FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HH/LDC/2020/0114
Property	:	Fernlea, Mill Lane, Torquay, Devon TQ2 5AN
Applicant	:	Fernlea (Torquay) Limited
Representative	:	Carrick Johnson Management Services Ltd blocks@carrickjohnson.com
Respondent	:	The Lessees
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(s)	:	Judge J Dobson
Date of Directions	:	21st January 2021

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 in respect of major works, being works to the roof. The Tribunal has made no determination on whether the costs of the works are reasonable or payable**.

The application and the history of the case

2. The Applicants applied for 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.

3. The Tribunal gave Directions on 4th January 2021, explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question 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.

4. The Directions also stated that having considered the application the Tribunal was satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11.

5. This the Decision made on that basis and following a paper determination.

The Law

6. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

7. Section 20ZA 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".

8. 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.

9. 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".

10. 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).

11. Where the extent, quality and cost of the works 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."

12. 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.

13. 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.

14. If dispensation is granted, that may be on terms.

15. The effect of Daejan has been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Consideration

16. The Applicants explained in the application that Fernlea Mill is four-storey purpose built block of 12 flats. The application states that no consultation has been carried out, stating that "the Applicants wish to receive dispensation for all of the consultation requirements relating to

these required repair works due to the extensive timescales involved if the Section 20 was required so that they may be able to instruct their chosen contractor as quickly as possible to proceed to order the materials and carry out the required works. If Section 20 is required, once this has expired the roof could of caused further damage to Flats 9 and 12 and even other flats if water ingress travels down the walls and ceiling in the building."

17. The Applicants state that "water ingress from the failing flat roof, which covers the whole building, is causing extreme damage to Flats 9 and 12, there is a worry that the ceilings of Flats 9 and 12 could get worse and collapse with the amount of water damage coming in. Also the contents of Flat 12 are starting to have regular mould from damp."

18. The works for which dispensation is required is described as follows: "Scaffolding needs to be erected for access to the flat roof, then the moss covering needs to be cleared, roof made safe and cleared, then the faulty felt on the roof needs to be scabbled and stripped off and then the roof needs to be primed and applied with a cap sheet overlay".

19. A sample lease, of Flat 11, was provided with the application ("the Lease"). The Tribunal understands that the leases of the other properties are in the same or substantively the same terms.

20. The Lease is tri-partite. The freeholder is said to be responsible for repairs and other services but the Applicants, as the management company, have covenanted to fulfil such obligations. The relevant provisions identifiable are contained in clauses 4 and 5, and in the definitions in clause 1.

21. It is apparent that the Lease as provided is not complete. There is no obvious Schedule 1 or the start of Schedule 2. The page numbering jumps from 21 to 25 towards the end. The Tribunal has carefully considered whether it appropriate to proceed on the basis of the incomplete Lease.

22. On balance and with some caution, the Tribunal has determined that it is. The relevant operative clauses appear to have been provided. There is no suggestion that any missing parts might have any relevance to the quite particular application being considered.

23. There has been no response from any of the leaseholders opposing the application. There have been responses agreeing with the application from the Lessees of flats 1 to 7 inclusive, flat 9 and flat 11, so from the Lessees of 9 of the 12 flats.

24. None of the leaseholders have therefore asserted that any prejudice has been caused to them. The Tribunal finds that nothing different would be achieved in the event of a full consultation, except for the delay and potential further problems.

25. Accordingly, the Tribunal finds that the Respondents have not suffered any prejudice by the failure of the Applicant to follow the full consultation process.

26. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works to the lift of the building.

27. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying long-term agreement. The Tribunal has made no determination on whether the costs are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1968 would have to be made.

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.

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.