FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/LDC/2022/0075**
HMCTS code	**:**	**V: CVPREMOTE**
Property	**:**	**Upper Flat, 6 Rathcoole Avenue, Hornsey, London, N8 9LY**
Applicant	**:**	**Real Estate & Property Investment Company Limited**
Representative	**:**	**Martin Langston (Counsel) instructed by Wallace Robinson & Morgan (Solicitors)**
Respondents	**:**	**Michael Quartey-Papafio** **William Quartey-Papafio**
Representative	**:**	**Barry Havenhand (Counsel) instructed by William Barca (Solicitors)**
Type of application	**:**	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	**:**	**Judge Robert Latham** **Alison Flynn FRICS**
Date and Venue of Hearing	**:**	**4 July 2022 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**11 July 2022**

DECISION

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1. The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 on condition that the Applicant bears its costs of making this application to the tribunal.

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2. The Tribunal does not make it a condition of dispensation that the Applicant should pay the costs incurred by the Respondents in respect of this application.

3. The Tribunal rejects the Applicant's application for a penal costs order against the Respondents pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

4. The Tribunal makes no order for the refund of the tribunal fees which have been paid by the Applicant.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been requested by the parties. The form of remote hearing was V: CPVEREMOTE. The Applicant has provided a Bundle of Documents extending to 324 pages.

The Background to the Application

1. 6 Rathcoole Avenue, Hornsey, London N8 9LY ("the Property") is a mid-terrace building which has been converted into two flats. This application involves the Upper Flat ("the Flat").

2. The Applicant, Real Estate and Property Investment Co Limited (the "Landlord"), is the freeholder of the Property. At all material times, the Property has been managed by VDBM Chartered Surveyors ("VDBM"). Ms Jasmine Sheldrick, a Senior Property Manager, has been employed by VDBM for 26 years. Mr Nichlas Oltarzewki-Bridgewater ("Mr Oltarzewki), a Building Surveyor, has worked for VDBM since August 2016.

3. The Respondents are the lessees under a lease, dated 24 December 1976, which they acquired on 26 August 1988. William and Michael Quartey-Papafio are brothers, who will be referred to as "William" and "Michael". William resides in the Flat, but Michael does not. Michael has his own room in the Flat, and a storage space, and visits from time to time to collect post. The Land Registry record the address of both William and Michael as being the Flat.

4. Between June and October 2018, the Landlord carried out a programme of external repairs and decorations to the Building. On 28 December 2018 (at p.219), VDPM invoiced Michael for the works in the sum of £16,743.37. The Respondents did not pay the sum demanded. In due course, the Landlord issued proceedings against William for this sum in the County Court (Case No. F46YM605).

5. The Respondents argued that the Landlord had failed to follow the statutory consultation procedures imposed by section 20 of the Landlord

and Tenant Act 1985 ("the Act") as a consequence of which the landlord was restricted to claiming £250 for the works. The Respondents accepted that on 3 May 2017, VDBM had served a Notice of Intention (at p.134) and on 20 July 2017 had served a Notice of Estimates (at p.139). However, these had only been addressed to William. The Respondents argued that the Landlord was obliged to serve these Notices on both joint tenants.

6. There was a further element to this claim. The Notice of Estimates had indicated that the cost of the works had been tendered at £21,104, including VAT and fees. However, once scaffolding had been erected, additional works were found to be necessary. The final cost was £31,109 (p.68). The Applicant has provided a final costed Schedule of Works (at p.69-74). The additional works are identified by "VO" and have been described as the Variation Order works.

7. Recorder Eaton Turner, sitting in the County Court at Central London, determined whether the Landlord had complied with its Section 20 consultation duties as a preliminary issue. The hearing was conducted on 8 July 2021. His judgment was handed down on 20 January 2022. The Recorder concluded that the Landlord had not complied with the statutory consultation requirements in that it had been obliged to give Notice to Michael. He added that his conclusion applied "equally to the Variation Order works".

8. The Recorder agreed to stay the County Court proceedings, to enable the Applicant to make this application for dispensation pursuant to section 20ZA of the Act. The Recorder recorded that the Applicant had pointed out that "that William accepted in his evidence that the work that was done was necessary, and does not contend that a different contractor should have been appointed to carry out that work".

9. On 20 January 2022, the County Court made an order staying the proceedings generally with liberty to restore. The Applicant was ordered to file a claim seeking dispensation before this tribunal by 20 April 2022. Upon the conclusion of the proceedings before this tribunal, the Applicant is required to notify the County Court which will restore the action to their lists.

