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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/LIS/2014/0063**
Property	:	**Viewpoint, 7-9 Sandbourne Road, Bournemouth, Dorset BH4 8JR**
Applicant	:	**Viewpoint Limited**
Representative	:	**Mr Andrew Howard (Coles Miller Solicitors LLP)**
Respondent	:	**Mr Keith Brown and the leaseholders of the other 63 flats at Viewpoint**
Representative	:	**Mr Wayne Miller (Laing Law Solicitors) for Mr Brown**
Type of Application	:	**To dispense with the requirement to consult lessees about major works under section 20ZA Landlord and Tenant Act 1985**
Tribunal Members	:	**Mr J Donegan (Tribunal Judge)** **Miss M Krisko FRICS (Valuer Member)** **Mr S Fitton (Lay Member)**
Date and venue of Hearing	:	**14 May and 02 June 2015** **Poole Magistrates Court, Park Road, Poole, Dorset BH15 2NS**
Date of Decision	:	**19 July 2015**

DECISION

Decisions of the tribunal

The tribunal makes the determinations set out at paragraphs 51-53 of this Decision.

The application

1. On 03 November 2014 Mr Keith Brown ('Mr Brown') submitted an application to the tribunal under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act'). That application concerned the service charges payable for Flat 48 Viewpoint, 7-9 Sandbourne Road, Bournemouth BH4 8JR ('the Flat') for the years ended June 2011 to 2015.

2. Mr Brown also issued a separate application, seeking the appointment of a Manager for Viewpoint under section 24 of the Landlord and Tenant Act 1987. Initial directions were issued on both applications 07 November 2014. Further directions were issued on 16 January 2015, following a case management hearing on 14 January 2015. The further directions provided that the section 24 application be stayed until the tribunal issues its decision on the service charge application.

3. At the case management hearing, the solicitor for Viewpoint Limited ('VL') conceded that a full section 20 consultation might not have been undertaken in respect of external work to window head lintels and cavities. The tribunal directed that any application for dispensation under section 20ZA of the 1985 Act should be made by 06 February 2015.

4. VL's application for dispensation was submitted to the tribunal on 04 February 2015 and directions for that application were issued on 06 February 2015. Paragraph 8 of the directions required VL to immediately send a copy of the application to each leaseholder at Viewpoint and to display the application in the hall/notice board. Paragraph 9 provided that the leaseholders should complete and file response forms with the tribunal, indicating whether they consented to, or opposed the application.

5. The service charge application and dispensation application were dealt with under the same case reference and were heard on the same day. This decision deals solely with the application for dispensation. The service charge application is the subject of a separate decision. Given that the tribunal dealt with two applications with different Applicants and Respondents, it is convenient to refer to the parties as 'VL' and 'Mr Brown'

6. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

7. The full hearing of the application took place on 14 May 2015. VL was represented by Mr Howard and Mr Brown was represented by Mr Miller. The tribunal reconvened on 02 June 2015 to determine the application.

8. Prior to the hearing the tribunal members were each supplied with a bundle that contained copies of the application, directions, statements of case and other relevant documents. The tribunal were also supplied with helpful skeleton arguments from Mr Howard and Mr Miller.

The background

9. VL is the freeholder of Viewpoint and Mr Brown is the long leaseholder of the Flat. Viewpoint consists of two purpose-built, seven-storey blocks (Block 7 and Block 9) with a total of 65 flats and extensive grounds. 64 of these flats are let on long leases and the Respondents are the leaseholders of these 64 flats. The remaining flat is owned by VL and was formerly used as caretaker's accommodation. It is now let on a short tenancy. At the start of the hearing, Mr Howard explained that the rent from this flat was used to subsidise the service charge account. The current rent is £12,000 per annum.

10. Viewpoint is managed by Foxes Property Management Limited ('FPML').

11. Mr Brown opposes the dispensation application. He is a shareholder in VL and was formerly a director of this company.

12. The tribunal inspected Viewpoint and the Flat during the afternoon of 13 May 2015, in the presence of Mr Brown, Mr Frank Groome, Mr Howard, Mr Karl Lyons (FPML), Mr Franklin (FPML) and Mr Patrick Cauldwell, who is a director of VL. The tribunal members were shown around the grounds and inspected the exterior of both blocks. They also inspected the foyer/lobby in the basement of Block 9 and the interior of the Flat.

