FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/31UE/LDC/2019/0012**
Property	**:**	**Westside Court, West Street, Earl Shilton LE9 7DZ**
Applicants	**:**	**Westside Court Management Company**
Representative	**:**	**Butlin Property Services Ltd**
Respondents	**:**	**The Long Leaseholders of Westside Court**
Date of Application	**:**	**28th October 2019**
Type of Application	**:**	**To dispense with the consultation requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA**
Tribunal	**:**	**Judge JR Morris** **Mr V Ward, BSc (Hons) FRICS**
Date of Directions	**:**	**31st October 2019**
Date of Decision	**:**	**17th December 2019**

DECISION

Decision

1. The Tribunal determines that it is reasonable to dispense with all the consultation requirements referred to in section 20 of the Landlord and Tenant Act 1985 as set out in Schedule 4 Part 2 of the Service Charges (Consultation requirements) (England) Regulations 2003.

Reasons

The Application

2. An Application was made on 28th October 2019, for dispensation from the section 20 consultation requirements in respect of remedying ground that had sunk adjacent to the foundations of the Property due to water ingress and the discharging of raw sewage into the void from drainage pipes which had been displaced due to the ground movement. The Tribunal Office informed all Respondent Leaseholders of the Application (copies were provided) and Directions were issued on 31st October 2019.

3. The Directions at paragraph 5 required the Applicants to send a copy of the Application, a statement explaining the purpose of the Application and the reason why dispensation was sought and copies of any specialist reports and quotations in respect of the proposed works to the Respondents by 15th November 2019. There was some delay in the Applicant's Representative complying with the Directions but it was confirmed that the information was sent out on 21st November 2019.

4. The Directions stated that the Application would be determined on or after 9th December 2019 based on written representations and following an inspection, unless either party made a request for an oral hearing by 29th November 2019. No request was received.

5. The Directions required the Leaseholders who wished to make representations regarding the Application to do so by 29th November 2019 with one copy to the Applicant and three copies to the Tribunal. No representations were received.

The Documentary Evidence

6. At the time of the Inspection and Decision the Tribunal was in receipt of the following documents:

    1. The Application Form setting out the work to be undertaken and the reasons for the application which outlined matters as follows:
        - Sink hole appeared and drainage and sewage pipes have dropped. Water and sewage from all the flats is flowing into the ground below two flat windows which is affecting the integrity of the foundations and causing a health and safety risk.

- Contractor appointed on 21st October 201. Area cordoned off all sunken slabs etc removed and pipework excavated. 6 meters of pipe replaced and area re-instated.
- The full survey was sent to all the directors and the Leaseholders were advised of the severity of the situation and the cost.

2. A list of the 12 long leaseholders was attached to the Application From;

3. A copy of a Lease for flat 2, which is understood to be common to all the Long Leaseholders, was provided dated 14th May 2004 between Jelson Limited (Landlord) (1) Westside Court Management Limited (Management Company) (2) and David Garry Mullahy (Tenant) (3) for a term of 999 years from 1st January 2004 confirming the Respondents are long leaseholders. The provisions of the Lease also included the obligation on the Landlord and Management Company to repair the drains under Schedule 5 of the Lease and the obligation of the Leaseholders under clauses 3 and 6.8 of the Lease to pay a service charge which includes the cost of the repairs expended by the Landlord and Management Company.

4. Copies of emails exchanged between the Applicant's Representative and the Applicant's Contractor, Drainclear (Leicester) Ltd as follows:
   a. Email from Applicant's Representative to Drainclear (Leicester) Ltd dated 14th August 2019 identifying the problem and requesting a report and quote to remedy;
   b. Email from Drainclear (Leicester) Ltd to Applicant's Representative dated 28th August 2019 advising CCTV investigation at cost of £540.00 plus VAT;
   c. Email from Applicant's Representative to Drainclear (Leicester) Ltd dated 29th August 2019 noting investigation approved by Applicant's Directors;
   d. Email from Drainclear (Leicester) Ltd to Applicant's Representative dated 20th September 2019 Report and Estimate provided, including schedule of materials, dated 16th September 2019 and photograph.

7. The Report and Estimate stated as follows:
"Following high pressure jetting and CCTV surveys it was found that the drains are combined storm and foul. There is a 6 inch and 4 inch pipe coming into the inspection chamber. Both pipes have dropped and need replacing. The engineers checked all the other nearby storm lines and they are all running into the main drain and through the inspection chamber. It was recommended that the pipes are excavated and replaced at a cost of £3,750.00 plus VAT."

8. A Statement in the Application Form and on a separate sheet giving Reasons for the work was provided as follows.

9. It was said that in normal circumstances the cost of the work would qualify for a statutory consultation process before work could proceed as required by section 20 of the Landlord and Tenant Act 1985. Dispensation is requested because:
    1) There was a clear and present danger to the stability of the building if remedial work to redress the growing sink hole immediately adjacent to the foundations was to be delayed and would place residents at increasing risk.
    2) Continuing discharge of raw sewage into the developing void/cavity had created a health and safety risk of infection which was escalating the longer commencement of work was delayed.
    3) It had been competently established that the remedial measures quoted for would resolve the issues if promptly applied.
    4) The cost of the proposed measures could be met by the existing reserve fund.
    5) All Leaseholders received notification as investigations proceeded advising on the avoidance of potential risks as well as the intention to proceed with the remedial measures.
    6) No leaseholder was prejudiced by not following the consultation process in that the result would have been the same had section 20 been applied. The delay caused by the process would have led to the situation worsening.
    7) All Leaseholders are members of Westside Court Management Company Limited (the Respondent) in which the freehold of Westside Court is vested therefore no individual Leaseholder is financially prejudiced as a consequence of not complying with the section 20 procedure.