The Current Application

10. On 20 April 2022, the Applicant issued the current application for dispensation. On 4 May, the tribunal gave Directions.

11. By 23 May the Applicant was directed to send to the Respondents an expanded statement of case stating what it is seeking to achieve by this application. The Applicant was further directed to send any documents on which it sought to rely and any legal submissions.

12. On 23 May (at p.312), the Applicant served the following:

(i) "Amended Particulars of Claim" in respect of this application, together with various enclosures (at p.32-47). These include (a) the Notice of Intention (3.5.17); (b) William's Response (3.5.17); (c) the Notice of Estimates (20.7.17); and (d) a Summary of the Works, including the Variation order works.

(ii) Written Submissions, including a copy of the decision of the Supreme Court in *Daejan Investments Ltd v Benson* ("Daejan") [2013] UKSC 14; [2013] 1 WLR 854);

(iii) The three witness statements which had been filed in the County Court: (a) Malcolm Johnston a director of the Applicant Company (19.6.20) (at p.84-86); (b) Nicholas Oltarzewski (20.7.20) (at p.87-223); and (c) Jasmine Sheldrick (8.3.21) (at p.224-278);

(iv) Notices to Admit Facts requiring William and Michael to admit that the works had been required and that the estimate which the Landlord had accepted was reasonable (at p.81-83).

13. By 6 June, the Respondents were directed to send the Applicant their statement of case setting out their position, together with any documents and legal submissions upon which they sought to rely.

14. On 6 June (at p.319), the Respondents served a Defence to the Amended Particulars of Claim (at p.75-76). They point out that the Applicant has offered no explanation as to why Mr Oltarzewski only served the statutory notices on William. Michael denies that he is bound by the responses that his brother made to these notices. However, he does not identify any prejudice that he has suffered as a result of Landlord's failure to serve the statutory notices on him. They did not respond to the Statements to Admit Facts.

15. The Directions made provision for the Applicant to send a Reply. The Applicant did not consider it necessary to do so. The parties were directed to exchange witness statements by 20 June. No further witness statements were exchanged. The application was set down for a face-to-face hearing. However, the parties requested, and the tribunal agreed to, a virtual hearing.

The Hearing

16. Mr Martin Langston (Counsel) appeared for the Applicant instructed by Wallace Robinson & Morgan (Solicitors). He was accompanied by Mr Mark Baldwin, from his Instructing Solicitors, together with Mr Johnston and Ms Sheldrick. He outlined two difficulties. First, the Applicant had requested a transcript of the hearing in the County Court.

This was not available. Secondly, shortly before the hearing, Mr Oltarzewski had been knocked off his bicycle and was in hospital. He was therefore not available to give evidence.

17. Mr Barry Havenhand (Counsel) appeared for the Respondents instructed by Wilson Barca LLP (Solicitors). He was accompanied by Ms Naz Matin from his Instructing Solicitors, together with William. There was no appearance from Michael. When confronted by the fact that the Respondents had not filed any witness evidence, Mr Havenhand felt obliged to ask for an adjournment. He was unable to offer any explanation as to why the Respondents had failed to comply with the Directions. He had not been provided with any witness statements. Michael was not present to indicate what evidence he might had been able to give, had he been afforded the opportunity to do so.

18. The parties had not provided the Tribunal with either the judgment of the Recorder Eaton Turner or the Order made pursuant to his judgment. Copies were provided to the Tribunal. After a short adjournment to consider these, the Tribunal made the following rulings, having regard to the Overriding Objectives in Rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"):

(i) The Tribunal did not require a copy of the County Court transcript. The Tribunal was not concerned with the evidence that they gave in the County Court, but rather that which they gave to this Tribunal.

(ii) The Tribunal would have regard to the witness statement submitted by Mr Oltarzewski, but the weight given to it would be reflect the fact that the Respondents had been unable to cross-examine him.

(iii) The Tribunal was not willing to adjourn the hearing to enable the Respondents to file witness statements. Directions had been given to enable the case to be determined fairly and in a proportionate manner. Mr Havenhand was unable to explain why no witness evidence had been filed. Despite the fact that Michael had the evidential burden of establishing any prejudice that he had suffered as a result of the Landlord's failure to serve the requisite Notices on him, no evidence had been adduced of prejudice. The Tribunal thus had no evidence as to what, if anything, he had known about the works that were proposed.