13. Mr Brown holds a long lease of the Flat, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease are referred to below.

The lease

14. The lease was granted by Clyffe (London) Limited ("the Lessor") to Peter Hanns Erlen and Monica Pearl Erlen ("the Tenant") on 03 April 1979 for a term of 125 years from 24 June 1975. Mr Brown is a successor in title to the Tenant and VL is a successor in title to the Lessor.

15. The definitions are to be found at clause 1 of the lease and include:

> *(2) "Building" means the building of which the demised premises forms part*
>
> *(3) "The estate" means the whole of the land comprised in the title above mentioned*

16. The Tenant's covenants are set out at clauses 3 and 4 and include an obligation:

> *4(4)(i) To pay to the Lessor on the execution of the Lease an advance payment of service charge in respect of the period from the date hereof to the next ensuing quarter day and in every year at the times herein provided for the payment of the said service charge to pay to the Lessor such further sums (being payments in advance for the next ensuing quarter) as the Lessor may in its own reasonable discretion request such sums to be credited to the Tenant against his own estimated liability for service charge PROVIDED ALWAYS as in the Fifth Schedule hereto*
>
> *(ii) To pay the Lessor within twenty-one days of the same being demanded such sum or sums as the Lessor may actually require to reimburse the Lessor against any sum or sums actually expended by the Lessor of which it might be urgently necessary to expend in fulfilment of the service obligations in respect of which the Lessor is unable to obtain reimbursement from the service charge paid in advance or from any sinking fund by reason of prior expenditure of all such sums*
>
> *(ii) On the usual quarter days in each year to pay to the Lessor as a service charge one quarter of such proportion of the total service charge as the rateable value of the demised premises bears to the total of the rateable values of all the Building*
>
> *(iv) So far as the same is not included in the service charge above mentioned on demand to pay and contribute a reasonable share of the costs and expenses of and incidental to making repairing maintaining amending lighting and cleansing all channels drains pipes watercourses walls party walls party structures and other*

conveniences which shall belong to or be used for the demised premises in common with other parts of the Building such share in the case of difference to be reasonably settled by the Lessor's Surveyor whose decision shall be final and to keep the Lessor indemnified against all costs and expenses in respect of all or any of the aforementioned matters

17. The service charge provisions are to be found in the fifth schedule and include:

5. The Lessor shall endeavour to maintain the Service Charge at the lowest reasonable figure but the Tenant shall not be entitled to object to any items comprised in the Service Charge by reason only that the materials work or service in question might have been provided at a lower cost

18. The Lessor's obligations are contained in the sixth schedule and include an obligation to insure the Building and the Estate (paragraph (1)). Paragraph. They also include an obligation:

(2) To maintain and keep in good and substantial repair and condition and (where necessary) renew:

(a) the main structure of the Building and the Estate including the principal internal girders and the exterior walls and balconies and the foundations and the roofs thereof with their main water tanks main drains gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the Building)

(b) all such gas and water mains and pipes drains waste water and sewage ducts and electric cables and wires as may by virtue of the terms of this Lease be enjoyed or used by the Tenant in common with the owners or lessees of other flats in the Building

(c) the lifts their supporting structures and machinery and the passages landings and staircases and other parts of the Building and the Estate enjoyed or used by the Tenant in common with others

(d) the automatic front door opening systems commonly known as Portaphones

(e) the swimming pool its plant and machinery

(f) the boundary walls and fences of the Estate

(g) the flat occupied by any caretaker porter or other staff employed by the Lessor in accordance with sub-clause (5)(c) of this clause

(h) the pathways forecourts and roadways leading to the basement car park

(i) all other parts of the Building and the Estate not included in foregoing paragraphs (a) to (h) and not included in this demise or in the demise of any other flat in the Building or in the Estate

19. There is also an obligation "*to tend keep clean and tidy and generally maintain the gardens forecourts roadways and pathways to the Estate*" (paragraph (5)(b)) and a 'sweeping up' clause at paragraph 5(10), reading:

(10) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessor may be considered reasonably necessary for the proper maintenance safety amenity and administration of the Estate

The issues

20. The sole issue to be determined is whether VL is entitled to dispensation in relation to qualifying works undertaken to two flank walls at Viewpoint.

