FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/ 1492.19/20
Property	**:**	Hadleigh Court, Shady Bower, Salisbury SP1 2RJ
Applicant	**:**	Marionette Fryer
Representative	**:**	Parker Bullen LLP
Respondent	**:**	Mrs Karen Scott (Flat 10)
Representative	**:**	PSH Law Solicitors
Type of Application	**:**	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	**:**	Mr D Banfield FRICS
Date of Decision	**:**	28 April 2020

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the following works;

The parapet wall is to be knocked down and rebuilt to comply with Building Regulation requirements.

The flat roof below the parapet wall must be renewed to ensure the building is water tight
The mortar below the brick wall is to be raked out to a depth of 20mm and repointed to prevent water from penetrating the wall.

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

The application for costs is refused.

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 1985 Act.

2. The Applicant explains that due to water penetration into the flats it is necessary to rebuild, to Building Regulation standards, the parapet wall which forms part of the external structure of the building. The flat roof below the parapet wall will also need to be replaced and some repointing.

3. Two quotations have been obtained and a notice sent to all leaseholders on 11 March 2020.

4. The Tribunal made Directions on 31 March 2020 indicating that the application would be determined on the papers in accordance with Rule 31 of the Tribunal Procedure Rules 2013 unless a party objected. The Directions required the Applicant to serve a copy on the Respondent and to confirm to the Tribunal that this had been done. Attached to the Directions was a form for the Respondents to indicate whether they agreed with or objected to the application.

5. The form was required to be sent electronically to the Tribunal by 15 April 2020 and it was indicated that if the application was agreed to or no response was received by the Tribunal the lessees would be removed as Respondents.

6. Forms have been received from the lessees of 7 flats 6 of whom agreed to the application. They, together with those who did not respond have therefore been removed as Respondents.

7. No requests for an oral hearing have been received and the application is therefore determined on the papers received in accordance with Rule 31 of the Tribunal Procedural Rules 2013.

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.**

9. Reference to page numbers in the bundle are shown as [x].

The Law

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

    20ZA Consultation requirements:

    a. 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.

11. 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 (1) 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

12. On 11 March Parker Bullen wrote to all lessees [12]explaining that it was required to consult leaseholders under S.20 and detailed the works as:

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The flat roof below the parapet wall must be renewed to ensure the building is water tight

The mortar below the brick wall is to be raked out to a depth of 20mm and repointed to prevent water from penetrating the wall.

13. A report dated 15 January 2020 from Harvey and Snowdon Consulting Structural Engineers [13] details the defects noted on their inspection and provides details of the remedial works required.

14. Quotations from Saul Bros Ltd [11] and Cathedral Gate Holdings [19] were obtained.

15. In a letter on behalf of Mrs Scott dated 14 April 2020 from PSH Law Solicitors to Mrs Fryer [162] it is accepted that “there is a need to rectify the ingress of water into the building” and refers to the report from Stephen Back Associates Ltd commissioned by their client. It was not agreed that a total rebuild of the wall is necessary and suggested a joint meeting of the experts and a joint report be agreed and prepared.

16. The letter goes on to refer to the quotations received, that the installers of the current flat roof membrane could remove and then re-attach it, and the water ingress to their client's sunroom and gable end.

17. In the Applicant's response [167] it was said that the Respondent had failed to say why the application was opposed or what she would have done differently if the statutory consultation process was completed.

18. Reference was also made to a factual error in Stephen Back Associates report which had now been corrected by them, that the company who had laid the roof membrane were no longer in business and that according to the project manager the Respondent appeared keen to reach a solution.

19. The cost of the works was also not relevant to an application for dispensation.

20. At pages 170 and 171 are photographs of water damage although there is no indication as to their relevance or location.

Determination

21. 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 the requirements.

22. The only issue for the Tribunal is whether the lack of consultation has prejudiced the Respondent in that if it had taken place would the landlord have done something different when arranging for the repairs to be carried out?

23. There is no dispute that remedial works are required, the Applicant is following the specification drawn up by a structural engineer and competitive quotations have been received.

24. It is clear that the works to prevent further water damage should be carried out without the further delay that Section 20 consultation inevitably involves. No evidence of relevant prejudice as considered in the Daejan case referred to above has been identified.

    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 following works;

    The parapet wall is to be knocked down and rebuilt to comply with Building Regulation requirements.

The flat roof below the parapet wall must be renewed to ensure the building is water tight

The mortar below the brick wall is to be raked out to a depth of 20mm and repointed to prevent water from penetrating the wall.

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

Costs

26. In a covering email from Parker Bullen an application for costs amounting to £3,144.00 is made on the grounds that;

1. The Respondent did not respond to the Notice to carry out works as all lessees were invited to do. The lessees were invited to consent to the application but the Respondent failed to do so.

2. In her form for Respondents, the Respondent indicated that she did not agree to the application, but in the statement sent to the landlord she failed to say why she opposed the application. Further the Respondent has failed to produce evidence of what she may do/have done differently if the full consultation process were complied with.

3. Accordingly, the Respondent's behaviour has been unreasonable, particularly since she previously expressed agreement to the works to James Jordan, the Applicant's agent.

27. There is no indication that the application for costs has been served on the Respondent and there is no indication as to the jurisdiction under which the claim is made. To avoid further litigation I am assuming that the application is made under Rule 13 of the Tribunal's procedural rules which states that costs may be awarded if a person has acted unreasonably in bringing, defending or conducting proceedings.

28. For an award to be made the Applicant has to demonstrate that the unreasonable behaviour was in respect of the proceedings before this Tribunal and behaviour leading up to any application is therefore irrelevant.

29. The only issue referred to above is that she failed to say why she opposed the application or to produce evidence in support.

30. The Upper Tribunal case of Willow Court Management Limited places a very high bar that must be crossed before behaviour can be considered unreasonable and a failure to effectively pursue a case comes nowhere near meeting such a requirement.

31. The application for costs is therefore refused.

D Banfield FRICS

28 April 2020

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. 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.

2. 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.

3. 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 appeal is seeking.