FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CB/LDC/2022/0013**
HMCTS code (audio,video,paper)	**:**	**P:PAPERREMOTE**
Property	**:**	**The Lydiate, Birkenhead Road, Willaston, Neston CH64 1RU**
Applicant	**:**	**The Lydiate Management Company No 2 Limited**
Applicant's Representative	**:**	**West Kirby Property Management Ltd**
Respondents	**:**	**The various Respondents referred to in Annex 1.**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 20ZA**
Tribunal Members	**:**	**Judge J.M.Going** **N.J.Swain MRICS FAAV**
Date of decision	**:**	**30 June 2022**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face- to- face hearing was not held because no one requested the same, it was not necessary nor practicable, and all the issues could be determined on the basis of the papers. The documents that the Tribunal was referred to were in the Application, those supplied with it, and Applicant's bundle, all of which the Tribunal noted and considered.

The Decision

Any remaining parts of the statutory consultation requirements relating to the works which have not been complied with are to be dispensed with.

Preliminary

1. By an Application dated 10 February 2022 ("the Application") the Applicant applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of urgent repairs to the water pumps ("the works") serving the various apartments and houses at the property ("the Lydiate").

2. The Tribunal issued Directions on 7 April 2022.

3. The Applicant, through its Managing Agent David Mayhew of West Kirby Property Management Ltd ("West Kirby") provided a bundle of documents including a statement of case, copies of an inspection invoice, extracts from notices sent to the Respondents and various estimates, and, as part of the Directions, was mandated to send copies to each Respondent.

4. None of the Respondents has indicated to the Tribunal any objection to the Application, and none of the parties have requested a hearing.

The facts and background to the Application

5. The Tribunal has not inspected the Lydiate but understands that it includes a 19th-century Grade II listed mansion house converted into 9 apartments, together with a further 7 houses in the grounds.

6. It is also understood, from a sample Lease, that each of the 16 Respondents owns an apartment or house within the Lydiate and is due to pay

a share of the costs of maintaining and repairing the apparatus for supplying water used by them all. Each Respondent is a shareholder and member of the Applicant, which is the Management Company formed for the purpose of carrying out various duties specified in their long/999-year term leases.

7. It was confirmed in the Application that all 16 residential units *"are supplied water by booster pumps of which 2 of the 3 pumps need urgent repairs and (are) not working… The pump engineer has said only 1 pump working … will struggle to provide all 16 units with water when high demand as it normally requires 2 pumps to work then. There is a five-week wait for parts to arrive from ordering. If the remaining pump fails then all 16 units have no water and therefore the repairs of the pumps are urgent"…. "The annual cold water booster pump service was carried out on 4 February 2022 the engineer reported 2 of the 3 pumps were not working due to failure of "Hydrovar" inverters… He recommends replacing 3 as…the remaining 1 is likely to fail soon due to the age of the pumps (17 years)… The estimated cost of the repair is £7194. The consultation threshold is £4000 (16 times £250)".*

8. On 7 February 2022, that is 3 days before making the Application, and in tandem to it, West Kirby had issued a notice to each of the Respondents of its intention to do the works (being the Stage 1 notice required under the consultation requirements) and inviting observations.

9. On 12 March 2022, after having obtained at least 3 estimates of £7194, £8628 and £8383 respectively, West Kirby issued the next notice to each of the Respondents as required under the consultation requirements and referred to the following written observations which had been received in response to its initial notice: –
"it would need to be an industrial electrician (someone familiar with VSDs) but the problem was clearly on the electrical side rather than the water side";
contact Lektronix as they appear to be a company used at site in the past"
"order a spare Hydrovar for emergency use in the future"
to which it responded as follows: –
"the fuses to the booster pumps were changed but did not repair the water pumps;
Lektronix do not deal with companies that are not VAT registered;
the guarantee on a Hydrovar is only 12 months and we would expect each to last five years – therefore the cost of keeping a spare Hydrovar would seem unreasonable".

10. None of the evidence has been disputed.

11. The Tribunal's Directions confirmed that any Respondent who opposed the Application could, within the stated timescale, send to the Applicant and to the Tribunal any statement they might wish to make in response.

