FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	HAV/00ML/LDC/2024/0627/EMG
Property	**:**	49 & 49a Stanford Road, Brighton BN1 5DH
Applicant	**:**	Ann McCarthy King
Representative	**:**	Mr Thomas of counsel instructed by Edward Harte Solicitors
Respondent	**:**	Ann McCarthy King (1) Jack Fox & Beth Hawley (2)
Representative	**:**	----
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member	**:**	Judge J Dobson Mr M J F Donaldson FRICS Ms T Wong
Date of Hearing	**:**	7th January 2025
Date of Decision	**:**	28th January 2025

DECISION

Summary of the Decision

1. **The Applicant is granted dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act,**

2. **The Tribunal has made no determination on whether the costs of the works are reasonable or payable.**

3. **The Tribunal fees shall be borne by the Applicant.**

The application and Background

4. The Applicant applied by application received on 2024 for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") from the consultation requirements imposed by Section 20 of the Act in respect of works in relation to 49 & 49a Stanford Road, Brighton BN1 5DH ("the Property").

5. The Property comprises an end Victorian terrace building comprised of one basement flat and one upper maisonette.

6. The Applicant is the freeholder of the Property. The Respondent lessees hold leases of dwellings within the Property. As will be identified from the parties, the leaseholder, if any, of the upper maisonette is the same person who is the freeholder- hence as to whether strictly the leasehold title of the upper maisonette continues rather than having merged into the freehold title is at least not certain. However, nothing turns on that in this case.

7. The Applicant explains in the application that there are two parts to the work involved in the application. Firstly, there is also work undertaken over a period of time which relates broadly to investigations in respect of damp experienced in the basement flat. Secondly, there is work to deal with rainwater entering the upper maisonette through a gap between the rear annex and the main roof, indicated to be in significant quantities. Scaffolding is said to be in situ, erected to inspect chimney pots as part of the first set of works and to which further scaffolding could be attached to facilitate the second set.

8. It is said that the upper maisonette leaseholder is responsible for two-thirds of the maintenance costs and the basement flat leaseholder is responsible for the other one third.

The history of the case

9. The Tribunal gave Directions on 15th November 2024, setting out the nature of the application and explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements, hence the question is not one of whether any

service charge costs are reasonable or payable. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any. A lot of detail of the application and stated reasons for it was given in the Directions, perhaps in consequence of the two different sets of work and lengthy narrative in the explanation making it difficult to distil the essence of the application more concisely.

10. The Directions [189- 196] originally listed the application for determination on the papers but as the application was objected to by the lessees of Flat49A, the Tribunal determined that a hearing should be listed, provided for in Directions dated 4th December 2024.

11. The Applicant provided a bundle for the hearing, comprising 250 pages. The bundle contained principally the application [3-14], a copy of each lease [16- 52]; the responses of the Respondents [67- 82] and the reply to those of the Applicant at some length [83- 198]. Relevant invoices for works were included [247- 250] and there is a surveyor's report in respect of the damp investigated in 2023- see below. Stage 1 consultation notices served were also contained in the bundle.

12. Whilst the Tribunal makes it clear that it has read the bundle, the Tribunal does not refer to the majority of the documents in this Decision specifically, it being unnecessary to do so. Various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case and many of the same points arise in more than one document. The Decision seeks to focus solely on the key issues and to the extent necessary in light of the issues raised and then to explain the conclusion arrived at. It should not be mistakenly assumed that the Tribunal has ignored matters not specifically referred to below or left them out of account. Where the Tribunal refers to specific pages from the bundle above and below, it does so by numbers in square brackets [ ].

The Law

13. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations contain the relevant provisions.

14. Section 20(1) states that:

> "Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of the tenants are limited in accordance with subsection (6) or (7) unless the consultation requirements have been either –
> a) complied with in relation to the works or agreement, or
> b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate Tribunal]."

15. Section 20(2) defines "relevant contribution" as being, in effect, the amount due under the service charge provisions in respect of the works or under the agreement.

16. Section 20 (5) adds further in relation to the amounts in consequence of which the section will apply.

17. Section 20 (6) and (7) provide that where amounts have been set, the contributions of a lessee are limited to that amount.

18. The Service Charges (Consultation Requirements) (England) Regulations 2003 (the "Regulations") identify at regulation 6 that:

> "the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250".

19. Section 20ZA (4) of the Act provides that "the consultation requirements" will also be prescribed by regulations. The requirement essentially involves a series of notices and information about the proposed works, the outcome of a tender process and the decision who to instruct, as well as providing, importantly, for lessees to be able to name contractors from whom quotes should be sought.

