required to consider whether it is reasonable to dispense with the consultation requirements. **The application does not concern the issue of whether any service charge arising from these works will be reasonable or payable.** The Tribunal was told that the cost of the works is some £2,000 per flat. Should the Respondents wish to challenge the service charge, the issue arises as to whether any application should be issued against Wandle, who levy the service charge, or the Applicant, who has been responsible for the works. To avoid any future complications, it would appear that the answer has been provided by the Court of Appeal in *Ruddy v Oakfern Properties Limited* [2006] EWCA Civ 1389; [2007] Ch 335. It would be open to the tenants to issue any such application against either Wandle or the Applicant. In practice, it might be desirable to issue against both.

6. The Tribunal asked the Applicant whether it had considered the impact of the Building Safety Act 2022 and whether the cost of the works might be recoverable against George Wimpey City Limited who built the Block pursuant to the terms of the Act or otherwise. Mr Veneik responded that the Applicant had been quoted "a five figure sum" for seeking legal advice on this unduly complex piece of legislation and was considering whether it would be proportionate to do so. This is a matter for the Applicant. The Tribunal understands that as a tenant controlled management company, it has a legitimate interest in minimising any service charge that is payable by its members.

The Application

7. By an application dated 4 May 2022, the Applicant seeks dispensation from the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act"). The application was issued by HML on behalf of the Applicant Management Company. The Tribunal notes that the individual who issued the application is no longer working for HML.

8. The application was issued against the following leaseholders:

(i) Nazir Ahmed Yatoo (Flat 2). In 2013, Mr Yatoo assigned his lease to Simon McDermott. Mr McDermott attended the hearing but had to leave early. He did not seek an adjournment. He agreed to be joined as a party to the application. Prior to his attendance at the hearing, Mr McDermott has played no part in this application.

(ii) Seymour Pearman & Paul Wilmott (Flat 3)

(iii) Maria Roche (Flat 9). In 2005, Ms Roche assigned her lease to Ms Lucy Thomas. Ms Thomas attended the hearing and agreed to be joined as a party.

(iv) Ivan Sebastian (Flat 20)

(v) Katherine Love (Flat 28). We understand that her second name should have been "Lowe". The Tribunal was told that Ms Lowe had died two years ago. Mr Veneik confirmed that her husband, Julian Lowe is now the leaseholder. He has responded to the application. The Tribunal joins him as a party to the application.

(vi) Ian Jackson & Sarah Oerkins (Flat 21)

The Tribunal removes Mr Yatoo, Ms Roche and Ms Love as parties to this application. All these directions are made pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules").

9. On 30 May 2022, the Tribunal issued Directions. The Tribunal stated that it would determine the application on the papers, unless any party requested an oral hearing.

10. By 13 June, the Applicant was directed to send to each of the leaseholders copies of the application form (with personal details deleted), statement of case, supporting documents and the directions.

11. By 4 July, any leaseholder who opposed the application was directed to complete a Reply Form which was attached to the Directions and email it both to the Tribunal and to the Applicant. The leaseholder was further directed to send the applicant a statement in response to the application together with any

documents upon which they sought to rely. The following leaseholders opposed the application:

(i) On 29 June, Ms Thomas (Flat 9) notified the tribunal that she opposed the application (at p.15-19). She provided a statement in response and requested an oral hearing.

(ii) On 3 July, Mr Pearman (Flat 3) notified the tribunal that he opposed the application (p.13-15). He provided a statement in response. He did not request an oral hearing.

(iii) On 4 July, Mr Sebastian (Flat 20) notified the tribunal that he opposed the application (at p.21-23). He did not provide a statement in response. Neither did he request an oral hearing. He appointed Wandle as his spokesman/representative.

(iv) On 4 July, Mr Lowe (Flat 28) notified the tribunal that he opposed the application (p.25). He stated that he had provided a statement in response. However, it seems that no such written response was provided. He did not request an oral hearing. He did not take any point that the application had been wrongly issued against his late wife who had been wrongly named as "Katherine Love".

12. On 25 July (at p.29-31), the Respondent provided a statement addressing the points raised by the leaseholders. The Applicant has filed a Bundle of Documents extending to 106 pages.

The Hearing

13. Mr Viney Veneik from HML appeared on behalf of HLM. The following leaseholders appeared: Ms Lucy Thomas (Flat 9); Mr Ivan Sebastian (Flat 20) and Mr Simon McDermott (Flat 2).

14. Mr McDermott had not been named as a party to the application. He stated that he had attended because he wanted to know what the case was about. He agreed to be joined as a party to the application. He did not seek an adjournment. He had to leave the hearing early because of child care responsibilities.

