



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

Case Reference : BIR/00CN/LDC/2020/0016

HMCTS : P:PAPERREMOTE

Property : Normid Court, Bunbury Road, Northfield, Birmingham B31
2DS

Applicant : Longhurst Group Limited

Respondents : The following lessees of Normid Court:

Flat 2: Mr Rogers
Flat 3: Mr & Mrs Wakeman
Flat 5: Mrs Salas-Wadge
Flat 7: Mr & Mrs Kolovos
Flat 8: Mrs Sapey
Flat 9: Mrs Williams
Flat 10: Mr Rodgers
Flat 11: Ms Towler
Flat 12: Mr Rao

Type of Application : An Application under section 20ZA of the Landlord and
Tenant Act 1985 for dispensation of specified Section 20
consultation requirements.

Tribunal Members : Judge David R. Salter (Chairman)
Robert Bryant-Pearson FRICS

Date of Decision : **24 March 2021**

DECISION

Introduction

1 The Landlord (“the Applicant”) applied to the First-tier Tribunal (Property Chamber) (FTT) in an application dated 9 December 2020 for an order to dispense with consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985 (“the Act”), as amended by the Commonhold and Leasehold Reform Act 2002. In short, this section together with the Service Charges (Consultation Requirements) (England) Regulations 2003 (‘the Regulations’) requires a landlord to consult with lessees before placing a contract to undertake any ‘qualifying works’ that would cost any tenant more than £250.00. The Regulations set out a timetable for the consultation and identify the procedures to be followed in the course of the consultation.

2 However, the Act envisages that there may be occasions where for various reasons a landlord may be unable to consult, for example in cases of emergency, and, consequently, there is provision in section 20ZA of the Act for a landlord to apply to the Tribunal for ‘dispensation’ to override all or some of the consultation requirements. An application may be made to the Tribunal before or after works are carried out.

3 In this case, the Applicant applied for dispensation from ‘further consultation requirements’, because in the course of carrying out works (‘the initial works’) in November 2020 at Normid Court, a purpose-built block of twelve flats, under a ‘qualifying long-term agreement’ it discovered ‘further issues and concerns’ that gave rise to the need for ‘additional works’. The Applicant described the initial works as the removal of asbestos containing soffits boards, renewal of fascia and soffits boards, and renewal of rainwater goods i.e. guttering and downpipes, whilst the additional works emanating from the ‘further issues and concerns’ were described in the application as follows:

- The repointing of 4 chimneys around the main roof due to perished mortar points. This work also include for renewing the lead aprons around the base of the chimneys.

- Replacing the flat roof sections around various locations of the main roof. This work is required because of the poor condition of the existing felt coverings and the poor condition of some of the supporting timber joists.

- Replacing the felt coverings and some supporting timber joists to all the dormers (Dormer is a roof structure containing windows, that projects vertically beyond the plane of the main roof) around the roof. On close inspection, it was noticed that the felt covering above these dormers had started to fail which had led to water entering some of the top floor flats. Due to these failing roof coverings, some of the timbers underneath these coverings have become damaged.’

The Applicant indicated that the cost of these additional works is £32,878.83 (plus VAT). This constitutes a cost of £3,287.88 to each of the Respondents and not £3,878.83 as stated in the application and repeated in Mrs White’s witness statement (see further, below).

The Tribunal is mindful that this was in addition to the cost of the initial works estimated at £79,467.92 plus VAT, equating to £7,946.79 for each Respondent.

The Applicant observed that in light of this discovery ‘we must proceed with the necessary remedial works without further consultation with the leaseholders as delaying these works would lead to further damage, increased costs...on top of the £32,878.83 + VAT already identified and disruption to the current work’.

In relation to such 'increased costs', the Applicant indicated the cost of further delay would include an additional scaffolding hiring cost (£14,470.00), an additional cost for undertaking the works out of sequence with the current works (£5,266.00) and referred to an unquantified cost related to recommencement of the works because of the non-availability of the contractor during the first six weeks of 2021.