21. Having heard submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Submissions

22. The application for dispensation concerns repairs to lintels and brickwork in the two flank walls. The grounds of the application were set out in VL's statement of case and were expanded upon by Mr Howard in his oral submissions. Appended to the statement of case were various documents including a photograph report on the repairs dated 26 January 2015 and a report from Mr Robert Samways FRICS of Samways Surveying Limited ('SSL'), dated 03 January 2012.

23. The blocks of flats at Viewpoint are numbered 7 and 9 Sandbourne Road. Block 7 is to the north and comprises of four sections (A, B, C and D). Block 9 is to the south and comprises of five sections (E, F, G, H and J).

24. In April 2010 British Gas ('BG') fitted an external gas supply pipe to the north wall of section J. BG also proposed to fit exterior gas pipework to sections E, F, G and H and the south east wall of section D. VL was aware of cracking to the east flank wall of section H, which would need to be investigated before the pipework was fitted. It arranged scaffolding to facilitate the investigation and instructed a chartered building surveyor, Mr Samways, who inspected the wall on 20 December 2011. He set out his findings in the report dated 03 January 2012. That report referred to an earlier report, dated 22 July 2010, which was not included in the hearing bundles.

25. The report dated 03 January 2012 was solely concerned with the east flank wall of section H. Mr Samways explained that the brickwork had been opened up to view the construction at fourth floor level. This revealed that the steel angle, which served as a lintel above the window heads, was severely corroded and had expanded to cause outward movement. This had caused cracking to the walls in Flat 58 and the exterior of the flank wall.

26. Mr Samways' investigation also revealed severe corrosion of the steel angle lintels and lateral movement at parapet level. He concluded that the degree of corrosion and movement was such that immediate repairs were required to both areas. Mr Samways copied his report to Enterprise Builders Limited ('EBL'), which had undertaken previous repairs at Viewpoint at competitive rates. He outlined proposed repairs, which involved the removal of brickwork at fourth floor level, replacing the corroded steel angle with a series of individual lintels above the windows and repairing/rebuilding the damaged brickwork. This work was to be undertaken in small sections to maintain structural stability. Mr Samways also recommended that lead cavity trays be installed above the lintel level and the insertion of a series of stainless steel wall ties.

27. Mr Samways recommended similar repairs at parapet level with the incorporation of a movement joint into the re-built section of the outer skin and an angle post built into the brickwork to provide improved stability to this wall. He also advised that it might be necessary to re-set and re-fix the top floor windows back to a vertical plane. In the penultimate paragraph of his report, Mr Samways suggested that he re-inspect once the builders had opened up the cavities to agree the exact detailing of the repairs.

28. EBL subsequently undertook the work to the east flank wall recommended by Mr Samways. There was no section 20 consultation and VL's case is that this would have been impractical, as it made sense to undertake the repairs when each section of brickwork was removed. Had the works stopped for consultation (or a dispensation application) then this would have increased the costs and put the structural integrity of the block at risk.

29. The external gas pipes were only fitted to the east flank wall after the repairs. Given the problems with this wall and the need to fit external gas pipes to block 7, the Applicant decided to investigate the condition of the south-east wall of section D. The scaffolding was then moved to this wall. Similar investigations were undertaken and similar faults were found. VL then instructed EBL to undertake repairs to this section. Again there was no section 20 consultation.

30. FPML wrote to the leaseholders on 24 July 2012, informing them of the repairs. Enclosed with the letter was a document headed "*WORK REQUIRED ON VIEWPOINTS OUTER WALLS*", giving details of the repairs and the costs. It is clear from this document that the repairs to section H had been completed whereas the repairs to section D were ongoing. The opening sentence of this document read:

"IT HAS BEEN APPARENT, FOR SOME WHILE, THAT WORK WAS NEEDED ON THE EAST FLANKS OF BLOCKS H/J AND C/D."

31. The tribunal were informed that the total cost of the repairs to sections D and H, was £118,500. At the hearing, the tribunal were supplied with a number invoices from EBL. These span the period 07 September 2010 to 20 September 2012 and come to £117,751.72 in total. There was also an invoice from SSL numbered 934/SS448, for £943.38, which when added to £117,751.72 gives a total of £118,695.10.