12. None have done so, and the Tribunal convened on 30 June 2022.

The Law

13. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

14. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to go through a 4 stage process: –

- Stage 1: Notice of intention to do the works

Written notice of its intention to carry out qualifying works must be given to each tenant and any tenants association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought, allowing at least 30 days. The Landlord must have regard to those observations.

- Stage 2: Estimates

The Landlord must seek estimates for the works, including from a nominee identified by any tenants or the association.

- Stage 3: Notices about estimates

The Landlord must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

The Landlord must give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the tenants' nominee.

15. Section 20ZA(1) states that: –

"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… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

16. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others (2013) UK SC 14* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;

- The purpose of the consultation requirements which are part and parcel of a network of provisions, is to give practical support is to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
- In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
- The financial consequences to the landlord of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord;
- The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
- The more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that tenants had suffered prejudice;
- Once the tenants have shown a credible case for prejudice the Tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application;
- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed to compensate the tenants fully for that prejudice.

The Tribunal's Reasons and Conclusions

17. The Tribunal began with a general review of the papers, to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

18. None of the parties requested an oral hearing and having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing. Although the parties are not legally represented, the issues to be decided have been clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact.

19. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –
- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.

- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Respondents retain the ability to challenge the costs of the works under section 27A of the 1985 Act.
- The consultation requirements are limited in their scope and do not tie the Applicant to follow any particular course of action suggested by the Respondents, and nor is there an express requirement to have to accept the lowest quotation. As Lord Neuberger commented in *Daejan* "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 done by, and what amount is to be paid for them".
- Albeit, as Lord Wilson in his dissenting judgement in the same case also noted "What, however, the requirements recognize is surely the more significant factor that most if not all of that amount is likely to be recoverable from the tenant."
- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, even in the simplest cases.
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)…."

20. Applying the principles set out in *Daejan* the Tribunal has focused on the extent, if any, to which the Respondents have been or would be prejudiced by a failure by the Applicant to complete its compliance with the consultation requirements, insofar as it has not done already done so.

21. As the Upper Tribunal has made clear in the case of *Wynne v Yates [2021] UKUT 278 (LC) 2021* there must be some prejudice to the leaseholders beyond the obvious fact of having to contribute towards the costs of works.

22. The Tribunal finds no evidence of any actual relevant prejudice: it is clear that the Respondents have been aware of the core issues for over 4 months, that formal notices have been issued, and at least 3 estimates obtained; there is no evidence that the Respondents dispute the problem; and there is evidence of the Respondents participating in the consultation process and of the Applicant having regard to the Respondents' observations.

23. As *Daejan* confirms the factual burden of identifying some form of relevant prejudice falls on the Respondents, and the Tribunal finds the Respondents have not identified any relevant prejudice, within the context of the regulations, in the Applicant's actions to date. Indeed, none of the Respondents has objected to the Application.

24. The Tribunal is not surprised by this, simply because the adverse consequences of a total failure of the water pumping system must be clear to all.

25. The Tribunal, in the absence of any written objections from any of the Respondents and having regard to the steps that have been taken, has

concluded that the Respondents will not be prejudiced by dispensation being granted.

26. The Applicant has made out a compelling case that the works were, and insofar as they have not already been completed remain, urgent. It is evident that the circumstances have or had the potential to severely impact on the health, safety, utility and comfort of the Respondents and their visitors.

27. The Tribunal is satisfied that to insist now on the completion of the consultation requirements, insofar as they have not already been completed, would be otiose.

28. For these reasons, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements.

29. It is however emphasised that nothing in this decision should be taken as an indication that the Tribunal considers that any service charge costs resulting from the works will be reasonable or indeed payable. The Respondents retain the right to refer such matters to the Tribunal under section 27A of the Landlord and Tenant Act 1985 at a later date, should they feel it appropriate.

Annex 1

The Respondent Leaseholders

Kenneth Ansell & Ann Ansell

Adrian Bell & Danielle Nay

Rhonda Jacques

Neil Whittle & Clare Whittle

Martin Sneesby

Andrew D Ablitt

Ken Ansell

Philip Dodd

Stephen Butterworth

Andrew Gilchrist & Beverley Gilchrist

Mark Smith & Debbie Smith

David White & Clare White

John Hogg & Rosemary Hogg

James Walsh & Louise Walsh

Timothy Speed

Matthew Warren