FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00EQ/LDC/2024/0044**
Property	**:**	**Beatty Court, Holland Walk, Nantwich, CW5 5UW**
The Applicant	**:**	**McCarthy & Stone Retirement Lifestyles Limited**
Respondents	**:**	**The residential long leaseholders at the property**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge J.M.Going** **H.Lewis FRICS**
Date of decision	**:**	**24 December 2024**

DECISION

The Decision

The Tribunal has determined that the statutory consultation requirements relating to the works can only reasonably be dispensed subject to the conditions set out in the Schedule hereto. Dispensation will only take effect when such conditions have been satisfactorily complied with.

Preliminary

1. By an Application dated 7 May 2024 ("the Application") the Applicant ("McCarthy & Stone") applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of repairs already undertaken to parts of the property's roof ("the works").

2. The Respondents ("the flat owners") are the owners of the 63 apartments within the property ("Beatty Court").

3. The Tribunal issued Directions on 23 October 2024 confirming that it considered that the Application could be dealt with by a determination on the papers and written submissions, unless any of the parties requested an oral hearing. None have done so. The Directions also set out the timetable for documents to be supplied by McCarthy and Stone, allowing for responses and a reply.

4. References in this decision to McCarthy and Stone include, where appropriate, any sister or connected company within the same group of companies.

The facts and background to the Application

5. The Tribunal has not inspected Beatty Court but has gained valuable insights from the photographs within the papers and from Google's Street view and satellite images.

6. Beatty Court is described in the Application as "a purpose built block of flats comprising of one and two bedroom apartments, age restricted community for the over 60s*(sic)*".

7. It is made up of a series of terraced blocks arranged in a 3- sided horseshoe. The pitched roofs on 2 of the sides are separated in the middle by asphalt covered valleys, which can be accessed through doorways or smoke vents. Most of the 63 apartments are on the ground and first floors.

The works

8. The works were described in the Application as: –

> "Clean down existing asphalt roof covering and remove solar reflective paint to 3no roof locations using 110v abrasive tooling. Supply and install 9mm ply wood to the perimeter of upstands to 3no roof locations. Supply and install new armour plan pvc membrane fully adhered to the existing roof covering and terminate to new ply upstands approx 100m2. Supply and install new armour plan membrane to the full perimeter upstands and hot air weld approx 164LM. Supply and install new rainwater outlets sealing to exiting pipe below. 12no in total. Supply and install new armour plan membrane to the perimeter of 3no smoke vents. Supply and install new armour plan protection walk way layer to newly finished roof. Arrange independent roof electrical test upon completion."

9. The Tribunal is not clear, and nor has it been made explicit by McCarthy and Stone, that this description formed part of a specification sent out to contractors in advance of the works being commissioned, or whether it is the description employed by the chosen contractor ("AES") in response to what may have been a less explicit brief.

The relevant lease provisions

10. Each apartment was let by McCarthy and Stone, as the landlord, to a flat owner, as the tenant, under a long 125- year term "standard apartment lease".

11. The following provisions are particularly relevant to the Application.

12. Clause 2.1 of the Sixth Schedule sets out McCarthy and Stone's obligation to maintain (inter alia) the structure and roofs of Beatty Court with its covenant with the flat owners: –

> "as often as may reasonably required to maintain repair tend cleanse repaint decorate and review the Building and the Estate not otherwise demised by this or any Other Lease including (but without prejudice to the generality of the foregoing: –
>
> 2.1.1 the main structure of the Building including (but not by way of limitation) the foundations roofs and exterior…"

13. The Fourth Schedule sets out the provisions for the calculation collection of the service charge and contingency fees. Each flat owner is obliged to pay a proportion (which differs between the 1 and 2 bedroom apartments) of the McCarthy and Stone's costs "in connection with the repair maintenance decoration renewal improvement and management of the Estate and the Building…"

The chronology

14. The following matters are apparent from the papers and have not been disputed. Opinions may differ as to how they should be interpreted.

