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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LDC/2017/0008**
Property	:	**38 Hemstal Road, London NW6 2AJ**
Applicant	:	**Ian Humberstone Limited**
Representative	:	**Mr Paul Henlen - Chestnut Tree Property Management Limited (managing agents)**
Respondent	:	**Mr Robanne Van Wijk and Ms Suzanne McGettigan (Lower Ground Floor Flat)** **Ms Michaela Wenkert and Origin Housing Limited (Raised Ground Floor Flat)** **Mr Ben Hartman (First Floor Flat)** **Ms Cecilia Pierantoni – Second Floor Flat**
Representative	:	**Ms Wenkert and Ms Pierantoni in person and Mr Stephen Chapman on behalf of Origin Housing Limited**
Type of Application	:	**To dispense with the requirement to consult leaseholders about major works**
Tribunal Members	:	**Mr J P Donegan (Tribunal Judge)** **Mr S Mason FRICS (Professional Member)**
Date and venue of Hearing	:	**15 March 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**10 April 2017**

DECISION

Decisions of the Tribunal

The tribunal grants dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') in respect of roof repairs undertaken to 38 Hemstal Road, London NW6 2AJ ('the Building') between June and August 2016 ('the Qualifying Works'). No conditions are imposed on the grant of dispensation.

The application

1. The applicant seeks retrospective dispensation from the requirement to consult with leaseholders regarding the Qualifying Works.

2. On 24 January 2017 the tribunal received an application under section 20ZA of the 1985 Act. Directions were issued on 27 January. Paragraph 5 of the directions provided:

    - *Those tenants who oppose the application shall by **13 February 2017: -***

    - *Complete the attached reply form and send it to the tribunal; and*

    - *Send to the landlord a statement in response to the application with a copy of the reply form. They should send with their statement copies of any documents upon which they wish to rely.*

    - *The tribunal will be entitled to consider that those tenants who do not respond to the directions support the application for dispensation."*

3. Two of the respondents, Ms Wenkert and Ms Pierantoni, submitted a joint reply form opposing the application.

4. The relevant legal provisions are set out in the Appendix to this decision.

The background

5. The applicant is the freeholder of the Building, which is a converted four-storey end of terrace house. It is divided into four flats that are all let on long leases. The Building is managed by Chestnut Tree Property Management Limited ('CTPML').

6. The respondents are the long leaseholders of the four flats at the Building. The Raised Ground Floor Flat is subject to two leases. Origin

Housing Limited ('Origin') holds a head-lease and Ms Wenkert holds a sub-lease. Origin was not named as a respondent in the original application and only learned of the application after the directions were issued. The tribunal formally adds Origin as a respondent, pursuant to rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules').

7. There have been a number of leaks in the Second Floor Flat, emanating from the roof above. Repairs were undertaken by Force Roofing Limited ('FRL') in September 2014 ('the 2014 Repairs'), following a section 20 consultation. These involved recovering a flat section at the apex of the roof, in felt. This section was originally covered with lead but had been cut into to create a roof light. By the time of the 2014 Repairs the section was covered in felt.

8. A further leak occurred in May 2016 and CTPML was notified on or about 10 May. FRL investigated the problem and erected a scaffold tower on 14 May 2016. They advised that further repairs were required to the roof. Ms Pierantoni expressed dissatisfaction with FRL and suggested the involvement of alternative contractors in emails to CTPML dated 19 and 20 May 2016.

9. FRL raised an invoice on 28 May 2016 for the sum of £1,000 plus VAT (total £1,200). The typed narrative reads "*Tower Scaffold, 1 x roofer visit*" and there is also a handwritten note suggesting that £300 had been allocated to previous work in December 2015 and £900 to the scaffold tower.

10. CTPML obtained two quotes for recovering the flat section of the roof with three layers of felt; one from J Davis and one from KLF Maintenance & Gardening Services ('KLF'). KLF recommended this area be stripped back and replaced with lead, to prevent further water pooling. They provided an alternative quote for this work of £1,150, which was accepted. Their quote for recovering with felt was £750.

11. KLF looked for other potential causes of the leaks, whilst the scaffold tower was in place. They identified problems with the lead flashing on the apex and with the chimney flaunching. They provided a further quote for repairing these areas, which CTPML accepted. An extension to the scaffold was required for the chimney repairs. The cost of the apex repairs was £850 and the cost of the chimney repairs was £375. The cost of the scaffold extension was £1,346 (including VAT), which was more than CTPML anticipated. They have only billed £500 of this sum to the service charge account.

12. Before instructing KLF, CTPML obtained a separate quote for a new roof in the sum of £6,600. They decided to proceed with the Qualifying Works, as this was a lower cost option. There was a slightl delay in undertaking the repairs due to bad weather. KLF's invoices for the

work to the flat roof and apex were dated 28 June 2016 and their invoice for the chimney repair was dated 01 August 2016.