20. An application for dispensation may be made prospectively or retrospectively.

21. Section 20ZA (1) provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

22. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14 [211- 219].

23. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

24. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

25. Where the extent, quality and cost of the works (or services) were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in

precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

26. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

27. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

28. If dispensation is granted, that may be on terms. That is to say that dispensation is granted but only if the landlord accepts- and fulfils- appropriate conditions. Specific reference was made to costs incurred by the lessees, including legal advice about the application made.

29. There have been subsequent decisions of the higher courts and tribunals of assistance in the application of the decision in *Daejan* but none are relied upon or therefore require specific mention in this Decision.

30. More generally, the Tribunal considers that the case authorities demonstrate that the Tribunal has a very wide discretion to, if it considers it appropriate, impose whatever terms and conditions are required to meet the justice of the particular case- in *Daejan* it was said "on such terms as it thinks fit- provided, of course, that any such terms are appropriate in their nature and their effect".

31. The matters in respect of dispensation necessarily apply only if a requirement for a consultation has arisen and no consultation or no compliant one was carried out.

The Leases

32. The leases of both dwellings have been provided, although the Tribunal specifically refers, insofar as necessary, to that for the 2nd Respondents' property dated 28th January 1983 ("the Lease"). The Tribunal understands that the lease of the other dwelling is in the same or substantively the same terms. In the absence of any indication that the terms of any other of the leases differ in any material manner, the Tribunal has only considered the Lease.

33. In general terms, the Lease [17- 42] covers the sorts of matters which would be expected, although reflecting drafting style at the time rather than a more recent one. There is no reason to set the provisions out at length where no dispute arises about them and the only aspect broadly relevant to this application is that the Applicant has the relevant repairing obligations.

34. Suffice to say that the Applicant has various obligations under the Lease, principally set out in clause 6. (D, including repair and maintenance. The 2nd Respondents are required to contribute to the costs and expenses of the Applicant complying with its obligations pursuant to clause 4. (B) and Schedule. The works involved in these proceedings appear to fall within the responsibility of the Applicant and to be able to be chargeable as service charges.

The Hearing

35. The hearing was conducted fully remotely as video proceedings.

36. The Applicant was represented by Mr Thomas of counsel. He was accompanied by Ms McCarthy King. Mr Fox attended on behalf of the two 2nd Respondents (including himself).

37. In the event, the hearing was relatively short. Mr Fox explained that Ms Hawley and himself were content in respect of the particular works. He explained that they had approved all of the works requested by the Applicant. His principal concern was that he did not wish to give up rights to be consulted in relation to any future works to the Property and about any additional costs. The 2nd Respondents also perceived that the cost of the surveyor's report was included in the major works for which dispensation was sought. Mr Fox was concerned at the cost of that.

38. Mr Fox suggested that there was no actual need for dispensation in relation to the works involved in this application. However, irrespective of agreement, there is in general such a need given that the statutory provision limits the amount which can be recovered as service charges unless dispensation is granted. Mr Thomas identified that may potentially be avoidable by a formal consent. (There may also be an argument that if a greater sum is demanded and is paid, thereby admitting or accepting that sum to be due, then the lessee cannot later argue for a limit. However, the outcome of that would be uncertain and there is little to be said for a landlord taking the chance.)

39. The position taken by Mr Fox at the hearing was along similar lines to the written objections. Those explained agreement to the urgent works, did not raise prejudice about any of the works (although said not all works had been urgent and suggested that some could have been the subject of consultation) and were concerned about consultation regarding future works.

40. It was also established that the works had all been completed, those in respect of the gap and the chimney pots since the date of the application. The potential difficulty with render setting properly described in the application was no longer relevant.

41. The Tribunal therefore considers that a decision regarding dispensation is required but very much set against the background of the above and so need not be lengthy.

Consideration

42. The key question for the Tribunal, as explained above, is whether the Respondents could demonstrate prejudice arising from the lack of consultation.

43. As Mr Thomas pointed out, the Respondents did not allege prejudice, so none was identifiable. The Applicant's paper reply to the 2nd Respondent's paper objection had suggested prejudice would have been caused by delay, by way of potential additional time and cost, but that does not amount to prejudice for the purpose of the Tribunal's consideration here and need not be dwelt on.

44. Given that and given the fact that the parties are aware of the works themselves and, to any extent relevant, the lengthy description of them in the application and the papers generally, the Tribunal sees no merit in setting them out in detail.

