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

**Case Reference:** CHI/24UP/LDS/2013/0048

**Property:** 2 Winterbarrow Cottages, Warnford,  
Southampton SO32 3LE

**Applicant:** Sovereign Housing Association  
**Representative:**

**Respondents:** Mr TG Boyes and Mrs A Boyes

**Representative:**

**Type of Application:** Dispensation from consultation  
Section 20ZA Landlord and Tenant Act  
1985

**Tribunal Members:** Judge WMS Tildesley OBE  
Mr P D Turner-Powell FRICS

**Date and venue of Hearing:** 7 October 2013 at Hearing Room, Tribunal  
Offices, 1<sup>st</sup> Floor, Midland House, 1 Market  
Avenue, Chichester, West Sussex PO19 1JU

**Date of Decision** 15 October 2013

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**DECISION**

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## DECISION

### Summary of the Decision

1. The application for dispensation with the consultation requirements is **refused**.
2. An order under section 20C of the Landlord and Tenant Act 1985 is **made** with the consent of the parties

### Introduction

3. The Applicant was a housing association which owned five properties known as the Winterbarrow cottages in the village of Warnford. The Applicant rented out numbers 1, 3, 4 and 5 Winterbarrow cottages. Number 2 was under shared ownership with Mr and Mrs Boyes, the Respondents. The terms of the shared ownership were set out in a lease dated 15 December 1995 made between The Hampshire Voluntary Housing Society of the one part, and Ms M B Hubbard and A S Miles Esq. of the other part (hereinafter referred to as the lease).
4. The sewage from the Winterbarrow cottages was handled by a private sewage treatment plant located on the Applicant's land in the front of number 5 Winterbarrow cottages. The plant had been constructed in the early 1990's and was now malfunctioning. The plant was effectively operating as a cess-pit which required emptying on a weekly basis.
5. The Applicant had decided to carry out extensive works on the sewage treatment plant, involving the installation of a new soakaway and associated drainage channels into which the treated effluent would discharge. The Applicant intended to construct the new soakaway on land at the rear of Winterbarrow cottages which was in the ownership of a Mr Sellick, a neighbouring land owner.
6. Since 2007 the Applicant had been in negotiations with Mr Sellick's representatives regarding the potential purchase of an easement over Mr Sellick's land in order to facilitate the construction of the soakaway and drainage channels. In early 2011 the Applicant had agreed with Mr Sellick a price of £7,500 for the easement but for some reason unbeknown to the Tribunal the negotiations stalled. Around September 2012 the Applicant resumed negotiations with Mr Sellick which resulted in a provisional agreement that the Applicant would pay Mr Sellick £13,750 for the easement plus his solicitor's and land agent's fees. The latter were estimated to be £1,500 plus VAT and disbursements of £50, and £1,260 plus VAT and disbursements of £75 respectively.
7. The Applicant sought an order to dispense with the consultation requirements under section 20 of the Landlord and Tenant Act 1985

(hereinafter referred to as the 1985 Act) with regard to the costs associated with the acquisition of the easement from Mr Sellick. The Applicant intended to consult with the Respondents on the specification and the costs for the remainder of the works to the sewage treatment plant. In this regard the  
5 Applicant had recently sent to the Respondents a “Notice of Intention to carry out Qualifying Works”.

8. On 7 October 2013 the Tribunal inspected the property in the presence of the parties, which was followed by a hearing in Chichester. Mrs Laura Brooks, the Leasehold Services Officer, and Mr Paul Wright, Senior Contracts  
10 Manager, presented the case for the Applicant. Mr and Mrs Boyes attended in person with Mr Boyes putting forward their case.

### **The Issue**

9. The Applicant’s reason for seeking dispensation in respect of the acquisition costs of the easement was that the consultation would serve no  
15 useful purpose. According to the Applicant, there was insufficient space to construct the soakaway on its own land. In those circumstances the only choice open to the Applicant was to put the soakaway on land owned by Mr Sellick, which meant that Mr Sellick was in the ascendant bargaining position regarding the acquisition costs. The Applicant pointed out that it could not go  
20 out to a competitive tender and in effect had to accede to Mr Sellick’s demands.

