



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	: CHI/00MS/LDC/2020/0112
Property	: West Central, Portland Street, Southampton SO14 7BH
Applicant	: Southern Land Securities Limited
Representative	: Nick Hritsov
Respondent	: Lessees listed on the following page
Representative	: Cooper Lingard Solicitors (for the lessees listed)
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)	: D Banfield FRICS Regional Surveyor
Date of Directions	: 8 March 2021

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works to repair the leaking soil stack pipes.

Dispensation is conditional upon details of the final works proposed being sent to each of the Respondents who will then have 30 days to make any observations.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

Respondents:

Flat 25 Mark Butler & Laura Austin

Respondents represented by Cooper Lingard Solicitors;

Flat

6: Christopher Mottola

7: Sylvia Xue

8: Katrina McKinlay and Francesca McKinlay

9: Ameeta Sandy

13: Matt Wong

14: Simon Airey and Jolanta Airey

15: Allen Tang

16: John Day

20: Justin Caffrey

21: India Bhaganani

23: Douglas Lawson and Christine Lawson

26: Paul Malloy

27: Daniel Lane

Background

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the Act.
2. The Applicant explains that there is a leak from soil stack pipes in the garage area of the block which is causing damage to the fabric of the building.
3. The Tribunal made Directions on 8 January 2021 indicating that the Tribunal considered that the application was suitable to be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected.
4. The Tribunal required the Applicant to send to the Respondents its Directions together with a copy of the Application and a form to indicate whether they agreed with or objected to the application and if they objected to send their reasons to the Applicant.
5. It was indicated that if the application was agreed to or no response was received the lessees would be removed as Respondents.
6. Objections were received by or on behalf of 14 lessees all of whom remain as Respondents. Those lessees who did not respond have been removed as respondents.
7. No requests for an oral hearing were made and the matter is therefore determined on the papers in accordance with Rule 31 of the Tribunal's Procedural Rules.
8. The only issue for the Tribunal is whether it is reasonable to dispense with any statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be reasonable or payable.

The Law

9. The relevant section of the Act reads as follows:

S.20 ZA Consultation requirements:

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.

10. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. In summary the Supreme Court noted the following

- i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
- ii. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
- iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
- iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- v. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
- vi. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
- vii. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
- viii. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

11. The Applicant has supplied a bundle of evidence in support of the application. It contains the original application and a copy of the objections received from the lessees to which no response has been made.

12. *The application stated that dispensation was sought “for the required soil stack repairs as foul water is currently evident in the garage area. Given the nature of the issue we would urge this application is considered urgently to ensure we prevent further damage being caused in the garage area. We recently had a contractor on site etc carry out a CCTV survey of the leaking soil stack pipes in the garage area and an estimate for cleaning and lining works has been received however this is currently under review. The reason why it is in review is that the contractor requires access into all the top floor flats in order, which will allow them to inspect for access panels or where access would need to be made to expose pipework and to inspect the manifold waste connections for defects. The contractor will then be able to provide costings for these works and they will advise further which flats they need access to.”*
13. *The lessees of Flat 25 referred to “The nature and potential cost of the Section 20 Works is so significant that it would be irresponsible to not consult with those that it directly impacts. Such consultation does not need to be lengthy or a drawn out process (which would be detrimental to the cause) but can be carried out in an efficient and effective way that suits all parties.”*
14. *Solicitors on behalf of the remaining Respondents indicated that “It is accepted that the subject matter of the application is a leak from a soil pipe in the basement garage area which has caused damage to the fabric of the building which will need to be repaired at possible significant cost. However, it is believed that dispensation with the statutory procedure could cause the Respondents prejudice for the reasons set out below.*
15. *Subsequent CCTV investigations revealed that certain joints high up in a soil pipe were leaking and waste water was dripping down the outside of that pipe and where that pipe exited into the basement garage and turned to run along the ceiling it was leaking. Not a great amount but a nuisance and it was reported to the Applicants.*
16. *The Applicants first attempt to resolve the leak was about 12 months ago. It is not known what investigations or repairs were carried out by the contractors instructed save for the use expanding foam in the hole between the pipe and the first floor - an attempt to remedy it we assume. The leak however continued and this caused the waste water to pool in the first-floor voids and eventually find its exit elsewhere (see below). Rather bizarrely the contractors used expanding foam to block that new exit and expanding foam again when a further exit point materialised.*
17. *Unbeknown the waste water continued to pool over the following months until it was running down the outside of the building and had filled the lift shaft with 5 feet of waste water. Indeed, it was*

