FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	LON/00BA/LDC/2019/0169
Property	**:**	98 Hartfield Road, Wimbledon, London, SW19 3TF
Applicant	**:**	Abbeytown Limited
Representative	**:**	Sam Madge-Wyld (Counsel)
Respondents	**:**	(1) Andrew McDougall & Halin Jankowski (Flat A) (2) Barry John Laker and Ciara Michelle Laker (Flat B) (3) Nicholas John Cole (Flat C & E); (4) Li Lin (Flat D) (5) Megan Elizabeth Skinner (Flat F)
Representative	**:**	Andrew McDougal (in person)
Type of Application	**:**	Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985.
Tribunal Members	**:**	Judge Robert Latham Duncan Jagger FRICS
Date and venue of Hearing	**:**	15 November 2019 at 10 Alfred Place, London WC1E 7LR
Date of Decision	**:**	18 November 2019

DECISION

Decision of the Tribunal

(i) The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985.

(ii) It is a condition of the dispensation that the Applicant does not pass on any costs relating to this application through the service charge.

The Application

1. By an application issued on 23 September 2019, the Applicant seek dispensation with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act"). The landlord specifies two reasons:

   (i) The works were required as a matter of urgency as a surveyor had indicated that parts of the flank wall appeared to be unstable; and

   (ii) The landlord was obliged to comply with the injunction issued by the County Court.

2. The lessees are:

   (i) Andrew McDougall and Halin Jankowski who live at Flat A on the ground floor (front).

   (ii) Barry John Laker and Ciara Michelle Laker who live at Flat B on the first floor (front).

   (iii) Nicholas John Cole who own flats Flats C & E but are not resident. Flat C is on the first floor (rear) and Flat E on the second and third floors.

   (iv) Li Lin who lives at Flat D which is on the second and third floors.

   (v) Megan Elizabeth Skinner who owns Flat F on the ground floor (rear), but is not resident. Ms Skinner brought the action for disrepair against the Applicant leading to the County Court orders made on 14 January and 19 August 2019.

3. On 1 October 2019, the Tribunal issued Directions. The Procedural Judge set this down for an oral hearing. By 15 October, the tenants were required to complete a form indicating whether they supported or opposed the application:

(i) Andrew McDougall and Halin Jankowski (Flat A): On 15 October, Ms Jankowski completed a form opposing the application. She states that she had been informed that the works were a "private arrangement".

(ii) Barry John Laker and Ciara Michelle Laker (Flat B): On 9 October, Ms Laker completed a form stating that she had no knowledge of the works.

(iii) Nicholas John Cole (Flats C & E): On 21 October, their Solicitor stated that they had no objection to the application.

(iv) Li Lin who lives at Flat D: No form has been returned.

(v) Megan Elizabeth Skinner (Flat F): On 6 October, Ms Skinner completed a form opposing the application.

4. By 30 October, those tenants who oppose the application were directed to file statements setting out why they opposed the application together with any documents upon which they intended to rely. Statements have been filed by Ms Skinner (Flat F) and by Ms Jankowski and Mr McDonald (Flat A).

The Hearing

5. The Applicant was represented by Sam Madge-Wyld (Counsel). He was accompanied by Mr Ganesh Khatri , a Solicitor with Freemans. Mr Khatri has made a witness statement in support of the application. Mr Madge-Wyld provided the tribunal with a Skeleton Argument. He clarified a number of points (none of which were apparent from the papers filed in support of the application):

(i) The application for dispensation solely relates to the sum of £10,990 paid to WS1 Maintenance in respect of the Phase 2 works. It does not relate to the costs of engaging Mr John Byers, a Surveyor who was instructed in connection with these works.

(ii) By reason of a Tomlin Order agreed in the County Court on 19 August 2019, the Applicant has agreed not to seek to recover any of the cost of Phase 1 of the works against Ms Skinner. The Applicant has further agreed to pay her £29,000 in full and final settlement of her claim for disrepair inclusive of costs and interest.

(iii) The Applicant was not seeking dispensation in respect of Phase 1 of the works. The Applicant conceded that it had failed to consult the tenants on these works and was therefore restricted to recovering £250 against each of the tenants.

Mr Madge-Wyld had no instructions on whether the Applicant had gone to tender on the Phase 1 works. A quote had only been sought in respect of the Phase 2 works from WS1 Maintenance, as they were engaged for the Phase 1 works.

6. Mr Andrew McDougall appeared in person. He elaborated upon the matters raised in his statement. Neither Ms Skinner or any of the other tenants appeared.

7. Mr Madge-Wyld argued that the application was straightforward and appeared somewhat surprised by the points raised by the Tribunal. This case involves a failure to consult on the Phase 2 works, which is compounded by its failure to consult on Phase 1. The evidence of Mr McDougall that the tenants had been treated with disdain by their landlord, was uncontradicted.

