FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LDC/2020/0046**
Property	**:**	**191-210 Nash House, Poynders Gardens Estate, London SW4 8PH**
Applicant	**:**	**Mayor & Burgesses of the London Borough of Lambeth**
Respondents	**:**	**Dipak Patel (Flat 204)** **Jade Walton (Flat 199)**
Type of application	**:**	**Dispensation from consultation requirements under section 20ZA of the Landlord and Tenant Act 1985**
Tribunal	**:**	**Judge Nicol**
Date of decision	**:**	**1st May 2020**

DECISION

The Tribunal grants the Applicant dispensation from the consultation requirements in relation to the major works to 191-210 Nash House, Poynders Gardens Estate, London SW4 8PH completed in January 2018.

The application

1. This matter has been determined on the papers which has been consented to by the parties. A face to face hearing was not held because the Tribunal directed that the case was suitable for the paper track and the parties did not object. The documents that the Tribunal was referred to are in a bundle of 257 pages, the contents of which have been recorded where appropriate below.

2. The Applicant is the freeholder of the Poynders Gardens Estate in south London. There are 20 flats, numbered 191-210, in one block, Nash House, 11 of which are held on long leases. The leases are in the same

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format and oblige the Applicant to repair and maintain the block while the lessees pay a share of the resulting costs.

3. In May 2016 the Applicant commenced a programme of major works across the 7 blocks on the estate, involving repairs to concrete, the roof, rainwater goods and balconies, replacement and redecoration in the communal external areas, rewiring of lateral mains and upgrading electrical services. The works were carried out by the Applicant's contractors, Mears, under a qualifying long-term agreement and completed in January 2018. The resulting service charge bill for each lessee is over £40,000 (the Tribunal was not provided with the exact figures or the service charge demands).

4. Any such works programme is subject to consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 (the relevant parts of which are set out in the Appendix to this decision). On 18th December 2015 the Applicant sent each of the 11 lessees notice in writing of their intention to carry out qualifying works in accordance with paragraph 1 of Schedule 3 of the Regulations and, by letter dated 12th January 2016, they extended the period within which lessees could reply with their observations from 19th to 24th January 2016.

5. However, the Applicant later identified the following ways in which they had not complied with the requirements thereafter:

   - On 7th January 2016 the lessee of Flat 192 sent in observations in response to the notice. The Applicant says that they had regard to those observations in accordance with paragraph 3 of Schedule 3 of the Regulations but failed to state their response to the observations by notice in writing to the lessee in accordance with paragraph 4.
   - The lessee of Flat 196 sent in their observations on 22nd January 2016. Under paragraph 4, the Applicant should have sent their response to the lessee by 11th February 2016 but actually sent it on 25th February 2016, 14 days late.
   - Similarly, the lessee of Flat 198 sent in their observations on 31st December 2015 but the Applicant did not send their response until 8th February 2016, 19 days late.

6. During these proceedings, the Applicant also admitted that they responded late, on 29th February 2016, to the observations Ms Jade Walton, the lessee of Flat 199, made on 23rd January 2016.

7. Due to these breaches of the statutory consultation requirements, the Applicant has applied to the Tribunal for dispensation from those requirements under section 20ZA of the Act. Without that dispensation, they would be limited to recovering only £250 from any affected lessee.

8. The Tribunal issued directions on 13th March 2020 including:

   (a) The application would be determined on the basis of written representations unless any party requested an oral hearing. No party requested an oral hearing.

   (b) Any lessee who opposed the application had to complete and send a reply form to the Tribunal and send the Applicant a statement of the grounds of their opposition. Two lessees responded, namely Mr Dipak Patel, the lessee of Flat 204, and Ms Walton.

9. Mr Patel asserted that dispensation should not be granted, not only on the basis of the Applicant's admitted failures but also on the following grounds:

   (a) Mr Patel sent in observations in response to the Applicant's notice on 14th January 2016. He admits that the Applicant responded on 4th February 2016, within the requisite 21-day period, but asserts that the Applicant had failed to have regard to his observations under paragraph 3 of Schedule 3 to the Regulations.