In approximately 2009	Beatty Court was built by McCarthy and Stone.
Subsequently	The flats were sold with NHBC Buildmark insurance. NHBC provided the Building Control.
	Mr Hobson a spokesperson for several of the flat owners referred to problems with roof leaks dating back to 2009 stating "The top roof leaks from day one…. we *(were)* assured that it was in hand and would be permanently fixed by the time we moved in. This was 15 years ago. This roof has leaked on and off ever since… The first we heard of the flat roofs being completely new was by letter dated 11 August 2023".
From 6 August 2009 to 1 March 2015	McCarthy and Stone employed Peverel, sometimes referred to as First Port, as its managing agents for Beatty Court.
Since 1 March 2015	McCarthy and Stone Management Services ("MSMS") have been its managing agents, and have paid for various roof surveys in 2015,2016,2017,2019,2021,2022 and 2022. It is understood that a number of those surveys were using drones. The papers also refer to the following payments for repairs:
5 January 2016	An invoice from Cheshire roofing services for £2340.
28 May 2016	A reference in the repairs and maintenance sundries account to roof repairs costing £270.
17 June 2016	An invoice from Cheshire roofing services for £1250.
3 July 2016	An invoice from Cheshire roofing services for £750.
6 November 2017	A reference in the repairs and maintenance sundries account to "communal – roof slip tile" costing £350.
24 January 2018	A reference in the repairs and maintenance sundries account to "communal – roof leak minor" costing £408.
29 November 2019	A reference in the repairs and maintenance sundries account to "communal – roof leak minor" costing £1360.80.
18 October 2020	A reference in the repairs and maintenance sundries account to "communal – roof leak minor" costing £180.

1 September 2021	2 references in the repairs and maintenance sundries account to "communal – roof leak minor", the first being investigations costing £156 and the second to a payment of £465.60.
28 October 2021	Reference in the repairs and maintenance sundries account to "communal – roof leak major" costing £1111.20.
On 27 June 2023	A stock asset survey of Beatty Court containing thumbnail photographs ("the condition report") was prepared by and for MSMS. It referred to instances of "evidence of historic patch repairs" and blocked outlets "evidence of growth in outlet, further evidence no maintenance carried out"
11 August 2023	McCarthy and Stone's operations manager wrote to the flat owners stating (inter alia) "Since the survey reports we have requested quotations for the works by specialist contractors… the commencement of these works will be the 22nd of August, however I am already aware that scaffolding has already been erected ahead of this date. Unfortunately, since the issue with the roof came to my attention earlier this year, it has taken some considerable time to identify the issues with the roof and then to find a suitable specialised contractor to carry out the repair. The repair will be completed under a special dispensation due to the urgency of the matter; you will receive further correspondence from the property operations team in relation to this. In order that I can answer further questions, in relation to other works that are required at Beatty Court, I will be attending a coffee morning on the 24th August…".
22 August 2023	The works began
24 August 2023	"Summary Notes" prepared by McCarthy and Stone of the coffee morning meeting stated inter alia: – "….McCarthy Stone have no records about what work was done at Beatty Court prior to taking over the management services in 2015. • Roof Works: there have been patch repairs on the roof since 2015 and surveys of the roof have been carried out (a breakdown of the dates, actions and costs are on the noticeboard) • There are two areas where the roof was leaking, and specialist contractors were called in to provide a

	quote for the works needed. MSMS received two quotes and the quote that MSMS went with was the cheapest that came in at £61760.40. • The work is being paid for out of the contingency fund. A dispensation to carry out the work without section 20 consultation is being used due to the urgent nature of the work".
31 August 2023	AES issued their interim invoice for 50% of their quoted costs being £30,880.20.
19 September 2023	AES issued their second invoice for a further £30,880.20 being the balance of the "remedial work to roof covering as per quotation".
29 September 2023	AES issued their final invoice for £7,464.85 "to include variation to main roof works. Installed new lead capping to parapet walls, installed new flashing detail to upstand perimeter where needed and applied sealant. Remove damaged roof tiles and replace with new to complete".