45. It is necessary, the Tribunal considers, to identify the two sets of work to which the Decision relates, so that it can be clear that dispensation has been granted in respect of those. Further and given the 2nd Respondents' concerns as to other works, so that the parties are clear about the limits of the dispensation and that consultation or separate dispensation will be required in respect of any other major works proposed or undertaken.

46. The Tribunal considers that the two sets of works comprised in these proceedings can be adequately summarised as follows:

    1) Works commencing in late 2023 to investigate and attend to damp to the chimney breast of the basement flat 49A Stanford Road, including inspection of a drain by CCTV) and work to a drain (in which for example mud was identified) and also scaffolding to enable work to repair a chimney stack, including by lime rendering, and to remove and replace chimney pots;

    2) Works in or about October 2024 to investigate and attend to a recently commenced water leak into the upper maisonette 49 Stanford Road, in a different location to the chimney and including additional scaffolding.

47. The Tribunal makes clear, as it did at the hearing, that the surveyor's report relates to a service and not to works. The report was obtained in connection with the undertaking of works, but it does not form part of those works. Any matters related to the cost of that survey may form part of any challenge to costs incurred and the service charges arising from those if and as appropriate.

48. It also necessarily follows that other works which fall outside of 1) and 2) above are not covered by this Decision. That exclusion covers inspections with a camera- and if specifically related, also clearing silt- which it said in

the application will be the subject of a separate consultation and not covered by this application.

49. The Tribunal does consider that the approach taken by the Applicant is a little imperfect. It is unusual for there to be dispensation sought in one application in relation to two quite different sets of work for distinct problems arising several months apart. The Tribunal can understand a query from the 2nd Respondents at an application in part related to works undertaken several months earlier. The problem is not alleviated by the manner in which the application was presented with a large amount of tightly packed detail all in capital letters, including a narrative, which if anything goes to obscure the works in question.

50. In that regard, there was merit in the point made by Mr Fox that the application refers to urgent work but then includes work undertaken a significant time ago. Hence, insofar as it is contended on behalf of the Applicant that urgency is relevant to dispensation, it cannot relate to that part of the work. That said, although the water ingress into the upper maisonette is mentioned first in the box in which the Applicant explains why dispensation is sought, there does go on to be mention of the other elements of work, if not necessarily in clear terms as to why those require dispensation.

51. The Tribunal observes that urgency often is relevant. It is often the need for urgent work which precludes formal consultation because of the timescale for that. However, urgency or lack of it is not the be all and end all. The question remains one of whether prejudice has been demonstrated as arising from the absence of formal consultation. Nevertheless, it must be right to say any urgency, at least for the first set of works, long since passed.

52. For the avoidance of doubt, the Tribunal determined that the Respondents had not demonstrated any prejudice by the lack of consultation.

53. The Tribunal considered whether any condition ought to be imposed, acknowledging the ability of the Tribunal to impose conditions and the appropriateness in some instances of doing so. However, the Tribunal could not identify anything which the imposition of conditions on the grant of dispensation should address.

54. In light of the above, the application for dispensation is granted. The Tribunal identifies no reason for imposing any conditions and hence the dispensation is unconditional.

55. This Decision is confined to determination, firstly, of the issue of potential dispensation from the consultation requirements and, secondly, in respect of the particular major works at 1) and 2) above.

56. The Tribunal has made no determination on whether the costs are payable or reasonable. If a Lessee wishes to challenge the service charges payable, a

separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

57. The Tribunal has made no decision at all in relation to any works which do not fall with the specific scope of this application. Any such works in the future require the consultation process to be followed unless an application is made to dispense with consultation and is granted.

58. Any other issues, if any, between the parties as to other causes of damp to the basement flat or as to works undertaken to that flat also fall well outside of this application and Decision.

Tribunal fees

59. The application for a grant of dispensation from consultation involves a landlord seeking an indulgence. It asks to be permitted not to do something it ought otherwise to do. The landlord, including this Applicant, has no (or at least relatively little) alternative but to apply.

60. It might be said that the hearing fee was a consequence of there being objections by the active Respondents, but it was the Tribunal that made the decision to list a hearing. At first blush, the Tribunal considered that insufficient to alter the appropriate approach. It is also of some relevance that, as explained above, and whether in consequence of seeking to cover two different sets of work to address problems commencing at different times or otherwise the manner in which the application form is completed, the application is not advanced as clearly as it might have been.

61. The Tribunal indicated its anticipated approach being that the fees would be borne by the Applicant and enabled Mr Thomas to obtain instructions. He had no representations to make.

62. The Tribunal is content that the appropriate approach is for the Applicant to bear the fees involved in the application. The Tribunal so orders.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.gov.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.