15. The Applicant did not include the two most relevant documents, namely the Notice of Intention and the Notice of Estimates, in the Bundle. Copies were provided at the hearing. Mr Veneik stated that these had previously been provided to the tenants.

16. All those present at the hearing made submissions.

The Law

17. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. A summary of these is set out in the speech of Lord Neuberger in *Daejan Investments Limited v Benson ("Daejan")* [2013] UKSC 14; [2013] 1 WLR 854 at [12]:

> Stage 1: Notice of Intention to do the Works: Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.
>
> Stage 2: Estimates: The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
>
> Stage 3: Notice about Estimates: The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
>
> Stage 4: Notification of reasons: Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

18. Section 20ZA (1) of the Act provides:

> "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."

19. The Tribunal highlights the following passages from the speech of Lord Neuberger in *Daejan*:

> (i) Sections 19 to 20ZA of the Act are directed towards ensuring that tenants are not required to (a) pay for unnecessary services or services which are provided to a defective standard (section 19(1)(b)) and (b) pay more than they should for services which are necessary and are provided to an acceptable standard (section 19(1)(b). Sections 20 and 20ZA are

intended to reinforce and give practical effect to these two purposes (at [42]).

(ii) A tribunal should focus on the extent, if any, to which the tenants have been prejudiced in either respect by the failure of the landlord to comply with the Requirements (at [44]). The only question that the tribunal will normally need to ask is whether the tenants have suffered "real prejudice" (at [50]).

(iii) Dispensation should not be refused because the landlord has seriously breached, or departed from, the statutory requirements. The adherence to these requirements is not an end in itself. Neither is dispensation a punitive or exemplary exercise. The requirements are a means to an end; the end to which tribunals are directed is the protection of tenants in relation to unreasonable service charges. The requirements leave untouched the facts that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them (at [46]).

(iv) If tenants show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the tribunal would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily a tribunal would be likely to accept that the tenants have suffered prejudice (at [67]).

(v) The tenants' complaint will normally be that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the tribunal (at [69]).

(vi) If prejudice is established, a tribunal can impose conditions on the grant of dispensation under section 20(1)(b). It is permissible to make a condition that the landlord pays the costs incurred by the tenant in resisting the application including the costs of investigating or seeking to establish prejudice. Save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements (at [58] - [59], [68]).

(vii) Where the extent, quality and cost of the works are unaffected by the landlord's failure to consult, unconditional dispensation should normally be granted (at [45]).

The Background

20. Isaac Way is part of a development consisting of three Blocks (Block A to C) of various heights, all under 18 metres. The development was constructed by Wimpey City Limited in the early 2000s. It is of a concrete framed construction with flat roofs. Balconies are of concrete projecting or inset over floor slabs. Walls are largely of traditional cavity construction, cladding and windows consist of a timber and aluminium cassette system. HLM manage Blocks B and C on behalf of the Management Company.

21. On 24 February 2020, HLM served a Stage 1 Notice of Intention on 26 of the 32 leaseholders of Block B and on Wandle. It was not served on Wandle's six sub-lessees. The Notice described the works as "replacement of insulation and installation of fire breaks and any associated works". The works were necessary to ensure that the building was fire safe and in line with the advice issued from the Ministry of Housing Communities and Local Government. The leaseholders were invited to make any observations on the proposed works and to nominate a contractor from whom an estimate should be sought by 28 March 2020.

22. Mr Veneik stated that the works had been recommended by their consultants, Effectis UK/Ireland Ltd, However, the report provided to the Tribunal (at p.35-70) is dated 27 July 2021 and is based on a site visit on 29 April 2021. This postdates the Notice of Intention. The report therefore seems to validate the works that had already been identified.

23. Mr Veneik stated that Wandle had responded to the Notice. Having sought their own professional advice, they had agreed to the works. Mr Veneik stated that none of the other leaseholders had responded.

24. On 7 December 2020, Wandle sent Ms Thomas a copy of the Notice of Intention. When she contacted them to complain about the works, Wandle told her that it was too late for her to do so.

25. On 11 December 2020, Stephen Jeremy, from HL Professional Services, prepared a Tender Report (at p.71-100). Five contractors had originally been invited to tender. However, due to the number of declines, seven further firms were invited to tender. All were on their list of approved contractors. Only three firms submitted tenders. On Call Property Services submitted an incomplete tender with pricing errors. They were afforded the opportunity to correct their errors and submit a revised tender. On Call Property Services provided the lowest tender in the sum of £156,385 (exc VAT). The tender is at p.42-103. Mr Jeremy recommended that this tender be accepted.

