FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AC/LDC/2019/0008**
Property	**:**	**25 Market Place Falloden Way London NW11 6JY**
Applicant	**:**	**Crescent Trustees Limited**
Representatives	**:**	**Richard Davidoff, Aldermartin Baines & Cuthbert, Managing Agents**
Respondents	**:**	**Albert Connick (1st floor flat, 25A Market Place) and Lisa Gershinson (2nd floor flat 25B Market Place)**
Objecting tenant	**:**	**As above**
Type of Application	**:**	**Application for the dispensation of consultation requirements pursuant to S. 20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Professor Robert M Abbey**
Venue of Paper Based Hearing	**:**	**10 Alfred Place, LondonWC1E 7LR**
Date of Decision	**:**	**13th March 2019**

DECISION

© CROWN COPYRIGHT 2013

Decisions of the Tribunal

(1) The Tribunal declines to grant the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (Section 20ZA of the same Act). The reasons for our decisions are set out below.

(2) A section 20C order is made on the terms set out below but to the effect that the applicant's costs in relation to this dispensation application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees.

The background to the application

1. The property is a purpose built block consisting of two residential two bedroom flats above a commercial unit. The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act, (see the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987), Schedule 4.)

2. The request for dispensation concerns roofing works required to prevent further water ingress to the property and in particular "causing damage to the internals of the building and getting into individual flats". The works include roof repairs remedial and reinstatement works for the block roofing structure to address water damage and the necessary repairs required to water damaged parts of the property. The applicant says "roof sections need to be replaced including tiles, slates, flashings, valley gutters, soffits and other associated" works.

3. Section 20ZA relates to consultation requirements and provides 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.*

....
(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.

4. At the time of a hearing for Directions on 16 January 20129 Judge Hawkes required tenants who opposed the application to make their objections known on the reply form produced with the Directions. Two objections were received by the Tribunal from the respondents. Further Directions were issued by Judge Hawkes on 4 March 2019 regarding the possibility of striking out the application. The Applicant was required to comply with clause 7 of the Directions from 16 January 2019 and to file submissions in response to the respondents' applications under section 20C of the Landlord and Tenant Act 19895 and Rule 13 of the 2013 Tribunal Rules. No such submissions were received by the Tribunal from the applicant.

5. In essence, the works mentioned above are required to prevent further water damage to the two flats. The works include remedial and reinstatement building works for the property roofing structure and are in the main required to address water damage and the necessary repairs required to parts of the property damaged by the ingress of water.

The decision

6. By Directions of the tribunal dated 16th January 2019 it was decided that the application be determined without a hearing.

7. The tribunal had before it a small bundle of documents prepared by the applicant that contained the application, grounds for making the application, copy correspondence, a specimen copy lease and copy Tribunal Directions. The Tribunal also had before it a further small bundle from the respondent containing their reasons for opposing the application.

The issues

8. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements. **This application does not concern the issue of whether or not service charges will be reasonable or payable**.

9. Having read the evidence and submissions from the Applicant and having considered all of the copy deeds documents and grounds for making the application provided by the applicant, the Tribunal determines the dispensation issues as follows.

10. Section 20 of the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.

11. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by such an application as is this one before the Tribunal. Essentially the Tribunal have to be satisfied that it is reasonable to do so.

12. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14 by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.

13. The Supreme Court came to the following conclusions:

    a. The correct legal test on an application to the Tribunal for dispensation is:

       "Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

    b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

    c. In considering applications for dispensation the Tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

d. The Tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

f. The onus is on the leaseholders to establish:

   i. what steps they would have taken had the breach not happened and

   ii. in what way their rights under (b) above have been prejudiced as a consequence.

14. Accordingly, the Tribunal had to consider whether there was any prejudice that may have arisen out of the conduct of the lessor/applicant and whether it was reasonable for the Tribunal to grant dispensation following the guidance set out above. It should also be remembered that both leaseholders have indicated that they actually oppose the application.

15. In their statement of case the respondents make it clear that neither in principle object to the works being undertaken. Indeed it would seem that one of the lessees raised the problem with the agents in March/April 2018. The tenants then observed that rather than deal with the problem at that point there was delay and then an application for dispensation that was denied as a result of a failure to comply with directions. The tenants have made it clear that it is their position that whilst the leak is concerning they do not consider it is sufficiently serious to justify by-passing the statutory safeguards.

16. In answer to the question, what would the tenants do differently if the applicant were to be required to follow the statutory consultation requirements; they say that they will seek to rely on the rights accruing to tenants under the consultation scheme. First they wish to have the right to nominate a preferred contractor and secondly that want sufficient time to scrutinise the lessor proposals.

17. In the light of the above, the tribunal is of the view that it could find prejudice to the tenants of the properties by them not being able to get involved in the process or being able to nominate a preferred contractor. The tenants have made it very clear that they want the rights accruing from the consultation process and it would be prejudicial to them not to have the benefit of this lessee statutory protection.

18. Rights of appeal made available to parties to this dispute are set out in an Annex to this decision.

20C application

1. The respondents also made an application under section 20c of the Act, i.e. preventing the landlord from adding the legal costs of these proceedings to subsequent service charge accounts. As was clarified in the case of *The Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and all the evidence presented.

2. Having read the submissions from the respondents, (nothing having been received from the applicants), and taking into account the determinations set out above the Tribunal determines that an order should be made as set out above. With regard to the decision relating to s.20C, the Tribunal relied upon the guidance made by HHJ Rich in the case of *Tenants of Langford Court v Doren Limited* (LRX/37/2000) in that it was decided that the decision to be taken was to be just and equitable in all the circumstances. The s.20C decision in this dispute gave the tribunal an opportunity to ensure fair treatment as between landlord and tenant.

Application for costs

3. The respondent raised the question of costs pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Arising from this application where the claimed amount was stated to be £2714.40. This is the amount charged by solicitors Whitehead Vizards in an account dated 10 January 2019.

4. Before a Rule 13 costs decision can be made, the tribunal needs to be satisfied that there has been unreasonableness. At a second stage it is essential for the tribunal to consider whether, in the light of unreasonable conduct (if the tribunal has found it to have been demonstrated), it ought to make an order for costs or not. It is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

5. It is not clear if the applicants have seen the above account. Dated 10 January 2019 or have had time to comment on the contents. The Tribunal received from the applicant total figures that did not explain how the totals were made. The sums claimed are substantial and therefore should be open to scrutiny.

6. Therefore, the Tribunal **DIRECTS** that by the **27h March 2019** the respondents provide a detailed breakdown of the Rule 13 fees claims for the legal fees along with the hourly rates and hours worked. The Tribunal further **DIRECTS** that the respondents serve the detailed

breakdown on the applicant who has **14 days** from the date of receipt of the detailed breakdown to provide to the Tribunal their comments/observations on the fees and charges claimed by the respondent. Thereafter further consideration will be given to this claim for Rule 13 costs.

Name:	Judge Professor Robert M. Abbey	**Date:**	13th March 2019

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.