FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/24UN/LDC/2018/0077**
Property	**:**	**Atholl Court, Kingsway Gardens, Andover, Hampshire SP10 4BB**
Applicant	**:**	**Aster Communities**
Representative	**:**	**Capsticks Solicitors LLP**
Respondents	**:**	**Mr J Renfrey** **Ms E Noble** **Mrs P Frost**
Representative	**:**	**-**
Type of Application	**:**	**Application to dispense with consultation requirements: sections 20 and 20ZA Landlord and Tenant Act 1985**
Tribunal Member	**:**	**Judge E Morrison**
Date of decision	**:**	**22 February 2019**

DECISION

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The application

1. By an application dated 5 October 2018 the Applicant lessor ("Astor") requested an order, pursuant to section 20ZA of the Landlord and Tenant Act 1985 ("the Act"), that the consultation requirements imposed by section 20 of the Act should be dispensed with for major works carried out at Atholl Court, Kingsway Gardens, Andover ("Atholl").

2. Originally six lessees were named as respondents, being the long lessees of flats at Atholl, the remaining thirty-four flats being occupied by general needs tenants of Astor. The respondents were required to return a form stating whether or not they agreed with the application, and were warned that those parties not returning the form would be removed as respondents. As three lessees did not return the form, only the remaining three lessees remain parties.

3. Directions were issued on 15 October 2018 which provided, amongst other things, for the application to be determined on the papers without an oral hearing unless a party objected. There has been no objection and therefore this is a determination solely on the basis of the written evidence and submissions. The Tribunal has also had regard to the evidence on the consultation process as set out in its previous decision (see paragraph 4 below).

Background

4. On 13 July 2018 the Tribunal issued its final decision in Case No. CHI/24UN/LSC/2017/0011, an application by Aster under section 27A of the Act to determine the reasonableness and payability of on-account service charges demanded from the lessees at Kingsway Gardens, a development which comprises five blocks, one being Atholl. The respondents to the current application also participated in the previous proceedings.

5. One of the challenges made to the service charges was that the consultation requirements under section 20 of the Act had not been complied with. As regards the other four blocks, the Tribunal found that section 20 had been complied with (para. 133 of decision). In respect of Atholl, the Tribunal found that the consultation requirements had not been met (paras. 134-135). The section 20 limitation on recoverability applies once those costs have been incurred (paras. 116,179). The works are, or are soon to be, complete.

The relevant statutory provisions

6. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable.

7. Section 20 of the Act provides that where costs exceeding an "appropriate amount" per lessee have been incurred on qualifying works, the relevant contributions of each lessee will be limited to that amount unless the consultation requirements have been either complied with or dispensed with by the determination of a Tribunal.

9. By Regulation 6 of the Services Charges (Consultation etc.) (England) Regulations 2003, the appropriate amount for qualifying works is £250.00.

10. Details of the consultation requirements are contained the Service Charges (Consultation Requirements) (England) Regulations 2003.

11. On an application under section 20ZA of the Act, the Tribunal may determine that any or all of the consultation requirements are dispensed with if it is satisfied that it is reasonable to do so.

The section 20 consultation on works at Atholl

12. The formal steps taken by Astor were as follows:

- On 31.3.16 Astor sent a Notice of Intention ("the stage 1 notice") to the Atholl lessees, stating that Astor intended to enter into an agreement to carry out the following works:

  Rainwater goods (guttering, gullies, fascias, soffits) re-design and replacement
  External decoration

  The stage 1 notice sent to the lessees in the other blocks listed much more extensive works.

- On 16.12.16 Astor sent a Notice of Proposals ("the stage 2 notice) to Atholl lessees, which was identical to the one sent to the lessees in the other blocks. While the lower part of the heading of the notice referred to the particular flat in Atholl owned by the lessee recipient, the main part of the heading mentioned only works to the other four blocks. The text of the notice itself began:

  "This notice is given further to the notice of intention to carry out works issued on 31 March 2016… The works proposed in that Notice were as follows:" There followed a list of many major items of work which had not been mentioned in the stage 1 notice for Atholl. No explanation was provided to Atholl lessees as to why the scope of work had increased.