The Law

8. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. A summary of those requirements is set out in *Daejan Investments Ltd v Benson* ("*Daejan*") [2013] UKSC 14; [2013] 1 WLR 854, the leading authority on dispensation:

> Stage 1: Notice of Intention to do the Works: Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.
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> Stage 2: Estimates: The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
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> Stage 3: Notices about Estimates: The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
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> Stage 4: Notification of reasons: Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

9. Section 20ZA (1) of the Act provides:

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

10. Mr Madge-Wyld took us through *Daejan* emphasising the following paragraphs from the speech of Lord Neuberger: [40] – [46], [52], [58], [63], [64], [68] and [69]. We highlight the following:

(i) Sections 19 to 20ZA of the Act are directed towards ensuring that tenants are not required to (i) pay for unnecessary services or services which are provided to a defective standard (section 19(1)(b)) and (ii) pay more than they should for services which are necessary and are provided to an acceptable standard (section 19(1)(b). Sections 20 and 20ZA are intended to reinforce and give practical effect to these two purposes.

(ii) A tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

(iii) A tribunal can impose conditions on the grant of dispensation under section 20(1)(b).

(iv) It is permissible to make a condition that the landlord pays the costs incurred by the tenant in resisting the application including the costs of investigating or seeking to establish prejudice. Save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

(v) A tribunal should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants and it is deciding whether to grant the landlord a dispensation. A tribunal is also 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 consult that it is having to do so.

(vi) This does not mean that a tribunal should uncritically accept any suggested prejudice. However, once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it.

(vii) The tenants' complaint will normally be that they were not given the requisite opportunity to make representations about proposed works to the landlord. In such circumstances, the tenants have an obligation to identify what they would have said.

The Background

11. The property at 98 Hartfield Road, Wimbledon, London, SW19 3TF is a four-storey building which was constructed in about 1860. It was originally a single house, but has subsequently been converted in the 1970s into six flats.

12. Ms Skinner complains of a history of disrepair. She first complained about damp coming through the walls of her ground floor flat in May 2012. In due course, she was compelled to issue an action for disrepair in

the County Court (Case No. D1QZ100Y). On 14 January 2019, District Judge Hayes, sitting at Clerkenwell and Shoreditch County Court made an order in respect of the disrepair. Mr Paul Hannent who had been appointed as joint expert had produced a report dated, 27 April 2018, which addressed the cause of the dampness and the works necessary to abate the same. These works were specified at [8.5.1] and [8.5.2] of his report. The Applicant was ordered to execute the works specified in [8.5.1] on or before 1 July 2019. The order did not include the works specified in [8.5.2] namely the provision of a French drain.

13. On 24 April, these "Phase 1" works commenced. Initially the works related to two of the external walls. Mr McDougall states that he was not informed about the extent of the work. He returned home after work one day to find scaffolding on his patio. All his outdoor furniture, pots, plants and personal possessions were covered in rubble and debris. Neither was the neighbouring owner notified of the works, despite that the scaffolding was erected on their land.

14. Mr McDougall complained to the landlord's managing agent that his flat was also affected by damp and that it made economic sense for the builder also to address the defects to the external wall of his flat. He was told that the Phase 1 works were "a private agreement".

15. On 5 June, the builders removed the render from the flank wall. They discovered that the wall was of very poor construction. It contained a void space with timber elements embedded therein. It was apparent that additional works were required, including the rebuilding of sections of the wall. The defective state of the wall is illustrated in a number of photographs.

16. Ms Skinner objected to paying for 50% of the costs of Mr Hannent returning to inspect, so the landlord instructed another Surveyor, Mr Byers. On 17 June, Mr Byers inspected the property and produced a report, dated 18 July. He confirmed the wholly unsatisfactory state of the flank wall. He noted that some sections appeared unstable. He produced a Schedule of Works (the "Phase 2 works") which included: (i) the outstanding works from [8.5.1] of Mr Hannent's report; (ii) the works specified in [8.5.2] of that report; and (iii) the additional works to remedy the inherent defects in the wall.

17. WS1 Maintenance provided a quote in the sum of £10,990 to execute these works. The landlord did not seek any further quotes as this was the builder on site. On 19 August the works commenced. On 30 August, the works were completed.

18. The Applicant did not consult with the tenants. Mr McDougall stated that the builders dug up a section of his patio to lay the French drain. No one had sought his permission or told him that this work was to be done. This trespass on land which had been demised to him was unlawful.

19. On 19 August, Ms Skinner's County Court Action was settled, the terms being set out in a Tomlin Order. On 23 September, the Applicant issued

the current application for dispensation. The Applicant did not communicate with any of the tenants prior to issuing this application.