19. Both Counsel had appeared in the County Court. The Tribunal heard evidence from Mr Johnston and Ms Sheldrick. The Tribunal had regard to the witness statement from Mr Oltarzewski. No application was made to adduce any oral evidence from William. The Tribunal heard submissions from both Counsel.

20. Mr Langston made the following submissions on behalf of the Applicant:

(i) The Respondent had not established any prejudice as a result of the Landlord's failure to serve the Notices on Michael. Dispensation should therefore be granted without condition.

(ii) The Variation Order works were all part and parcel of the original package of works. When scaffolding is erected and a more thorough inspection is possible, it is not unusual for additional works to be identified. There was therefore no need for any further consultation notices to be served. In such circumstances, it would not have been appropriate to delay works for three months to consult on such works.

(iii) The Respondents had been unreasonable in defending this application and the Applicant seeks costs pursuant to Rule 13(1)(b) of the Tribunal Rules. The Applicant has served a Form N260 Statement of Costs seeking costs in the sum of £15,660 (inc VAT). The sum claimed was reduced to £11,410 to reflect the savings from this being a virtual hearing.

21. Mr Havenhand made the following submissions on behalf of the Respondents:

(i) Dispensation should be refused. There had been a flagrant breach of the statutory duty to consult. No explanation had been provided for the Landlord's failure to serve the Notices on Michael. Michael had been prejudiced in that he had been denied the opportunity to comment on either the scope of the works or the selection of a contractor.

(ii) There had been a separate duty on the Landlord to consult on the Variation Order works as a result of which the Respondents' liability had increased from £10,552 (50% of £21,104) to £16,743. There had also been a further flagrant breach of the duty to consult both William and Michael.

(iii) If dispensation is to be granted, it should be granted on conditions. The Respondents should not be required to pay the costs of the Applicant. The Applicant should rather pay the Respondent's costs in the sum of £3,270. The costs claimed by the Applicant were disproportionate.

22. It is important to be clear what the Tribunal is not being required to determine, namely:

(i) Whether the sum of £16,743 demanded from the Respondents is reasonable or payable.

(ii) The division of the costs of the works between the two flats.

(iii) The Counterclaim which has been brought by the Respondents.

These all remain matters for the County Court.

The Law

23. 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* 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.
>
> 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.

24. 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."

25. 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]).

26. In *Phillips v Francis* [2014] EWCA Civ 1395; [2015] 1 WLR 741, the Court of Appeal considered what constitutes a single set of "qualifying works" for the purposes of section 20 of the Act. Lord Dyson, MR, held at [36] that this is a question of fact having regard to the relevant factors including: (i) where the works were carried out (i.e., whether they are contiguous or physically far removed); (ii) whether they were all the subject of one contract; (iii) whether they were done at more or less the same time; and, (iv) their nature and character. Lord Dyson stressed that this is not to be considered to be an exhaustive list.

<u>The Facts</u>

27. The facts can be stated briefly. On 3 May 2017 (at p.134), VDBM sent the Stage 1 Notice of Intention to "Mr W Quartey-Papafio" at the Flat. It listed the proposed work and drew his attention to the right to make observations on the intended work, within 30 days. It also stated "If your objections are of a technical nature, you should provide a copy of any qualified or professional opinion supporting your submission".

28. On 30 May 2017 (at p.137), William responded to the Notice. He stated that he had "no observations of a technical nature at this stage", but questioned why he had not been sent a copy of a survey of the Property carried out on behalf of the Agents in November 2015. He had, he said "expected one by the 29th May 2017, as discussed in our telephone conversation earlier this month".

29. On 20 July, 2017 (at p.139), VDBM sent the Notice of Estimates to William at the Flat. Tenders had been sought from six builders, two of whom had decided not to quote. Four builders provided quotes ranging from £15,292.25 to £37,046.10. When professional fees and VAT are added, these ranged from £21,104.26 to £52,123.61. The Landlord stated that it was minded to accept the lower estimate. The notice stated that all the quotations were available for inspection. The Notice did not invite observations allowing at least 30 days for this. However, neither Counsel took any point on this. William made no response to this Notice.