The parties' submissions

15. McCarthy and Stone explained, in the letters to the flat owners notifying them that the Application had been made, that "Because the works were urgent, we proceeded to complete the works without consulting with yourselves, although we did write to you all on 11/08/2023 to advise of our intention…. The works were urgent due to water ingress to the building in more than one location, affecting electrical and fire equipment and causing damage to the interior of the building (ceiling tiles, carpets, wallpaper). There were x5 buckets in the corridors to capture water, but these presented a trip hazard. Therefore we proceeded to instruct a resolve of the issues, urgently.".

16. Owners from 31 of the apartments responded individually objecting to the Application. Many designated Mr Hobson as their spokesman. He pointed out that the average age of the flat owners is in the early 80s, that a number who might have responded were limited not just by age but also infirmity, and that in the 15 months since the works were undertaken more than a third will have moved on. Sadly, there was also reference to some having died. He also complained as to the delay in the submitting of the Application.

17. Many of the individual objections were succinct but no less articulate for that. They contained several common themes. It was stated that problems with the roof leaking were evident from very early in the building's life, and ongoing, that they should have been properly rectified under such guarantees as the apartments were sold with, past repairs were inadequate, there were management failures, and the sudden urgency of the works was questioned in the context of the previous months of delay whilst buckets were in place.

18. As but one example, it was said "We were advised that the Section 20 Consultation had not been carried out due to the urgent nature of the works. The roof had been leaking for a number of years and numerous complaints made by Residents, particularly those on the 3+ Floor. Had the cause of the leakage been subjected to a thorough investigation at that time, there would have been no urgency and need to apply for a Section 20 dispensation.

If an application had been submitted in accordance with Section 20, I would have raised concerns regarding the high cost of the work, particularly as the building was only built some 14/15 years ago. I would have asked for a copy of the Specification for the works as submitted to the Contractors to be also made available to Residents, so that they could see the extent of the work and make a judgement on "value for money"".

19. Many referred to heartfelt beliefs that the flat owners should not be responsible or have to pay for problems due to failures by McCarthy and Stone whether as to "the design of the roof or substandard building work carried out at the time the building was erected" or mismanagement thereafter, and concerns that because of the depletion of the contingency fund they are "now facing extremely worrying and substantial increases in our service charge".

20. When replying, McCarthy and Stone said "Had MSMS consulted the works could not have commenced until the statutory Section 20 consultation process was complete. A Section 20 consultation process is subject to many external factors and will take a minimum of 4-5 months.

To arrange for works to be completed as quickly as possible, ensuring the safety of homeowners and staff, whilst also being mindful to reduce the risk of further damage to the property, MSMS obtained a quote and proceeded to complete the works…

The contract was awarded to AES a trusted contractor who have a proven working relationship with MSMS.

Whilst the NHBC provide a 10-year warranty of the building, an end of warranty inspection is not a service they provide. Nor would this work be covered under the buildings insurance policy.

During MSMS' tenure of management of the development, jobs had been raised by the development relating to minor roof works, all of which were attended to and resolved.

MSMS instruct and complete an annual drone survey on all their developments. An asset survey was completed which identified the cause of the leak as poor-maintenance, not a build defect. McCarthy Stone built Beatty Court; however, it was managed by First Port from 6 August 2009 to 1st March 2015 when MSMS then took over management of the development. We are unable to comment on maintenance by First Port".

The Law

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

22. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to go through a 4-stage process: –

- Stage 1: Notice of intention to do the works

Written notice of its intention to carry out qualifying works must be given to each leaseholder and any leaseholders association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought, 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 a nominee identified by any leaseholders or the association.