   (b) In particular, Mr Patel asserts that he had pointed out that the scaffolding and roof replacement costs were not reasonable. In 2013/14 scaffolding was erected to another block, Vaughan House, where he also has a flat, at a cost of £32,258.43 compared to the cost for the subject property of £102,501.44. He asserts that the Applicant has not provided a cogent explanation.

   (c) Mr Patel also asserts that the notice of 18th December 2015 was defective so that it was invalid, although he has not specified how other than to assert that it contained "errors" and appeared to have been cobbled together in a very slapdash manner. In a letter dated 1st February 2018, he alleged that the appendices to the notice contained two mathematical errors but it is not clear whether he still relies on these matters as they are not in his statement of case.

   (d) Mr Patel alleged that the original estimate for the block in the Applicant's notice was £175,351.98 but the final cost came to £803,056.71 so that his estimated contribution as set out in the notice was £9252.90 but his service charge is £41,491.75.

   (e) Mr Patel points out that another notice had previously been served on 25th March 2013, although he did not get a copy, and queried whether works should have been completed within a period of time after that rather than a further notice being served.

10. Ms Walton has also asserted that dispensation should not be granted and her statement of case makes the following points:

   (a) The Applicant's statement of case wrongly stated that they responded to her observations on Friday 26th February 2016 when, in fact, they responded, at her prompting, on Monday 29th February 2016. She queried the Applicant's explanation of staffing shortages over the Christmas period.

(b) Some relevant information, namely leaflets with payment options and FAQs, was only provided during the observation period.

(c) The costs include works to the windows which are the lessees' responsibility.

(d) Ms Walton agrees with others that the works are not "value for money".

(e) Ms Walton asserted that the agreement with Mears should have been re-tendered.

(f) The Applicant failed to provide details of the cost of roof works in 2013/14 to a neighbouring block, Vaughan House, for use as a comparison with the cost to the subject property.

(g) Ms Walton supports Mr Patel's point about the scaffolding cost compared with that for other works in 2013/14 at Vaughan House.

(h) Some of the works were defective (she does not specify which).

(i) There are works in the final bill which were not in the estimate and some costs vary.

11. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

(a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42] (It is arguable that the statutory consultation requirements arising from section 20 were aimed at more than just addressing the costs referred to in sections 18 and 19 and that it is absurd to suggest that lessees' interests, particularly where their property is also their home, do not go beyond the cost to them, but the Supreme Court thought otherwise.)

(b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

(c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]

(d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

(e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]

(f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

(g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

(h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

(i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

(j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

(k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

12. In this case, Mr Patel and Ms Walton were manifestly not deprived of their opportunity to make representations. They took that opportunity but are dissatisfied with the Applicant's response. In relation to Ms Walton, she does not suggest that the fact that she received the response a few days late in itself caused her any difficulty or prejudice.

13. Section 20ZA of the Act is not concerned whether the works or the costs are reasonable within the meaning of section 19. The lessees have a separate remedy under section 27A to challenge their service charges on that basis but none of the parties have made any such application. However, many of Mr Patel and Ms Walton's points are precisely about the reasonableness of the works or their costs.

14. Mr Patel tries to square the circle by claiming that the Applicant's failure to accede to any of his observations about the reasonableness of the costs in itself demonstrates that the Applicant failed to have regard to them. There can be no doubt that the Applicant had some regard to his observations because they provided a detailed letter in response. The only way Mr Patel would be able to demonstrate that this regard was insufficient on the sole basis that his points were not conceded would be if he established that his points were obviously correct. A landlord has proper regard to an observation, even if they reject it, if they have a reasonable basis for rejecting it. This encompasses the possibility that the landlord's argument may be found later by a Tribunal to be wrong on an application under section 27A – due regard does not mean the landlord has to achieve a standard which is immune to legal challenge.