13. In the Tribunal's view, a reasonable Atholl lessee receiving the stage 2 notice may not have appreciated that the works now mentioned for the first time applied to Atholl. It might reasonably have been assumed that they applied only to the other blocks. In any event the Atholl lessees

had had no formal opportunity to comment on the additional works prior to receiving the stage 2 notice.

14. Work to the private balconies was not mentioned in either notice.

15. In addition to the formal consultation, Aster state they sent a letter dated 1.3.16 to all lessees inviting them to participate in the tender specification and contractor selection process for the proposed works to the blocks, including Atholl, as part of what became known as the "procurement group". Astor's evidence includes reply forms from two Atholl lessees (not any of the remaining respondents to this application), showing that they received Astor's letter. At that point in time the only information about proposed works provided to Atholl lessees (in contrast to lessees of the other blocks who had been receiving information via non-statutory consultation for some time) was a letter dated 27.10.15 setting out a 30 year building costs plan in very general terms.

Aster's case on dispensation

16. Aster's submissions are mostly found in the Reply dated 4.12.18. Astor seeks dispensation from the consultation requirements in relation to all items of work undertaken save for the overcladding of the eaves boards (which the Tribunal found, in the 27A proceedings, to be unnecessary).

17. Astor relies on the fact that, in those proceedings, all other aspects of the works were held to be reasonable save for replacement of the private balcony asphalt and work to the private balcony wing walls. Astor's submissions draw heavily on the approach to dispensation set out by the majority of the Supreme Court in *Daejan Investments Limited v Benson and others* [2013] UKSC 14, and in particular focus on whether the deficiencies in consultation have caused prejudice to the lessees. It is argued that the Atholl lessees will not have to either (a) pay more than an appropriate sum or (b) pay for inappropriate works, and therefore there has been no prejudice.

18. In respect of (a) Astor point out that Stepnell, the contractor which undertook work to all the blocks, was appointed through a competitive tendering process and was the lowest tenderer. Lessees from all blocks, including Atholl, had the opportunity to participate in the process via the stage 2 notice, and although many lessees commented on the scope of the works (which were similar for all blocks, although less extensive for Atholl), there was no objection to the actual costings or to the selection of Stepnell.

19. In respect of (b) Astor state that the works identified in the stage 1 notice were fully consulted on with the Atholl lessees. As regards all other works save for the balconies, it is said that the Tribunal has already found that scope of these works is reasonable, within the 27A proceedings, and therefore there can be no prejudice to the lessees. As to the balconies, it is submitted that the work that has actually been

carried out is far more limited than that which the Tribunal was being asked to approve in the 27A proceedings. It is no longer Astor's case that the balcony asphalt and some or all of the wing walls should be replaced; instead more limited remedial works have been carried out "at a far lesser estimated cost". Reference is made to the report of Welling Partnership Property and Construction Consultants ("Welling") prepared in July 2017 – after the contract had been awarded to Stepnell – which concluded that overcoating the asphalt would suffice, along with some brickwork repairs to the walls. Mr Steve Greenhalgh, Astor's Asset Manager, states in his second witness statement that the works in fact undertaken to the balconies at Atholl have been based on that recommendation. It is further submitted that it will still be open to the lessees to argue, once the final costs of the works is known, that these costs were not reasonably incurred, and thus there can be no prejudice.

The lessees' objections to dispensation

Mr J Renfrey

20. Mr J Renfrey is represented by his father Mr P G Renfrey, as in the earlier proceedings. He says that as the stage 2 notice did not mention Atholl in the main heading, it was assumed that the additional works listed related only to the other blocks and that only the works to the rainwater goods and external decoration applied to Atholl.