- Stage 3: Notices about estimates

The Landlord must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

The Landlord must give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the leaseholders' nominee.

23. Section 20ZA(1) states that: –

"Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

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

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

The Tribunal's reasons and conclusions

25. The Tribunal, having convened on 17 December 2024, began with a general review of the papers, to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules [1] permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

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

27. The Tribunal has every sympathy with the flat owners faced with costs of over £69000 for repairs to roofs that were less than 15 years old.

28. The Tribunal's jurisdiction is, however, limited, and its focus must be specific.

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

- The only issue for the Tribunal to decide is whether it is reasonable to dispense with the statutory consultation requirements;
- To grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision;
- The Application does not concern the issue of whether service charges will be reasonable or payable. The Flat Owners retain the ability to challenge the costs of the works under section 27A of the 1985 Act;
- The consultation requirements are limited in their scope and do not tie a landlord to follow any particular course of action suggested by the leaseholders, and nor is there an express requirement for it to have to accept the lowest quotation. As Lord Neuberger commented in *Daejan* "The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are done by, and what amount is to be paid for them.";
- Albeit, as Lord Wilson in his dissenting judgement in the same case also noted "What, however, the requirements recognize is surely the more significant factor that most if not all of that amount is likely to be recoverable from the leaseholder.";
- Experience shows that the consultation requirements inevitably, if fully complied with, take some (a minimum of 2 to 3) months to work through, even in the simplest cases;
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)….".

30. In addition to the facts identified in the timeline the Tribunal has made the following further findings. Where factual matters might be in issue, it applied the standard of proof required in noncriminal proceedings, being the balance of probabilities.

- The flat owners' objections have mostly been made within statements of truth; the facts that they allude to are credible and have not been challenged;
- McCarthy and Stone's responsibility for maintaining and repairing the common and structural parts including the roofs of Beatty Court has been a constant throughout the building's life; Peverel was no more than McCarthy and Stone's appointed managing agent for the first 6

years. McCarthy and Stone's sister company and part of the same group has been its managing agent for the last 9 years;

- "Defect or wants of repair" are defined in clause 1 of the standard apartment lease as "a defect whether latent or patent arising from the result of defective design defective supervision of the construction of the Building or defective materials used during its construction or any repair to be effected by the Landlord under the terms of Paragraph 2 of the Sixth Schedule but shall exclude all wants of repair attributable to breach of the Tenants covenants to repair and maintain".
- McCarthy and Stone is one of the country's largest providers of sheltered housing; it clearly knew the detail of the consultation requirements when writing its letter of 11 August 2023;
- the same cannot be assumed of the flat owners when receiving the letter; understandably, due to age, and sometimes infirmity, they are much more reliant on others;
- the statement in that letter that "the repair will be completed under a special dispensation due to the urgency of the matter" is misleading, possibly disingenuous, insofar as it gave the impression that dispensation had been granted or is automatic;
- the works were begun and completed without proper consultation or any real time allowed for the flat owners to seek independent advice, explore alternative options, or nominate alternative contractors. It is noted that McCarthy and Stone refers to "two quotations obtained" but neither quotation was provided to form part of the application and no further detail made available other than a statement that "the cheapest was accepted".

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

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

33. Nevertheless, as Lord Neuberger explained in Daejan (at paragraph 68 and when referring to the Tribunal to by its former name, the LVT,) "the LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so."