15. The Tribunal is satisfied that the points made by the Applicant in response to Mr Patel's and Ms Walton's are at least arguable. The Tribunal would go further and say that, on their face and without further evidence, the Applicant's arguments appear to be correct and Mr Patel's and Ms Watson's wrong. For example, the Applicant points out that the scaffolding comparison between Vaughan House and the subject property is not appropriate as they were dealing with works of an entirely different extent. Further, there is authority for the proposition that the windows in a flat acquired through the right to buy remain the responsibility of the landlord, whatever the lease may say.

16. The figures given by Mr Patel (paragraph 8(d) above) are not correct. The Applicant's notice of 18th December 2015 gave a total estimated cost of £623,800.31. The lower figure of £175,351.98 appears to come from some earlier letter from the Applicant which the Tribunal has not seen. Two points arise:

    (a) The fact that a substantially lower figure was given previously would be expected to give rise to genuine concern. However, it is one thing to raise a question, while the answer is quite another. The Tribunal has seen before where a lessee seems to regard their question as rhetorical, as if asking it establishes their point without more. However, raising a question obliges a lessee to listen to the answer and to acknowledge when that answer is sufficient to any extent, rather than to continue with the same point as if it had not been addressed. In this case, the Applicant has sought to explain why the costs increased. If any lessee wishes to challenge that explanation, they have a remedy under section 27A.

    (b) Both Mr Patel and Ms Walton object that the costs in the final bill were significantly higher than the estimate in the original notice of 18th December 2015. It is in the nature of an estimate that it is unlikely to be precisely accurate, particularly on a project of this size. In and of itself, such an increase does not imply that the landlord has done anything wrong. Again, if any lessee wishes to make a case that, on the examination of further evidence, the increase was unreasonable, they may apply to the Tribunal under section 27A.

17. To the extent that it is relevant, the Tribunal cannot identify any errors in the notice of 18th December 2015 which would render it "invalid". It conveyed sufficient information for any lessee to have the opportunity to make meaningful observations, as indeed both Mr Patel and Ms Walton did.

18. Neither Mr Patel nor Ms Walton have identified any prejudice which has arisen from the Applicant's particular failures in this case in relation to the consultation process. Nor would the Tribunal expect to find any, given the nature of those failures. In one case, not involving either Mr Patel or Ms Walton, the Applicant failed to respond to a lessee's observations and, in 3 other cases, they were some days late in sending their response. No lessee was deprived of any substantive right to be consulted. The Tribunal is satisfied that the Applicant had due regard to

the observations they received, whether they responded within the statutory time limit or not.

19. For these reasons, the Tribunal is further satisfied that it is reasonable to grant the Applicant dispensation from the statutory consultation requirements.

Name: Judge Nicol **Date:** 1st May 2020

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 20 Limitation of service charges: consultation requirements

(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 20ZA Consultation requirements: supplementary

(1) Where an application is made to the appropriate 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.

(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 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 other 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 provision 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.

Service Charges (Consultation Requirements) (England) Regulations 2003

6. Application of section 20 to qualifying works

For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250.

7.— The consultation requirements: qualifying works

(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3.

SCHEDULE 3

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS UNDER QUALIFYING LONG TERM AGREEMENTS AND AGREEMENTS TO WHICH REGULATION 7(3) APPLIES

Regulation 7(1) and (2)

Notice of intention

1.—

(1) The landlord shall give notice in writing of his intention to carry out qualifying works–

- (a) to each tenant; and
- (b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall–

- (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
- (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
- (c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
- (d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
- (e) specify–
  - (i) the address to which such observations may be sent;
  - (ii) that they must be delivered within the relevant period; and
  - (iii) the date on which the relevant period ends.

Inspection of description of proposed works

2.—

(1) Where a notice under paragraph 1 specifies a place and hours for inspection–

- (a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works and estimated expenditure

3.

Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

Landlord's response to observations

4.

Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).