26. On 18 December 2020, HLM served a Stage 3 Notice of Estimates on 26 of the 32 leaseholders of Block B and on Wandle. It was not served on Wandle's six sub-lessees. HLM provided details of the three tenders. The total cost, including the surveyor and principle designer fees, ranged from £206,428 to £379.106. The leaasehoolders were invited to make any observations on the estimates by 22 January 2021. Mr Veneik stated that no observations were received.

27. Mr Veneik stated that the works commenced in May 2022 and were completed in June. These involved the replacement of insulation to the existing rainscreen cladding systems and the installation of cavity barriers. Wandle has paid its contribution for the works relating to the eight flats. The sums range from £1,248.15 (Flat 20); £1,317.90 (Flat 9); £2,234.55 (Flat 28); and £2,324.70 (Flat 3). In due course, Wandle will pass these costs down to the Respondents.

28. Whilst the Respondents were not formally consulted about the works, a number of them were members of the Wimpey Users/Lant Lane WhatsApp Group. A post by Mr Pearman (Flat 3) is at p.33.

The Tribunal's Determination

29. The Respondents have raised a number of points in response to this application. Ms Thomas (Flat 9) complains that the leaseholders were not afforded a vote. The Respondents were afforded no voice in the conversation. She had understood that Taylor Wimpey (the company formed from the original developer) were going to pay for the works. Alternatively, the bill would be met by the government. She suggests that the works were a knee jerk reaction to the Grenfell Fire. The Tribunal asked her what action she would have taken had she been served with the Notice of Intention and the Notice of Estimates. She responded that she would have argued that the works were not necessary. She suggested that she would have suggested a contractor from whom an estimate might be sought. However, she was not able to specify such a contractor.

30. Mr Pearman (Flat 3) complained that that Wandle were trying to change the rules retrospectively. This was unfair. Wandle was failing to accept responsibility for their mistake. He concluded: "It's not about the money for me, but very much about accountability".

31. Mr Sebastian (Flat 20) did not provide a statement setting out his reasons for opposing the application. At the hearing, Mr Sebastian complained that he had been excluded from the consultation. He would have been interested in finding out more about the works. He would not have nominated a contractor.

32. Mr Lowe (Flat 28) notified the tribunal that he opposed the application. However, he has not provided any particulars of his grounds for opposing the application.

33. Mr Veneik stated that Taylor Wimpey had only indicated that they might pay for the works if it was established that they had been negligent. No government

fund has materialised. Mr Veneik stated the Respondent was keeping under review whether it would be proportionate to seek redress from the developer.

34. The substantive complaint is that the Respondents were denied of their statutory right to be consulted. There was no statutory requirement for a ballot. Mr Veneik stated that on 23 June 2022, HLM sent an email to Ms Thomas offering to meet the Wandle subtenants. The Respondents did not avail themselves of this opportunity. He pointed out that the works were urgent as any leaseholder seeking to sell or re-mortgage their flats would need an "EWS1 Certificate", which would not have been available unless the works were executed.

35. The Tribunal is satisfied that the Respondent should have consulted the Respondents about the works. Wandle should also have involved the Respondents in the process. Both are at fault. However, the duty to consult is not an end in itself.

36. The sole issue for this Tribunal is whether any of the Respondents have established that they were prejudiced by the failure to consult. No "real prejudice" has been established. The Applicant served the Notice of Intention on 28 leaseholders and Wandle. None of these leaseholders questioned whether the works were necessary. Wandle took their own advice before accepting that the works were necessary. The Respondents have adduced no evidence that the works were not necessary. The Tribunal is satisfied that the works were required.

37. HLM tested the market by seeking tenders from a total of 12 contractors. Three tenders were returned. The Applicant accepted the lowest tender. Although Ms Thomas suggested that she would have nominated a contractor from whom a tender should be sought, she has not identified any such contractor. No other leaseholder sought to nominate a contractor. The Tribunal is satisfied that the Applicant took adequate steps to test the market.

38. The Tribunal therefore grants dispensation from the consultation requirements imposed by section 20 of the Act. It is a condition of the dispensation that the Applicant shall not seek to recover any of the costs relating to this application for dispensation from the Respondents. The Applicant should have included the Respondents in the statutory consultation procedures. This was a serious failure. Further, the manner in which the Applicant has handled this application has been far from satisfactory.

39. Mr Veneik stated that Wandle had been granted either one or six shares in the Applicant Management Company in respect of the six leases that they hold. Wandle is entitled to nominate one (or more) of their subtenants to exercise their rights as shareholder in the Management Company. Wandle should consider whether to exercise this right.

40. The Tribunal will serve a copy of this decision on the Applicant and the six Respondents. The Applicant must provide a copy to Wandle.

Judge Robert Latham
8 December 2022

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 **by e-mail** 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).