21. Mr P G Renfrey does not specifically deny that his son received the letter dated 1.3.16 (see paragraph 15 above) but suggests that if this was not in fact sent to Atholl lessees then he was denied the opportunity to participate in the procurement group. Had he been given this chance, Mr P G Renfrey, who states he has 30 years of relevant experience, would have drawn attention to what he perceives to be flaws in the procurement process, suggesting that the lack of certain processes such as "critical path analysis" and "staffing matrix calculation" have caused prejudice. He then refers to concerns that the Stepnell contract has overrun, which he opines is unlikely to be at no cost to the lessees, and which might have been avoided had "the Atholl Court leaseholder skillset" been deployed in the section 20 process. He suggests that any dispensation should be limited to the works in the stage 1 notice plus a proportion of the preliminaries.

Ms E Noble

22. Ms Noble also states that she has no paperwork inviting her to participate in the procurement group. She submits that prejudice has been caused by the "lack of opportunity to attend early meetings, put forward contractors, attend the procurement group or make comments in the early stages". If she had had that opportunity, and also been told the true scope of the proposed works at Atholl, she would have asserted that little remedial work was required to Atholl, compared with the other blocks, and that no proper survey had been carried out. She

suggests that "as work is now complete, we cannot verify how much, if any, of the work was actually required".

Mrs P Frost

23. Mrs Frost also states she was unable to find her invitation to join the procurement group, and that the Atholl lessees were prejudiced by their "deliberate exclusion". She states that "To suggest that the outcome of this group would not have been different with our contribution, given Mr Renfrey's qualifications in this exact area and my husband's 25 years financial accountancy experience with multi million pound contracts … is ludicrous". Furthermore, because the stage 1 notice mentioned only limited works, there was no opportunity to comment on the additional works. Astor had adequate time between stage 1 and stage 2, and should have issued an amended stage 1 notice for Atholl noting all the additional works, instead of only mentioning those works for the first time in the stage 2 notice. If Astor had done that then there would still have been time for the Atholl lessees to participate in the procurement group.

Discussion and determination

24. There is one issue of fact to be determined: whether Astor's letter dated 1.3.16 was sent to the Atholl lessees. Astor say that it was sent, and have produced two reply forms received from Atholl lessees dated 4.3.16 and 7.3.16. None of the remaining respondents to this application admit receipt of this letter. However Mrs Frost did not own her flat at that time (she completed her purchase on 31.3.16), which could well explain why she does not have it. Ms Noble has been unable to find it in her paperwork. Mr Renfrey does not deny his son received the letter. Considering all the evidence, the Tribunal finds, on a balance of probabilities, that this letter was sent to the Atholl lessees, inviting them to join the procurement group, but that the lessees may not have appreciated its relevance to them at the time.

25. There is no doubt that the consultation process for the Atholl lessees fell far short of what is statutorily required. However *Daejan* makes it clear that the decision whether or not to grant dispensation does not depend on the seriousness of the breach, or the reasons why it occurred, and is not intended to be punitive. Sections 20 and 20ZA of the Act are intended to reinforce, and give practical effect to, the protections set out in section 19, namely that lessees should not pay for works or services the costs of which are not reasonably incurred, or which are not of a reasonable standard (*Daejan* at paras 42-44). The focus must be on whether any of the lessees have been or will be prejudiced by the failure to comply with the statutory consultation requirements. The factual burden of establishing some relevant prejudice lies on the lessees, although their arguments may be viewed sympathetically by the Tribunal. If lessees suggest that they were not given the opportunity to make representations about the proposed works, they should identify what they would have said (*Daejan* at paras.67-69).