The Inspection

10. The Tribunal inspected the Property on 9th December 2019. Notwithstanding the parties having been informed of the date and time of the inspection no representatives were present.

11. The Development comprises 12 self-contained two- and three-bedroom flats held on long leases. Access to the Development is via a controlled vehicular access gate and an uncontrolled pedestrian gate to a car park. Around the car park is a three-storey block of 10 flats with 7 garages and 2 two storey annexes, one attached to the main block and the other is a detached block of a flat over 3 garages. The buildings are constructed of brick under a tile roof with upvc windows and doors and rainwater goods. There is a door entry system to the common parts of the main block.

12. The Tribunal identified the site of the sink hole, which has now been re-instated, from the photograph provided. The Tribunal noted the proximity of the hole to the foundations of the building and to the ground floor flats. It also noted the position of the inspection chamber to which the sewage and storm water pipes were connected. It also noted the position of the eco-drains for surface water.

The Law

13. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.

14. The consultation provisions appropriate to the present case are set out in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The Procedure in the Regulations is summarised in Annex 2 of this Decision and Reasons.

15. Section 20ZA allows a Landlord to seek dispensation from these requirements, as set out Annex 2 of this Decision and Reasons and this is an Application for such dispensation.

Determination

16. In determining whether or not dispensation should be given and the extent of such dispensation the Tribunal took into account the decision in *Daejan Investments v Benson* [2013] UKSC 14. Lord Justice Gross said that "*significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion under s.20ZA(1)*".

17. In addition, Lord Neuberger said that the main issue and often the only issue is whether the tenants have been prejudiced by the failure to comply:
Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) 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. [44]

18. From the Contractors' Report and the inspection the Tribunal found that the remedial works were urgent and that any delay to repair the storm water and drainage pipes and fill the hole caused by the escape of water, was a health and safety risk to residents and Leaseholders and may result in damage to a part of the foundations of the building. The Tribunal found that a qualified and approved contractor was engaged to carry out the work.

19. The Tribunal also found that the Leaseholders had been informed of the works and their cost and that no objections had been received to the work being carried out by the contractors engaged. The Tribunal found that there was no significant prejudice to the leaseholders in the consultation procedure not having been followed.

20. Whether or not the leaseholders are members of the Respondent Company and whether or not the cost of the works can be met by the reserve fund are not matters to which the Tribunal can have regard when deciding whether or not to grant dispensation.

21. In addition, the Tribunal found that the Leaseholders were not prejudiced on this occasion because of the urgency of the work, the specific nature of the repairs and the limited number of specialist water company approved contractors able to carry out foul drainage work. Other works which are not as urgent, where the extent of the work and methods of carrying it out are less specific and the contractors' quotations may be more varied, would *prima facie* require the consultation procedure to be followed as individual Leaseholders would be prejudiced if not given the opportunity to contribute to the process. On these latter occasions the result would not necessarily be the same whether or not section 20 had been applied.

22. This is not an application to determine the reasonableness of the works or their cost. If, when the service charge demands in respect of these works are sent out, any Respondent objects to the cost or the reasonableness of the work or the way it was undertaken, an application can be made to this Tribunal under section 27A of the Act.

23. The Tribunal determines that it is reasonable to dispense with all the consultation requirements referred to in Section 20 of the Landlord and Tenant Act 1985 as set out in Schedule 4 Part 2 of the Service Charges (Consultation requirements) (England) Regulations 2003.

Judge JR Morris

ANNEX 1 - 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.

ANNEX 2 - THE LAW

1. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.

2. The consultation provisions appropriate to the present case are set out in Schedule 4 Part 2 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The Procedure of the Regulations and are summarised as being in 4 stages as follows:

   A Notice of Intention to carry out qualifying works must be served on all the tenants. The Notice must describe the works and give an opportunity for tenants to view the schedule of works to be carried out and invite observations to be made and the nomination of contractors with a time limit for responding of no less than 30 days. (Referred to in the 2003 Regulations as the "relevant period" and defined in Regulation 2.)

Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants.

A Notice of the Landlord's Proposals must be served on all tenants to whom an opportunity is given to view the estimates for the works to be carried out. At least two estimates must be set out in the Proposal and an invitation must be made to the tenants to make observations with a time limit of no less than 30 days. (Also referred to as the "relevant period" and defined in Regulation 2.) This is for tenants to check that the works to be carried out are permitted under the Lease, conform to the schedule of works, are appropriately guaranteed, are likely to be best value (not necessarily the cheapest) and so on.

A Notice of Works must be given if the contractor to be employed is not a nominated contractor or is not the lowest estimate submitted. The Landlord must within 21 days of entering into the contract give notice in writing to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the Landlord's response to them.

3. Section 20ZA allows a Landlord to seek dispensation from these requirements, as follows –

(1) Where an application is made to a leasehold valuation 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.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
if it is an agreement of a description prescribed by the regulations, or in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,

c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) and (7)... not relevant to this application.