13. The various roof repairs that make up the Qualifying Works were undertaken in June 2016. The total sum billed to the service charge account was £3,775, which is broken down as follows:

• Scaffold tower	£900
• Replace flat roof covering with lead	£1,150
• Repairs to roof apex	£850
• Scaffold extension for chimney repairs	£500
• Chimney repairs	£375
	£3,775

This figure exceeds the statutory cap under section 20 of the 1985 Act and. The applicant should have consulted the respondents before arranging the Qualifying Works and now seeks retrospective dispensation under section 20ZA.

The hearing

14. The application was heard on 15 March 2017. The applicant was represented by Mr Henlen of CTPML. Ms Pierantoni and Ms Wenkert appeared in person. Mr Chapman appeared on behalf of Origin.

15. The tribunal was supplied with two hearing bundles; one from the applicant and one from Ms Pierantoni and Ms Wenkert. The applicant's bundle contained copies of the application, directions, statements of case, email correspondence, repair invoices and leases. The second bundle contained joint statements from Ms Pieratoni and Ms Wenkert and various supporting documents, including photographs of the roof.

16. The tribunal considered all of the documents in the bundles when deciding the application, as well as the parties' oral representations. It also had regard to the Supreme Court's decision in ***Daejan Investments Limited v Benson and others [2013] UKSC 54***, which it summarised to the parties during the hearing.

The issues

17. The sole issue to be determined by the tribunal is whether to grant dispensation under section 20ZA, which turns on whether it is reasonable to dispense with the section 20 consultation requirements. The tribunal is not determining whether the cost of the Qualifying Works is payable by the respondents. Equally it is not deciding whether the 2014 Repairs were undertaken to a reasonable standard.

Evidence and submissions

18. Mr Henlen relied on the applicant's statement of case dated 28 February 2017 and also made brief, oral submissions. He considered the Qualifying Works to be urgent, as water was seen dripping through the ceiling spotlights in Second Floor Flat. This was potentially hazardous and Ms Pierantoni had to use buckets to collect the water.

19. The applicant decided the Qualifying Works needed to be undertaken immediately, rather than wait for a full section 20 consultation that could take 3 months or more. There was some consultation, as the respondents were informed of the findings of the roof inspections and provided with copies of the quotes. They specifically requested the appointment of alternative contractors, due to their dissatisfaction with FRL.

20. KLF advised that the felt on the flat roof section was laid on top of the original leadwork, which had a ridge in it. This allowed water to pool, which may have contributed to the leaks. KLF recommended that stripping off the felt and replacing the original lead would allow an inspection of the underlying timber and provide a longer term repair.

21. The roof is old and difficult to access, due to the height of the Building. It can only be safely inspected from scaffolding, which means that regular inspections are not possible.

22. Mr Chapman submitted that CTPML should have undertaken a temporary repair to the roof in May/June 2016, to prevent the leaks and then embarked on a full section 20 consultation before undertaking more extensive work. He suggested the respondents had been prejudiced by the lack of consultation, as they were given no opportunity to look at other repair options. Had there been full consultation, they might have suggested more extensive repairs.

23. Ms Pierantoni and Ms Wenkert relied on their joint statements dated 17 February and 03 March 2017. The first statement gave brief details of the various leaks and suggested the applicant and CTPML were negligent, as there had been problems with the roof since 2012 and a series of failed repairs.

24. The second statement was more detailed and addressed the management of the Building, as well as providing a chronology of the previous roof repairs. Ms Pierantoni and Ms Wenkert suggested alternative means of accessing the roof and referred to the general poor condition of the roof. They alleged that the Qualifying Works arose due to the poor quality of the 2014 Repairs. They also suggested there was sufficient time for a full section 20 consultation, as the Qualifying Works were not completed until the end of August 2016.

25. Ms Pierantoni and Ms Wenkert also relayed a conversation with 'Gus' of KLF on 08 September 2016. He told them he had inspected the roof several months before and had provided a report to the applicant *"...advising that the previous work had been very badly done, and that everything would need redoing and that it would be advisable to replace the roof".*

26. In her oral submissions, Ms Wenkert said there was very little consultation before the Qualifying Works. She explained the respondents had obtained advice from an independent roofing contractor. His findings were relayed to CTPML in an email from Suzanne McGettigan of the Ground Floor Flat dated 21 June 2016. This included the following paragraph:

"Our roofer will come on Thursday and provide a formal repair quote and he might have a window to do this within the next 8 to 10 days. We collectively do not want to incur any costs from a sub-par contractor and therefore, because no works have even started (thus contrary to any 'emergency' action), would like to appoint our own roofer for the repairs."

The email did not give the name of the respondent's roofing contractor and the tribunal was not supplied with a copy of his/her report. Ms Wenkert complained that CTPML had dismissed the contractor's opinion.

27. As to prejudice, Ms Wenkert also suggested that full consultation might have resulted in more extensive repairs. She submitted that CTPML should have obtained a second opinion on the condition on the roof, which would have enabled the respondents to weigh up the various repair options. She described the Qualifying Works as a *"sticking plaster"* and suggested they had been ineffective as there had been a very recent leak in the Second Floor Flat.

28. The tribunal pointed out that if it granted dispensation it could impose conditions. Ms Wenkert suggested the applicant should be required to obtain a full survey on the condition of the roof, at its expense.