10. The Respondents acknowledged that the Applicant had no choice but to accept the price fixed by Mr Sellick for the purchase of the easement. The Respondents, however, considered that they had insufficient information to  
25 make a judgment on whether the Applicant’s proposal for the renewal of the sewage treatment was the only option to remedy the inherent defect with the plant.

11. The Respondents stated that they first heard about the proposals in June 2013 when the Applicant offered to pay the Respondents’ share of the  
30 acquisition costs provided the Respondents gave up their right to be consulted on the works to the sewage treatment plant. The Respondents did not wish to do that, and held misgivings about the rationale for the project. The Respondents in effect wanted more time and better information to satisfy themselves about the soundness of the Applicant’s proposals.

35 12. The issue for the Tribunal is whether it is reasonable to dispense with the consultation requirements on the acquisition costs for the easement. The Tribunal at this stage is not concerned with whether the Respondents were liable to pay those costs under the lease. This was a matter which may be the subject of other proceedings before the Tribunal further down the line.

## The Law

13. The Tribunal's starting point is section 19 of the 1985 Act which states that

“(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period —

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(a) only to the extent that they are reasonably incurred, and

(b) where they are carried out on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.”

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14. Section 19 provides the Respondents with safeguards in respect of the recovery through the service charge of the Applicant's costs in connection with the sewage treatment plant. The Applicant is only entitled to recover those costs that are reasonably incurred provided the works are to a reasonable standard.

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15. Section 20 of the 1985 Act gives the Respondents an additional safeguard when the works carried out on the property are qualifying works which is defined as works on a building or any other premises, and the costs of those works would require the Respondents to contribute under the service charge more than £250 in any 12 month accounting period. When these  
20 circumstances exist the additional safeguard is that the Applicant is required to consult in a prescribed manner with the Respondents about the works. If the Applicant fails to do this, the Respondents' contribution is limited to the £250 threshold, unless the Tribunal dispenses with the requirement to consult.

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16. Section 20(2) defines the contribution, known as the relevant contribution, which the Respondents have to make on qualifying works if the consultation requirements are complied with<sup>1</sup>. Section 20(2) states that

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“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.”

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17. In this case the Applicant is proposing to carry out works on the sewage treatment works, and to recover a contribution in excess of £250 from the Respondents through the service charge. The Applicant has decided to ask the Tribunal's permission to dispense with consultation on a particular aspect of the works over which it has no control on the costs. The particular aspect is the costs associated with the acquisition of the easement over Mr Sellick's land. The Tribunal is assuming at this juncture in its decision that such costs  
40 are recoverable under the lease and that they are part of the costs of the qualifying works.

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<sup>1</sup> Subject to section 19 and the requirement of reasonableness.

18. Section 20ZA of the 1985 Act is the authority which enables the Tribunal to dispense with the requirement for the Applicant to consult with the Respondents on the acquisition costs of the easement. Section 20ZA provides that

5                   “(1) Where an application is made to the *property* 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  
10 requirements.”

19. The dispensation may be given either prospectively or retrospectively. In this case the Applicant is asking for a prospective dispensation. The circumstances in which prospective dispensation may made could include the case where only one contractor could possibly carry out certain works.

15 20. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, it would appear that the Tribunal has a broad discretion. That discretion, however, has to be exercised in the context of the legal safeguards given to the Respondents under sections 19 and 20 of the 1985. This was the  
20 conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* which decided that the Tribunal should focus on the issue of prejudice to the tenants in respect of their statutory safeguards. Thus Lord Neuberger at paragraphs 40 – 45 said that

25                   “[40] Section 20ZA(1) gives little specific guidance as to how an LVT is to exercise its jurisdiction "to dispense with all or any of the [Requirements]" in a particular case. The only express stipulation is that the LVT must be "satisfied that it is reasonable" to do so. There is obvious value in identifying the proper approach to the exercise of this jurisdiction, as it is  
30 important that decisions on this topic are reasonably consistent and reasonably predictable. Otherwise, there is a real risk that the law will be brought into disrepute, and that landlords and tenants will not be able to receive clear or reliable advice as to how this jurisdiction will be exercised.

35                   [41] However, the very fact that s 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a s  
40 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.

45                   [42] So I turn to consider s 20ZA(1) in its statutory context. It seems clear that ss 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are

necessary and are provided to an acceptable standard. The former purpose is encapsulated in s 19(1)(b) and the latter in s 19(1)(a). The following two sections, namely ss 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. This view is confirmed by the titles to those two sections, which echo the title of s 19.