30. Works started in June 2018 and were completed in October 2018. However, once scaffolding had been erected, additional works were

found to be necessary. The chimney was found to be defective and wall tiles were required. A new skylight was required. A number of ridge tiles were found to be missing. The final cost was £31,109 (p.68). The Applicant has provided a final costed Schedule of Works (at p.69-74). The additional works are identified by "VO" and have been described as the Variation Order works.

31. The Tribunal has heard no evidence as to why VDBM failed to serve the Notices on Michael. The Notices were served by Mr Oltarzewski. He did not address this in his witness statement in the County Court. Ms Sheldrick stated that service charge demands had been sent to "W and M Quartey-Papafio" at the demised Flat. However, she accepted that VDBM had sent a number of letters to Michael at 24 Lynton Avenue.

32. The Tribunal suggested that Mr Oltarzewski had failed to distinguish between his "W" s and his "M" s. Thus, on 10 October 2017 (at p.250), William wrote to Mr Oltarzewski about the proposed works. On 15 November 2017 (at p.251), Mr Oltarzewski responded to this in a letter sent to "M Quartey-Papafio" at the Flat. On 23 November 2017m (at p.253), William responded to Mr Oltarzewski. On 12 December 2017 (at p.254), Mr Oltarzewski responded to "M Quartey-Papafio". There is no evidence as to whether Michael saw all, or any, of this correspondence.

The Tribunal's Determination

33. Recorder Eaton Turner concluded that the Landlord had not complied with the statutory consultation requirements in that it had been obliged to give Notice to Michael. He noted that William had accepted in his evidence that the work that was done was necessary and did not contend that a different contractor should have been appointed to carry out that work.

34. In his Defence in this application, Michael asserts that he is not bound by the observations of his brother. However, he has adduced no evidence to indicate what he would have said in response to either the Notice of Intention or the Notice of Estimates. Even with the benefit of hindsight, he has not sought to suggest that any of the works were unnecessary or that another estimate should have been accepted. In short, he has not established any "real prejudice" arising from the Landlord's failure to serve him with either notice.

35. Mr Oltarzewski sent the two Notices to "Mr W Quartey-Papafio" at the Flat. He should have addressed the letters to "Mr W and Mr M Quartey-Papafio". This was a mistake. There was no ulterior motive. However, it has proved an extremely expensive mistake for the Landlord. The cost of this mistake is the greater because the Landlord sought to argue that service on one joint tenant complied with the statutory requirements. The error could rather have been remedied by a prompt application to this tribunal for dispensation.

36. The Tribunal is satisfied that all the works constituted a single set of "qualifying works". All the works were executed at the same time, whilst the scaffolding was erected, and by the same contractor.

37. The Tribunal is satisfied that dispensation should be granted. Neither Michael nor William have established that they suffered any prejudice by this mistake. However, the Tribunal is satisfied that dispensation should be granted on terms that the Applicant should bear its costs in making this application to the tribunal. It should also bear the cost of the tribunal fees that it has paid. The Landlord was required to make this application to cure the mistake that it had made.

38. The Tribunal does not make it a condition of dispensation that the Applicant should pay the costs incurred by the Respondents in respect of this application. Neither William nor Michael have sought to establish any real prejudice. The adherence to the statutory requirements is not an end in itself. Neither is dispensation a punitive or exemplary exercise. On the basis of the evidence before us, the Tribunal was bound to grant dispensation.

39. The Tribunal rejects the Applicant's application for a penal costs order against the Respondents pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. This is normally a "no costs" jurisdiction. The Applicant would need to establish that the Respondents had acted unreasonably in defending or in the conduct of the proceedings. The Upper Tribunal has set a high threshold for this in *Willow Court v Alexander* [2016] UKUT 290 (LC). The UT (at [20]) approved the observations of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

40. Mr Langston suggested that the Respondent had acted unreasonably in failing to make appropriate admissions in response to the Notices to Admit Facts. This is not conduct which would justify a penal costs order. The tribunal should use its case management powers "actively to encourage preparedness and cooperation, and to discourage obstruction,

pettiness (see *Willow Court* at [26]). No application was made for a Direction that the Respondents should answer these questions.

41. The Tribunal concludes by observing that this should have been a straightforward application for dispensation. In the absence of any prejudice suffered by the tenants, the outcome was clear.

The Next Steps

42. This Tribunal has determined the application for dispensation. The next step is for the Applicant to notify the County Court which will restore the County Court action F46YM605. It is to be hoped that the parties will be able to settle the outstanding issues in dispute, without legal fees escalating still further.

Judge Robert Latham
11 July 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).