29. Ms Pierantoni reiterated the history of leaks since 2012, which have affected her enjoyment of her flat. Given this fact, she would have been willing to *"pay a bit more for a long term solution and avoid further leaks"*. The absence of a formal consultation meant she was not given this option and had been prejudiced.

30. Ms Pierantoni confirmed there had been a further problem with water coming into her flat that week.

31. In response, Mr Henlen pointed out there had been no roof leaks between the 2014 Repairs and May 2016. As far as he was aware, the

Qualifying Works had been successful. The recent water ingress is being investigated and might be due to condensation.

32. Mr Henlen opposed Ms Wenkert's suggestion of a full survey. He pointed out that the Qualifying Works only related to part of the roof and other parts of the roof had not been inspected. Scaffolding would be required for a surveyor to access the entire roof, which would be prohibitively expensive.

The tribunal's decision

33. The tribunal is satisfied that it is reasonable to dispense with the consultation requirements in section 20 of the 1985 Act.

34. The tribunal grants retrospective dispensation from these consultation requirements, for the Qualifying Works and does not impose any conditions on the grant of dispensation.

Reasons for the tribunal's decision

35. At paragraph 44 of the ***Daejan*** decision, Lord Neuberger identified the purpose of the consultation requirements "*...is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate..*". He went onto say that the tribunal's focus when determining a dispensation application "*..must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements*".

36. At paragraph 54, Lord Neuberger stated that the tribunal was not constrained when exercising its jurisdiction under section 20ZA and that "*..it has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect*".

37. The final two sentences of paragraph 67 read:

"As Lord Sumption said during the argument, if the 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 LVT 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 and LVT would be likely to accept that the tenants had suffered prejudice."

38. The key issue in this case is whether the respondents have been prejudiced by applicant's failure to undertake a full section 20 consultation before embarking on the Qualifying Works. The tribunal is not deciding whether the applicant has breached the repairing obligations in the leases or whether the 2014 Repairs were undertaken to a reasonable standard. Equally it is not deciding whether the Qualifying Works were reasonably incurred. These issues could all be considered on a separate application under section 27A of the 1985 Act.

39. There is some merit in the respondents' argument that they lost the opportunity to consider alternative repair options. Had there been a full consultation they could reasonably have requested a roof survey. They could then have considered the repair options and might have proposed more extensive (and expensive) repairs. However this has to be balanced against the urgent need for the repairs. The tribunal agrees with Mr Henlen. This was an emergency, as water was leaking into the second floor flat and being collected in buckets. Not only was this very unpleasant for Ms Pierantoni, it was also hazardous.

40. The email correspondence reveals that Ms Pierantoni, quite understandably, was pressing for urgent repairs to the roof. It was reasonable for the applicant to commence the repairs in June 2016, without undertaking a full section 20 consultation. Such a consultation would have taken three months or more. Put simply, the repairs could not wait that long. It was for the applicant to arrange the repairs, in accordance with the leases, rather than the respondents. It was reasonable for the applicant to instruct KLF rather than allow the respondents to instruct their preferred contractor.

41. The applicant could have sought prospective dispensation from the tribunal after the various quotes were obtained but before embarking on the Qualifying Works. This would also have led to delays. Given the urgent need for the repairs, it was reasonable to press on with the repairs.

42. There was partial consultation, as evidenced by the email correspondence in the bundles. CTPML provided the respondents with details of the proposed repairs and acted on their request to use alternative contractors. It obtained two quotes for the initial scheme of repairs and copied the various quotes to the respondents.

43. The respondents have not established any material prejudice arising from the failure to comply with the section 20 requirements. They were aware of the proposed works and made representations to CTPML. They obtained advice from an independent roofing contractor and could have sought their own survey, independently of the managing agents, once the scaffold tower was erected in May 2016.

44. Having regard to the factors set out above, the tribunal concluded that dispensation should be granted. It then considered whether any conditions should be imposed. Initially it was attracted to Ms Wenkert's suggestion of a full survey. Arguably the applicant should have commissioned a survey once the scaffold tower was erected. This could have established the condition of the roof and the various repair options. However the cost of such a survey would have been substantial and might have been payable by the respondents, via their service charges, depending on the wording of the leases. Given the urgent need for the repairs and the relatively modest cost of the Qualifying Works, it was reasonable for the applicant to proceed without a survey.

45. The tribunal does not impose any conditions on the grant of dispensation. However the applicant may wish to commission a roof survey now, given the age of the roof, the history of leaks, the absence of regular inspections and the limits of KLF's inspection. The entire roof should be checked to ascertain the condition and whether further repairs are required. If the applicant decides to follow this suggestion then he should liaise with the respondents before instructing a surveyor. In particular, the parties should discuss funding the cost of the survey and how best to access the roof.

46. Nothing in this decision prevents the respondents from seeking a determination of their liability to pay for the Qualifying Works or the 2014 Repairs, pursuant to section 27A of the 1985 Act. They may wish to seek independent legal advice upon the merits of such an application and their other concerns, relating to the management of the Building.

Name: Tribunal Judge Donegan **Date:** 10 April 2017

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) 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 .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in

accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all of 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.

....