The Applicant added that '[we] are also concerned that as we move into the worst of the seasonal weather the work should take place immediately to prevent any further damage, ensure the health, safety and wellbeing of the residents and avoid further significant costs to the scheme'. The Applicant named the above-named lessees of Normid Court as the Respondents.

- 4 By Directions dated 14 December 2020 and issued by the Regional Surveyor, the Applicant was directed, upon receipt of the Directions, to send, immediately, to each of the Respondents a copy of the application with any accompanying documents, including a copy of the Directions and the Tribunal's covering letter. The Applicant was also instructed to place copies of the aforementioned documents in the hall/on the notice board of Normid Court and to notify the Tribunal by 8 January 2021 that this had been done. Further, the Directions afforded the Respondents, individually or jointly, the opportunity (to be exercised as soon as possible but not later than 22 January 2021) to inform the Tribunal in writing, with a copy to the Applicant, whether they consented to or opposed (in whole or in part) the application, wished to appoint a spokesperson or wished the Tribunal to hold a hearing.
- 5 In addition, the Applicant was directed to prepare a bundle of documents (broadly, comprising those documents that were material to the application, including a statement setting out the full grounds for the application) and to send three copies to the Tribunal and a copy to any of the Respondents who had indicated opposition to the application by 5 February 2021. Further, the Respondents, other than those who consented to the application, were directed to prepare, either individually or collectively, a bundle of documents, including a statement setting out why the application was opposed and any supporting documents (other than those provided by the Applicant), copies of which were to be sent to the Tribunal and the Applicant, respectively, by 19 February 2021.
- 6 The Directions also informed the parties that in March 2020 inspections of properties and land were suspended with immediate effect and that with effect from 1 July 2020 the following arrangements apply:
 - 'a) In relation to the inspection of the interior of buildings and premises, the suspension will remain in effect. To mitigate the impact of the suspension, the Tribunal may consider the following:
 - i. Parties may be permitted to produce photographs and/or videos of the condition or other relevant aspects of the property or land;
 - ii. External "drive by" inspections by Tribunals may be permitted in appropriate cases.
 - b) In relation to the inspection of the exterior of buildings or parcels of land, Tribunals will have the discretion to carry out an inspection of the property that is the subject matter of the dispute between the parties. The discretion will be exercised by a judge or a valuer chairman who will take all relevant considerations into account, including the representations of the parties and the need for appropriate social distancing. If the judge or valuer chairman directs that an external inspection may take place, then the judge or valuer chairman may also place conditions on how the inspection shall be conducted, including, where appropriate, a direction that the parties shall not be entitled to accompany the judge/valuer chairman or Tribunal members.'

In the event, no inspection of the exterior of Normid Court was undertaken by members of the Tribunal.

- 7 In an e-mail from the Tribunal dated 9 February 2021, the Applicant was informed that no objections to the application had been received from any of the Respondents. The Applicant was also reminded of its obligation to provide three copies of its bundle of documents to the Tribunal in accordance with the Directions.

In furtherance thereof and in accordance with the Directions, Mrs Andrena White, Head of Leasehold Services for the Applicant, submitted, on behalf of the Applicant, on 15 February 2021 her witness statement, a copy of a Statutory Notice of Intention dated 7 February 2020 relating to the initial work, a copy of the application, a copy of the Directions, copies of letters dated 8 December 2020 written by the Applicant to each of the Respondents relating to the application, the overall cost and a breakdown of those costs in relation to the additional works, various photographs indicative of locations where the additional works were required, and a copy of the lease relating to Flat No. 12. In addition, Mrs White provided a copy of a transfer of engagements between the Friendship Care and Housing Limited and the Applicant dated 20 May 2019.

- 8 The Tribunal did not receive submissions or objections from any of the Respondents.
- 9 No request for a hearing was received by the Tribunal.
- 10 In light of the above, the Tribunal determines the application on the basis of the written evidence submitted by the Applicant and without an inspection of Normid Court.