the dripping of waste water from the lift when it rose from the ground floor that could be heard that alerted the Respondents and it was the lift engineers who found the lift shaft covered in waste and 5 ft deep in waste water. The current position is that the ground floor void is soiled, the ground floor communal areas are soiled and the complete lift shaft is soiled (the lift has been out of use since the summer). Because of the continued escape of waste water, we suspect that considerable cleansing and redecoration will be required to the fabric of the building (including the lift) at considerable cost.

18. *It was when the lift engineers found that the escaping waste water had simply found other exit point(s) that the Applicants then employed new contractors with CCTV that the cause was found. By this time the waste water has been escaping for over 12 months. We are not sure if a temporary repair was carried out but the leak (into the basement) has now returned to a small drip from the same pipe (after all the expanding foam was removed from the various locations).*

19. *The prejudice caused by dispensation would/could affect the following.*

a) The Respondents need to be allowed to investigate whether the actions of the first contractors have contributed to the considerable damage that has subsequently been caused to the building's fabric. The question needs to be asked as to whether the acts of the first contractor resulted in the waste water being diverted into other voids and then into the communal areas and lift shaft - for which investigative tests may be required that would not be possible if the works are completed. It should be noted that the lift shaft is no longer filling up with waste water so there would appear to be a possible link between the acts of the first contractor and the subsequent damage.

b) Whether the Applicant has been negligent in connection with the instruction and or actions of the first contractor.

c) Whether the Applicant has been negligent in connection with reporting the leak and or damage to our insurers. We are aware of insurer involvement but not any outcome. Water damage from leaks would normally be the subject of an insurance claim but there has been no reference to any insurer involvement or indemnity.

The costs associated with the works could be considerable and the Applicant should follow the correct statutory procedure in all respects. The matters in (a) to (c) could have a material affect on the costs ultimately payable by the Respondents.”

Determination

20. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with those requirements. Guidance on how such power may be exercised is provided by the leading case of *Daejan v Benson* referred to above.
21. Objections have been received from a large number of lessees largely on the grounds that the lessees wish to investigate whether the actions of the Applicant and its contractors have been negligent and hence increased the costs eventually payable by the lessees.
22. Whilst such a desire and indeed need to investigate the actions of the Applicant is acknowledged, I must consider whether such an investigation would be facilitated by requiring the Applicant to follow the requirements of Section 20.
23. Part 2 of Schedule 4 to the 2003 Regulations sets out the steps to be followed which were summarised in the *Daejan* decision as;

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.

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

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.

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. contributed to the No objections have been received and therefore no evidence of prejudice has been submitted.
24. The consultation procedures are to enable lessees to be aware of the proposed works, have their observations considered and nominate a contractor. The observations to be considered will be in respect of the works proposed rather than the reason why those works are required and there is nothing in the regulations to permit lessees to delay the carrying out of works whilst investigations such as those referred to in paragraph 19 above are carried out.
25. Given the above I am not persuaded that refusing this application would enhance the lessees' understandable desire to investigate the past actions of the Applicant.
26. The Applicant has however indicated that the proposed works are "under review" and remain to be finalised. I consider it reasonable that the Respondents are advised of the final works proposed and that they should have the opportunity to comment thereon.
27. In view of the above **the Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works to repair the leaking soil stack pipes.**
28. **Dispensation is conditional upon details of the final works proposed being sent to each of the Respondents who will then have 30 days to make any observations.**
29. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
8 March 2021

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 by email to rpsouthern@justice.gov.uk 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.