26. All three respondents have suggested they were prejudiced by the lack of opportunity to participate in the procurement group. Although the Tribunal has found that they were invited to participate, it is entirely understandable why they might not have considered at the time that this was important. The stage 1 notice sent by Astor to the Atholl lessees had mentioned only works about which there has been very little controversy. However, even if the stage 1 notice had mentioned all the works proposed at Atholl, so that the letter of 1.3.16 would have had more obvious significance to its recipients, the loss of opportunity to participate would still only have related to *non-statutory* consultation. There was never any statutory requirement on Astor to set up a procurement group with lessee participation[1]. The respondents are required to establish some prejudice arising as a result of failing to follow the *statutory* requirements, not as a result of anything else. Therefore what they may or may not have said at the procurement group, and what effect it might or might not have had, is irrelevant to the application for dispensation.

27. Aside from the procurement group it is correct to say that the Atholl lessees had no real opportunity to comment on the additional works until after the stage 2 notice had received, by which time the specification had been prepared and tenders received. Even then the applicability of the additional works to Atholl was far from clear. However, only Ms Noble has sought to identify any relevant prejudice specifically arising out of the failure to follow the statutory requirements. She suggests that if the scope of the proposed works had been notified earlier to Atholl lessees, she would have queried the necessity of some of the works, and pointed out that no proper survey of Atholl had been undertaken. By implication, she asserts that this could have resulted in more limited works being done, at a lower cost. She suggests that now the work is complete, it is not possible to verify how much, if any, of the work was actually required.

28. Were this a case where there was no or insufficient evidence now available as to whether the works were required, Ms Noble's point would have considerable merit. But while it is true that there was only one formal professional report on defects at Atholl (from the specialist masonry consultants, Bersche-Rolt, covering concrete repairs) available prior to the preparation of the specification, other evidence, including expert evidence, was made available in the 27A proceedings which established, to the satisfaction of the Tribunal, that all the works, other than those to the eaves and the private balconies, were reasonably required, and the actual cost of those works was not challenged.

29. Astor does not seek dispensation in respect of the eaves works; thus the Atholl lessees will not have to pay for the cost of these. As regards the works to the private balconies, the Tribunal accepts that if the lessees

[1] Mr Renfrey and Mrs Frost also appear to assume, without any evidentiary foundation, that lessees would have been able to participate with or via a non-lessee representative.

had had the opportunity to make representations, that might well have resulted in a reduced scope of work in the specification, and a reduced sum demanded on account for those works. However, in the 27A proceedings, the Tribunal disallowed any payment on account for the balcony works in any event, on the ground that as at the date of the demand, they had not been shown to be required. As Astor did not seek to enforce payment prior to the Tribunal's determination, the lessees have not so far been required to pay for any inappropriate works.

30. It is clear that Astor will in due course seek to recover some costs from the Atholl lessees for balcony works. Astor can now rely on the Welling report of July 2017 to support its case that these works are reasonable. The report includes photographs and other considerable detail about the condition of the balconies at that time, before work had been carried out. The respondents have not alleged or adduced any evidence that the works recommended by the Welling report were not reasonably required. It will still be open to the respondents to make that case once they are asked to pay for the works, but on the evidence presently before the Tribunal, there is nothing to suggest that the respondents will be asked to pay for inappropriate works or pay an inappropriate sum for those works. The Tribunal does not accept Ms Noble's assertion that it will not be possible to verify what work was actually required; aside from the Welling report there is likely to be additional documentation available from the contract administration records.

31. The conclusion of the Tribunal is therefore that the respondents have not established they have been or will be prejudiced by the deficiencies in the statutory consultation, and the Tribunal is satisfied that it is reasonable to grant dispensation in respect of all works at Atholl save that relating to the eaves.

32. There remains the question of whether the dispensation should be on terms. The lessees should not have to pay for any of Astor's costs in connection with the application for dispensation. The Tribunal therefore grants the dispensation on terms that none of Astor's costs of or incidental to this application are to be recoverable from any of the lessees at Kingsway Gardens through future service charges.

33. For the sake of completeness, it is noted that none of the respondents, who all acted without legal representation, have made any claim for costs and therefore the Tribunal has not considered any terms that might have required payment of such costs.

Dated: 22 January 2019

Judge E Morrison

Appeals

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.