34. Viewing the flat owners' arguments sympathetically, the Tribunal finds that they have made out a case for at least "potential" relevant prejudice, and McCarthy and Stone have not rebutted that. The potential for prejudice is credible because of being deprived of the opportunity of commissioning an independent surveyor's report of the available options and bringing forward nominees to provide estimates. The Tribunal has no doubt that had the flat owners been put on proper and due notice of works which were going in total to cost over £69,000 they would have sought the opportunity to challenge them, taken expert advice as to whether they were necessary, and sought comfort as to whether they were being asked to pay more than they should. They were not given those opportunities. They were faced with a fait accompli, the scaffolding was in place and the contract let before they were given any intimation that this was a major works project. Not only did McCarthy and Stone choose to ignore the consultation requirements, its stated reasons for doing so can only be justified if one condones past inaction. Nor does the Tribunal accept that the works were an emergency or necessarily more urgent than they had been in the previous months of delay. Sadly, the flat owners may have become further prejudiced by the time taken by McCarthy and Stone to properly make its application to the Tribunal, for which there can be no reasonable excuse. The flat owners remain in limbo as regards liability for costs which they consider to be clearly McCarthy and Stone's responsibility.

35. The next task for the Tribunal to consider was how the prejudice or potential prejudice that has been suffered should best be addressed. The Tribunal accepts (as apparently do all the parties) that some works were required. However, the extent of what was necessary or appropriate is uncertain. Moreover, the works completed were of a repairing nature rather than a complete renewal and there is nothing within the application which considers the respective merits of each option. Accordingly, the Tribunal remains unclear as to whether the flat owners were being asked to pay for inappropriate works and/or whether, because of the lack of due and proper consultation, they are being asked to pay more than they should.

36. After careful consideration, the Tribunal found that whilst dispensation could be granted, it would only be reasonable to do so on terms designed to remove the possible prejudice to the flat owners resulting from the consultation requirements not being completed. In other words, by imposing conditions designed to allow the flat owners to be put back in the position, insofar as that is now possible, that they would have been if the statutory consultation process had been allowed to take its course.

37. The Tribunal has therefore determined to grant dispensation but only to be effective when the conditions more particularly referred to in the following schedule have been satisfactorily completed. Such conditions give the flat owners the opportunity to take expert advice, at McCarthy and Stone's expense, to further investigate any relevant prejudice arising from the consultation requirements not having been observed.

38. If the parties need further help in interpreting or implementing those conditions further directions can be sought from the Tribunal.

Concluding comments

39. It is emphasised that this Decision relates solely to the application for dispensation of the consultation requirements relating to the works. Nothing within it should be taken as an indication that the Tribunal considers that any service charge costs resulting from the works will be reasonable or indeed payable or, removes the parties' right to make a further application to the Tribunal under section 27A of the Landlord and Leaseholder Act 1985 in respect of such matters at a later date, should they feel it appropriate.

The Schedule hereto

The preconditions to dispensation

1. McCarthy and Stone is to pay the reasonable costs of a single expert nominated by the flat owners to consider, and make observations on (1) whether it was necessary and appropriate to carry out the works as specified (2) the estimates obtained before the works were commissioned (3) the costs as invoiced for the works (4) any warranties attaching to the works, and (5) whether alternative works, other than those specified, might have been considered to have been equally, if not more, appropriate, and their likely cost at August 2023 (estimated within a reasonable range and on the assumption of having been completed to a reasonable standard and carrying a suitable warranty).

2. All parties are to use their best endeavours to assist in the timely completion of the expert's report. It is expected that an expert should be able to be appointed within 6 weeks of the receipt of this decision and assumed that the flat owners can agree between themselves whom they wish to instruct. If more than one expert is suggested, the majority view (based on each apartment having an equal vote) should prevail. The flat owners should obtain from their selected expert a fee quote, copying that to McCarthy and Stone for information only, and instruct the expert to liaise with McCarthy and Stone over the provision of any necessary information (insofar as that has not already been made available).

3. McCarthy and Stone must facilitate the process by allowing for inspections and providing the expert with any necessary information which is reasonably requested. Such information should include but is not limited to the condition report and the estimates obtained in advance of the works.

4. McCarthy and Stone's costs relating to the Application or satisfying these conditions are not to be included in any costs which might be recoverable by it from the flat owners through future service charges or otherwise.

1. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, as amended.