32. The narrative on the SSL invoice reads:

"To inspect 4/4/12 and report on phase 2 works to North Block, South East flank. To re-inspect 27/4/12. Time involved = 3 hours. To measure up and prepare draft plans for porch roofs issued 13/7/12; to prepare additional plans 10/9/12. Time involved = 6 hrs. Fees based on time involved. 9 hours @ £85/hour = £765"

This suggests that there was an earlier invoice, covering Mr Samways inspection on 20 December 2011, his subsequent report and supervision of the repairs on section H.

33. It transpires that not all of the EBL invoices relate to the lintel and brickwork repairs. Those numbered 3280, 3281, 3283 and 3284, totalling £4,950.28, date back to September 2010 and relate to other repairs. Invoices numbered 3362, 3378 and 3409, totalling £13,993.20, relate to work to the roof turrets. All of these invoices should be disregarded when applying the section 20 cap.

34. Based on the narratives, it appears that the invoices numbered 3312, 3318, 3387, 3396, 2298, 3399, 3400, 3406, 3407 and 3408, totalling £46,311.84, relate to the repairs section H. Invoices numbered 3411,

3417, 3421, 3422, 3426 and 3434, totalling £52,496.40, appear to be for the repairs to section D.

35. VL contends that it should be granted dispensation, as the repairs were necessary and there was no relevant prejudice to the leaseholders. Mr Howard relied on the response forms that had been filed with the tribunal. Out of 64 leaseholders, 54 had signified their support for the dispensation application. Mr Howard suggested that this level of support was overwhelming, bearing in mind there are leaseholders in a nursing home, abroad or who only purchased during the course of these proceedings. He also suggested that the level of support demonstrates there can be no relevant prejudice to the leaseholders. In Mr Howards' words that number of leaseholders "*..can't be wrong*".

36. If the section 20 statutory cap is applied then the maximum sum that can be recovered by VL is £14,172. Mr Howard made the point that the cap does not apply to Mr Samways' preliminary investigations or supervision fees. Rather it only applies to the cost of the repairs.

37. In his oral submissions, Mr Howard acknowledged that VL's status, as a leaseholder owned company, should have no bearing on the application and that the burden of proof was on VL. He referred to the Supreme Court's decision in ***Daejan Investments Limited v Benson and others [2013] UKSC 14*** and suggested that the section 20 consultation requirements are a means to an end and not an end in itself. Their purpose is to protect leaseholders. When deciding whether to exercise its discretion the tribunal should ignore the nature of the consultation breach, other than in relation to the prejudice that might be caused to the leaseholders.

38. Mr Howard described the repairs to sections H and D as one continuous set of works that were done within weeks of each other. He suggested that Mr Brown's argument that there was no evidence that the works were required as a matter of emergency was misdirected. It is not the case that dispensation should only be granted for emergency works. Rather the test is one of reasonableness and based on the decision in ***Daejan*** the tribunal must consider whether there has been real prejudice to the leaseholders. This is narrowly defined and normally arises where the failure to consult has resulted in a freeholder incurring costs that are unreasonable in amount or which are below a reasonable standard.

39. Mr Howard contended that where there is no prejudice then dispensation should be granted unconditionally. If prejudice is established then conditions can be imposed on the grant of dispensation. However in this case, Mr Brown has not made any attempt to identify prejudice. He has not identified what he would have said, had he been given an opportunity to make observations on the repairs. There is no expert evidence to suggest the extent, quality or

cost of the works has been affected by the failure to consult and there has been no attempt to quantify any prejudice.

40. Mr Howard invited the tribunal to grant dispensation unconditionally. He submitted that any request that Mr Brown's costs be paid by VL, as a condition of dispensation, should be refused given there had been no attempt to establish any prejudice.

41. Mr Brown opposed the dispensation application and relied upon an undated statement of case, prepared by Mr Miller. Mr Miller expanded upon the grounds of opposition in his oral submissions. His starting point was that dispensation should be refused altogether. If granted then it should be restricted and subject to a costs condition.