The Leases

- 11 As indicated above (see, paragraph 7), the Applicant provided the Tribunal with a copy of a specimen lease in the form of the lease relating to Flat No. 12; a copy of the lease relating to Flat No. 3 accompanied the application. Each of these leases was granted for a term of 125 years at a ground rent of £10.00 per annum for the entire term. They set out, *inter alia*, the following rights and obligations that are germane to the resolution of the application.

- 12 In clause 3(ii) of those leases, the lessor covenants with the lessee as follows:

‘ To keep in repair the structure and exterior of the demised premises (including drains gutters and external pipes) and of the maintained structure so far as it supports or protects the demised premises or provides access thereto and to make good any defect affecting that structure.’

Clause 1(g) defines “maintained structure” as ‘those parts of the flats which comprise the main structure and exterior and the communal passageways entrances and stairways thereof.’

- 13 In turn, the lessee covenants with the lessor in clause 2(iv):

‘ To pay to the lessor in the manner set out in the Fourth Schedule hereof a one twelfth part of the Lessor’s expenses in maintaining the amenity areas and the maintained structure (such expenses being mentioned in the said Fourth Schedule)...’

- 14 Part I of the Fourth Schedule specifies the expenses to which clause 2(iv) refers. For the purposes of the application, these expenses include:

'Monies actually expended or reserved for periodical expenditure by or on behalf of the Lessor at all times during the term hereby granted on the following:-

(i) repairing rebuilding repointing or otherwise treating as necessary and keeping the maintained structure in good and substantial repair order and condition and replacing all worn or damaged parts thereof.

- 15 It is apparent from the above provisions of these leases that the cost of the additional works at Normid Court identified by the Applicant fall within the Applicant's repairing obligation and, further, that the contribution by each of the Respondents to this cost, even though not specifically designated as a 'service charge', may be regarded as a service charge item for the purposes of section 18 of the Act. Accordingly, the consultation provisions in section 20 of the Act and the Regulations would normally apply to any costs exceeding the £250.00 threshold.

Relevant Law

- 16 As intimated above (see above, paragraph 1), section 20 of the Act, as amended, and the Regulations provide for the consultation procedures that landlords must normally follow in respect of 'qualifying works' (defined in section 20ZA(2) of the Act as 'work to a building or any other premises') where such 'qualifying works' result in a service charge contribution by an individual lessee in excess of £250.00.

- 17 Provision for dispensation in respect of some or all such consultation requirements is made in section 20ZA(1) of the Act which states:

'Where an application is made to a leasehold valuation tribunal (a jurisdiction transferred to the First-tier 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.' (*emphasis added*)

- 18 In *Daejan Investments Ltd. v Benson et al.* [2013] UKSC 14 (*Daejan*), the Supreme Court set out the proper approach to be taken to an application for dispensation under section 20ZA of the Act. In summary, this approach is as follows:

- a. The Tribunal should identify the extent to which lessees would be prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the consultation requirements;
- b. That no distinction should be drawn between 'a serious failing' and 'technical error or minor or excusable oversight' on the landlord's part save in relation to the prejudice it causes;
- c. The financial consequences to the landlord of not granting a dispensation are not relevant factors when the Tribunal is considering how to exercise its jurisdiction under section 20ZA; and
- d. The nature of the landlord is not relevant.

- 19 Further, in exercise of its power to grant a dispensation under section 20ZA of the Act, the Tribunal may impose such terms and conditions as it thinks fit, provided only that these terms and conditions must be appropriate in their nature and effect.