The Tribunal's Determination

20. The only issue which this Tribunal is required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements, and if so, whether to impose any conditions. **This application does not concern the issue of whether any service charge costs will be reasonable or payable**. However, the statutory consultation procedures are part of the statutory armoury to protect lessees from paying excessive service charges or for works executed to a defective standard.

21. The landlord's breach of its statutory duties to consult start with the Phase 1 works. Mr McDougall argued that the timescale specified by the Court had given the landlord adequate time to consult the other tenants on these works. In the event, there had been no engagement whatsoever. The tribunal is not asked to grant dispensation for these works and the Applicant accepts that it will be limited to recovering a maximum of £250 per flat. The Applicant has agreed that Ms Skinner should pay nothing.

22. Mr McDougall has canvassed the following issues of prejudice in respect of the Phase 1 Works:

    (i) Failure to Consult: Had he been consulted, he would have raised the scope of the works. In particular, his flat was also affected by dampness. He would also have had the opportunity to investigate whether the need for these works was due to the landlord's failure to abate the dampness over a period of six years.

    (ii) The obtaining of estimates: The tenants had no opportunity to nominate a contractor from whom an estimate should be sought. The Applicant adduced no evidence that it had gone out to tender to test the market before appointing WS1 Maintenance to execute the works.

23. Mr McDougall canvassed similar issues in respect of the Phase 2 Works:

    (i) Failure to Consult: Had he been consulted, he would have again raised the dampness affecting his flat. He would also have had the opportunity to investigate why these additional works were required and whether these fell within the landlord's covenant to repair for which he could be held liable.

    (ii) The obtaining of estimates: The decision to arrange for WS1 Maintenance to execute the works was predicated upon the fact that it had been appropriate for the landlord to employ them in the first place.

24. Ms Skinner argues that the Applicant should have gone back to the County Court to ask for additional time to enable it to comply with its

statutory duty to consult. She also highlights that the landlord should have sought three quotes for the work.

25. The Tribunal is satisfied that the tenants have failed to establish any sufficient prejudice to justify the tribunal to refuse dispensation:

(i) We are not concerned with the Phase 1 Works. These works related to Ms Skinner's flat. She has brought an action for disrepair as a result of which she is not obliged to contribute to the cost of the works. It is not for this tribunal to consider whether the other tenants could deploy a similar argument. The landlord accepts that their contribution is capped at £250 as a result of its failure to consult.

(ii) Had the landlord consulted about the scope of the works, Mr McDougall could have argued that these should extend to his flat. However, this would have been more relevant at the Phase 1 stage. Had his flat been included, the cost would have been higher. Again, if he wants to argue at a later date that the cost of any works to his flat are higher because they were not executed at an earlier stage, that is a matter for another tribunal.

(ii) The Tribunal is not concerned with the reasonableness of the quote of £10,990 provided by WS1 Maintenance. If the tenants seek to argue that the quote was unreasonably high, and that a lower quote would have been obtained had the landlord tested the market, this would be for another tribunal.

26. The Tribunal must have regard to the reality of the situation. On 5 June 2019, the render had been removed from the flank wall and it was apparent that the construction of the wall was wholly inadequate. Works were urgently required. We asked Mr McDougall whether he had any criticism of the Schedule of Works prepared by Mr Byers. He had none, but commented that he did not have the expertise to express an informed comment. It was not unreasonable for the landlord to obtain a quote from WS1 Maintenance, the contractor on site, to execute the works that were required.

27. However, the urgency of the works is no justification for the approach adopted by the landlord towards its tenants. Whilst time may not have permitted the full statutory consultation process, this is a case where there was no engagement with the tenants, despite the fact that the landlord expects the tenants to bear the cost of the works. The landlord acted in cynical disregard of the rights of its tenants.

28. The tenants currently have no evidence that the quality of the works was inadequate or that the costs of the works were unreasonable. However, should such evidence subsequently become available, the landlord will have to accept the consequences of denying its tenants their statutory rights before the works were executed. This is a matter which any future tribunal would be able to take into account.

29. The Tribunal is satisfied that it should be a condition of the dispensation that the Applicant does not pass on any costs relating to this application through the service charge. The landlord could and should have engaged with its tenants. Mr Madge-Wyld suggested that a time came when it was no longer reasonable for the tenant to oppose the application. We do not accept his argument. A Procedural Judge had determined that an oral hearing was required to determine this application fairly. As is normal in this type of case, the Judge set a tight timetable which left little time for the tenants to review their position. The tenants raised a number of legitimate concerns. They were entitled to ventilate these concerns at an oral hearing. Indeed, a number of relevant issues were only clarified at the hearing.

30. In the alternative, the Tribunal would have concluded that it is just and equitable in the circumstances for an order to be made under section 20C of the Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. Whilst it was only Mr McDougall who made such an application, it would have been open to the other tenants to make similar applications.

Judge Robert Latham,
18 November 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).