42. Mr Miller pointed out that the tribunal application and VL's statement of case only referred to window head lintels/cavities and did not refer to the other works undertaken by EBL. Based on VL's case, dispensation could only be granted for the urgent repairs identified in Mr Samways' report, as there was no evidence to justify the other repairs. At paragraph 3.0 of his report, Mr Samways concluded *"The degree of corrosion to the steels and the movement within the brickwork is such that these two areas require immediate repair"*. Mr Miller suggested that the dispensation application should be restricted to the EBL invoices numbered 3387, 3396, 3398 and 3399, in the total sum of £31,717.20. These invoices were all dated 08 March 2012 and were issued within 2 months of Mr Samways' report.

43. Mr Miller argued there was no evidence to suggest that the repairs had to be undertaken urgently. There is no indication that the flats had to be evacuated, nor any indication of structural instability. Accordingly there was sufficient time for VL to follow the consultation procedure or seek prospective dispensation from the tribunal.

44. Mr Miller's responses to the arguments advanced by VL/Mr Howard, can be summarised as follows:

(a) EBL were not working on site at the time Mr Samways produced his report. The fact that they had undertaken previous work at Viewpoint at competitive rates was not a good reason for VL's failure to consult.

(b) The failure to consult was not an innocent mistake. Rather this was a deliberate action on the part of VL. Further this is not a case where there has been partial compliance. There was no consultation whatsoever.

(c) VL has not given a satisfactory explanation for the failure to consult. The only justification is Mr Samways' report, which

identified the need for repairs to section H. It does not address section D.

(d) VL did not discuss the need for repairs with any of the leaseholders. Rather it simply pressed on with the work.

(e) The failure to consult has caused prejudice, as there has been no 'testing' of the necessity of the work, the reasonableness of the work or the charge for the work. Further the leaseholders had no opportunity to inspect the damaged areas prior to the repairs or inspect the repairs, which are now concealed by the brickwork. In addition the leaseholders had no opportunity to make observations on the repairs or check EBL's prices. VL failed to get any quotes, even from EBL, before the repairs were undertaken. Rather EBL just charged for the work, as it progressed.

(f) Mr Brown cannot say what he would have done differently, had there been consultation as he has no means of checking the scope, quality or cost of the repairs or whether it was appropriate to instruct EBL. This is clear prejudice. The failure to obtain even one quote means that he cannot check whether EBL's charges were reasonable.

(g) Had VL complied with the consultation obligations then they would have obtained at least two quotes for the repairs and tested the level of EBL's charges.

(h) The completed tribunal response forms simply show that a large number of leaseholders consent to the application and have little evidential value. The forms do not ask if leaseholders have been prejudiced by the lack of consultation. Further one other leaseholder, Mr Shaffer of Flat 17, has objected to the application. His solicitors, Matthew & Matthew, set out his concerns in a letter to the tribunal dated 27 April 2015. These focussed on FPML's failure to follow the statutory consultation procedure and suggested that the costs of the application should be borne by FPML.

(i) VL has not established that it is reasonable to dispense with the section 20 consultation and dispensation should be refused. If dispensation is granted then it should be conditional upon VL paying the costs incurred by Mr Brown in instructing Mr Miller. These costs have been incurred as a direct consequence of VL's failure to consult. Mr Miller estimated that his costs amounted to £1,500 plus VAT.

45. In response, Mr Howard pointed out that Mr Samways' report identified the need for repairs to the brickwork and at parapet level to section H, as well as to the window heads. Mr Samways had opened up

and tested a sample section of the flank wall in section H and there was no need to test elsewhere.

46. Mr Howard also referred to paragraph 69 of the decision in ***Daejan*** and Mr Brown's failure to identify what he would have said, had he been consulted regarding the repairs. Mr Brown has the benefit of hindsight and still has not said what he would have said or done. It is not enough to say he might have acted differently, had there been consultation.

47. Mr Howard suggested that it was impossible for VL to obtain quotes for the repairs, given the need to open the flank walls in sections. The extent of the damage could only be established on opening up and the walls had to be repaired on a piecemeal basis. Mr Howard also mentioned that photographs of the ongoing repairs were displayed in the foyer in Block 9.

48. Mr Howard also suggested that had VL embarked upon full consultation then the scaffolding outside section H would have to be dismantled before being reassembled once the consultation had been completed. This would have resulted in a disproportionate increase in the cost of the repairs.

49. In relation to the letter from Matthew & Matthew, Mr Howard pointed out that this did not identify any prejudice that had been suffered by Mr Shaffer.