- 20 For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

Submissions of the Parties

The Applicant

- 21 The essence of the Applicant's case is set out in the Application (see above, paragraph 3) and is supplemented by Mrs White's witness statement.
- 22 In that witness statement, Mrs Wilson provided, initially, further information about the background to the filing of the application. She explained that a Statutory Notice of Intention relating to the initial works had been served on each of the Respondents in February 2020, but those initial works did not commence until November 2020 because of Covid-19 restrictions and the unavailability of materials. Mrs White confirmed that the 'further issues and concerns' referred to in the application became apparent when the initial works commenced.
- 23 Thereafter, Mrs White re-iterated the information conveyed in the application about the nature of the additional works, their cost collectively and to each Respondent, and the reasons for undertaking those works without further consultation with the Respondents (see above, paragraph 3).
- 24 Mrs White added that she contacted each of the Respondents in order to advise them of the additional works, because '[we] felt it was only right and it would allow the customer to ask any questions at that time'.
- 25 Mrs White also alluded to the copies of letters dated 8 December 2020 and addressed to each of the Respondents that the Applicant had adduced in evidence. In those letters, the Applicant advised each of the Respondents of the circumstances leading to the identification of the need to carry out the additional works, the nature of those works (with the above-mentioned supporting photographs) and their cost (including the itemised breakdown of those costs), and the reasons for undertaking those works without further consultation. A copy of the Applicant's application to the Tribunal for dispensation of such further consultation was sent with each of the letters.

In those letters, the Applicant acknowledged that the cost of the additional works was a significant amount and that the Respondents might be concerned about the repayment of this sum. In this respect, the Applicant indicated that it may be able to offer a repayment loan to Respondents over a 12 month period. The Respondents' attention was also drawn in the letters to a statement attached to those letters which showed the balance in the sinking fund relating to Normid Court.

The Respondents

- 26 No evidence was submitted to the Tribunal by any of the Respondents (see above, paragraph 8), although Ms Towler (Flat 11) signified, in writing, on 13 January 2021 her support for the application for dispensation.

The Tribunal's Determination

- 27 The Tribunal reaches its decision on the evidence adduced by the Applicant, the relevant law and its knowledge and experience as an expert Tribunal. It noted that none of the Respondents had objected to the dispensation sought in the application, and acknowledged Ms Towler's support for the application.
- 28 It is clear to the Tribunal from the Applicant's evidence that the additional works relating to Normid Court that were identified in the application and affirmed in Mrs White's witness statement were urgently required. It is of no consequence that the need for such works was discovered by happenstance.
- 29 Section 20ZA does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with some or all of the consultation requirements. However, as seen above (see, paragraph 18), the Supreme Court in *Daejan* has indicated that the Tribunal in considering whether dispensation should be granted must take into account the extent to which lessees would be prejudiced by a landlord's failure to consult.
- 30 In this case, the likely physical consequences of not taking prompt action in relation to the carrying out of the additional works are readily apparent, notably, and inevitably, further damage arising from water ingress in some of the top floor flats, as, indeed, is the economic cost of not seeking to co-ordinate the completion of the initial and additional works. The Applicant made each of the Respondents aware, in writing and through Mrs White, of these circumstances and of the urgency required in carrying out the additional works. The Respondents were also alerted to the related application for dispensation in respect of any further consultation requirements.
- 31 The dispensation sought in the application, if granted, provides, in effect, a means for expediting the carrying out of the additional works in order to curtail damage or further damage to Normid Court and obviates economic costs that might, otherwise, be incurred should such works be delayed following consultation.
- 32 In these circumstances and applying the tests set out in section 20ZA and the approach specified in *Daejan*, the Tribunal finds that the lessees (Respondents) would not be prejudiced by granting the dispensation of the section 20 consultation requirements in the Act and in the Regulations to the extent sought in the application and that it would be reasonable to grant such dispensation. Accordingly, dispensation is granted.
- 33 Parties should note that this determination relates only to the dispensation sought in the application and does not prevent any later challenge by any of the lessees (Respondents) under sections 19 and 27A of the Act on the grounds that the costs of the works incurred had not been reasonably incurred or that the works had not been carried to a reasonable standard.

Judge David R. Salter

Date: 24 March 2021

Appeal to the Upper Tribunal

- 34 If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after this written decision has been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).
- 35 If the party wishing to appeal does not comply with the 28-day time limit, the party 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.
- 36 The application for permission to appeal must identify the decision to which it relates, state the grounds of appeal and state the result the party making the application is seeking.