50. In response to questions from the tribunal, Mr Howard advised that no attempt had been made to obtain alternative quotes for the repairs and there had been no consideration of a dispensation application between the repairs to sections H and D.

The tribunal's decision

51. The tribunal determines that the works covered by EBL's invoices numbered 3280, 3281, 3283 and 3284 did not form part of the repairs to the flank walls in section H and D and there was no need for VL to consult with the leaseholders regarding these works. Equally there was no need for VL to consult with the leaseholders regarding the works to the roof turrets (EBL invoices 3362, 3378 and 3409) or Mr Samways' fees (SSL invoice 934/SS448).

52. The tribunal grants the application for dispensation in relation to the repairs to the flank wall in section H covered by EBL invoices numbered 3312, 3318, 3387, 3396, 2298, 3399, 3400, 3406, 3407 and 3408. The grant of dispensation is conditional upon VL paying Mr Brown's legal costs in the

sum of £1,800 (including VAT) within 28 days of the date of this decision.

53. **The tribunal refuses the application for dispensation in relation to the repairs to the flank wall in section D covered by EBL invoices numbered 3411, 3417, 3421, 3422, 3426 and 3434. It follows that the statutory cap of £14,172 applies to these invoices, which total £52,496.40(including VAT).**

Reasons for the tribunal's decision

54. The repairs detailed in invoices 3280, 3281, 3283 and 3284 were undertaken by 07 September 2010 (the date of the invoices) and were separate to the lintel and brickwork repairs to the two flank walls. The total amount of these invoices was £4,950.28, which is below the statutory cap.

55. The repairs to the roof turrets detailed in invoices 3362, 3378 and 3409 were also separate to the lintel and brickwork repairs. The total amount of these invoices was £13,993.20, which is below the statutory cap.

56. The definition of qualifying works set out in section 20ZA (2) of the 1985 Act is *"works on a building or any other premises"*. It does not extend to professional fees incurred in supervising, or investigating the works. It follows that the fees covered by the SSL invoice (and any earlier invoice/s) should be treated separately to the repairs to the flank walls. There was no need for VL to consult with the leaseholders before instructing Mr Samways/SSL.

57. At paragraph 44 of the Supreme Court's decision in ***Daejan***, Lord Neuberger identified that the purpose of the consultation requirements *"...is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate.."*. He went onto say that the tribunal's focus when determining a dispensation application *"..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"*.

58. At paragraph 54, Lord Neuberger stated that the tribunal was not constrained when exercising its jurisdiction under section 20ZA and that *"..it has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect"*.

59. Both Mr Howard and Mr Miller referred to paragraph 67, which dealt with conduct issues. The final two sentences are key and read:

"As Lord Sumption said during the argument, if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily and LVT would be likely to accept that the tenants had suffered prejudice"

60. The tribunal's starting point was to consider whether the repairs to the flank walls were one or two sets of qualifying works. It concluded that there were distinct sets of works; one to section H and one to section D. Based on the EBL invoices, it appears that the works to section H were completed by 19 April 2012. Upon completion of these repairs the scaffold was dismantled and re-erected by section D. However the repairs to section D were not undertaken until the summer of 2012. The invoices for these repairs span the period 19 June to 20 August 2012 and the FPML letter to the leaseholders, informing them of the works, was not sent until 24 July 2012.

61. Given the time lag between the two sets of repairs, the tribunal is satisfied that there were two distinct sets of works. This view was reinforced by the separate billing of the repairs and the reference in the SSL invoice to "*phase 2 works to North Block*". It is clear that there were two phases of work; the repairs to section H forming phase 1 and the repairs to section D forming phase 2.

62. The statutory cap applies to each section of works and VL should have followed the section 20 consultation procedure before embarking on each set of works.

63. The tribunal then looked at whether any prejudice was suffered by the leaseholders, for each set of works. The tribunal agrees with Mr Miller that the completed response forms were of little evidential value in determining whether there had been prejudice. The same is true of the letter from Matthews & Matthews.

64. The tribunal had no details of prejudice suffered by the other tenants and only had limited details for Mr Brown. His argument is that he cannot say what he would have done differently, had there been consultation, as he and the other leaseholders were kept in the dark. This argument carries some force, notwithstanding the lack of evidence.

65. In relation to the repairs to section H, the tribunal finds that there was prejudice in that Mr Brown had no opportunity to check the scope, quality or cost of the repairs. However it accepts the arguments advanced by Mr Howard, regarding the necessity and timing of the repairs. Given that scaffold had been erected and some brickwork

removed, it was entirely reasonable to embark upon the repairs without consulting with the leaseholders. The alternative would have been to defer the repairs for at least 3 months, pending the outcome of the consultation. Not only would this have delayed the repairs, there would also have been an increase in the costs and this would have resulted in greater prejudice to the leaseholders than the prejudice arising from the failure to consult. Further the report from Mr Samways identified the need for "*immediate repair*". The tribunal is satisfied that the repairs to section H were sufficiently urgent that VL could not await a full section 20 consultation.

66. In the circumstances it is reasonable to dispense with the consultation requirements for the section H repairs. The application is granted in for these repairs, upon condition that VL pays Mr Brown's legal costs within 28 days of the date of this order. These costs would not have been incurred had VL complied with section 20. The costs estimate of £1,500 plus VAT provided by Mr Miller is reasonable and the level of his costs was not challenged by Mr Howard. The tribunal estimates that Mr Miller should have spent approximately 7 hours in taking instructions, perusing the documents, drafting and serving Mr Brown's statement of case, drafting and serving the skeleton argument and preparing for and appearing at the hearing. This equates to approximately £215 per hour, which is more than reasonable. Accordingly the estimated costs of £1,500 plus VAT are allowed in full.

67. The position in relation to section D is quite different. In this case, VL has not established any urgent need to undertake these repairs. It had known of the problem in this section for some time, as outlined in the document enclosed with FPML's letter of 24 July 2012. Section D was not addressed in Mr Samways' report and there was no expert evidence establishing the need for these repairs. It may be that Mr Samways' recommended these repairs, but there was no evidence of this.

68. As outlined at paragraphs 60-61, there was a time lag between the two sets of repairs. VL had ample time to embark on a section 20 consultation or apply for prospective dispensation before starting work on section D. It failed to take either of these steps and has not provided a satisfactory explanation for this failure. A section 20 consultation would not have delayed the repairs or increased the cost of the work. The consultation would not have prejudiced the leaseholders in any way. However the failure to consult did prejudice Mr Brown, as he lost the opportunity to seek a second opinion on the repairs before they were undertaken and lost the opportunity to make observations on the need for the repairs and the scope, timing and cost of the repairs. This prejudice was substantial and far outweighed any minor inconvenience to VL of complying with section 20.

69. Having decided that there was material prejudice on the section D repairs, the tribunal then considered whether it would be reasonable to

grant dispensation upon terms. The tribunal concluded that this was not appropriate, as the failure to consult was egregious. There was no consultation by VL whatsoever and no attempt to engage with the leaseholders, even though there was ample time to do so. Displaying photographs of the ongoing repairs in the foyer was of no benefit, as the work was already underway. Further the circular letter from FPLM was only sent out when the repairs were nearing completion. FLPM, as professional managing agents, clearly knew of the consultation requirements. Further VL would have been aware of these requirements, as section 20 notices had been served for previous major works. The tribunal concluded that the failure to consult before the works to section D was deliberate and was a flagrant breach of section 20.

70. In the circumstances it is not reasonable to dispense with the section 20 consultation requirements for the section D repairs. The application is refused for these repairs.

Application under s.20C and refund of fees

71. There was no application for an order under section 20C of the 1985 Act that was specific to the dispensation application. However Mr Brown did seek a section 20C order in relation to the proceedings generally. This is dealt with in the tribunal's decision on the service charge application.

72. There was no application for a refund of any fees that VL had paid in respect of the dispensation application/hearing[1].

Name: Tribunal Judge Donegan **Date:** 19 July 2015

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Appeals

1. Any party 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 which application must:-

   a. be received by the said office within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

   b. 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

2. If the application is not received within the 28-day time limit, it must include a request for an extension of time and the reason for it 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in

accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all of 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 –
(a) if it is an agreement of a description prescribed by the regulations, or
(b) 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 the 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 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) Regulations under section 20 or this section –
(a) may make provision generally or only in relation to specific cases, and
(b) may make different provisions for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.