[43] Thus, the obligation to consult the tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works. Mr Rainey QC and Mr Fieldsend for the Respondents point out that sometimes the tenants may want the landlord to accept a more expensive quote, for instance because they consider it will lead to a better or quicker job being done. I agree, but I do not consider that it invalidates my conclusion: loss suffered as a result of building work or repairs being carried out to a lower standard or more slowly is something for which courts routinely assess financial compensation.

[44] Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

[45] Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be - ie as if the Requirements had been complied with."

21. The decision of the Lands Tribunal in *David Auger, Association of Camden Council Leaseholders v London Borough of Camden* 2008 WL 678171 is also relevant to the circumstances of the case. Although the facts of the *Auger* case concerned the dispensation of consultation in respect of a qualifying long term agreement, the facts of that case have a resonance with this one.

22. In *Auger* Camden Council supplied the tenants with no meaningful information about the proposed partnership agreement with a contractor to deliver a programme of housing capital works. His Honour Judge Huskinson concluded in effect that an application for dispensation must be supported by detailed evidence as to the impracticality of complying with the requirements for which a dispensation was sought. If it was not so supported, the application should be refused as it compromised the protection given to the

tenants under sections 19 and 20 of the 1985 Act (see paragraphs 45-48 of the decision which sets out Judge Huskinson's reasoning).

23. The Tribunal derives the following principles from the above discussion on the law in relation to its approach to the Applicant's request to dispense with the consultation requirements. First, the Tribunal must be satisfied that the Applicant has adduced persuasive evidence to substantiate its assertion that consultation would serve no useful purpose because the acquisition costs are determined by Mr Sellick. Second, the Tribunal must assess the level of prejudice to the Respondents in the context of their statutory safeguards if dispensation is granted.

### **The Facts Found**

24. The Tribunal finds the following facts:

(1) The negotiations between the Applicant and Mr Sellick have been ongoing for a significant period of time. The Applicant advanced no substantive reason for the prolonged negotiations. There was a possibility that the costs may have been lower if the parties had reached an agreement before the tax year ending 5 April 2013 but that deadline has now passed. Although it would appear that the sewage treatment plant has been malfunctioning for a considerable time, the Tribunal is satisfied that the Applicant had not regarded the need for the relevant works as urgent or as an emergency.

(2) The Applicant had only recently engaged with the Respondents about the works to the sewage treatment plant because the Applicant had overlooked that one of the Winterbarrow cottages was in shared ownership. The Applicant believed that all the cottages had been let on short term tenancies and assumed that there was no requirement to consult with the tenants of the Winterbarrow cottages.

(3) The Respondents stated that they had not been given sufficient information and time to consider the proposals. The Respondents first heard of the proposals around June 2013 when the Applicant offered to waive the Respondents' proportion of the acquisition costs if they waived their right to be consulted on the works. It would appear that the Applicant only supplied them with the actual details of the works, in the form of a quotation from its contractor, Envirowise Limited, when it made its application for dispensation on the 5 September 2013.

(4) Although the Respondents accepted that in principle the Applicant had no control over the acquisition costs, they were not convinced on the information given to them that the location of the soakaway on Mr Sellick's land was the best option. Mr Boyes, who had some technical knowledge of building works, questioned whether the proposal to pump the treated sewage uphill to the soakaway might result in a recurrence of the present problem of the sewage returning by gravity to the site of the

treatment plant. Mr Boyes also queried why the soakaway could not be sited on land owned by the Applicant.

5 (5) The Applicant was unable to supply information on the location of the current soakaway to the Tribunal. The Applicant had relied on the technical expertise of its contractor, Envirowise Limited, for its proposed solution to the problem with the sewage treatment plant at Winterbarrow cottages. The report from Envirowise Limited took the form of a quotation dated 1 March 2013, and was based on the proposition that the soakaway would be located on Mr Sellick's land at the rear of the cottages. The Applicant indicated that it would engage the services of a civil engineer to test the feasibility of the proposals after completion of the consultation with the Respondents.

15 (6) The Tribunal is not convinced on the Applicant's evidence that the construction of the soakaway on Mr Sellick's land was the only option to remedy the defect with the sewage treatment plant. The Tribunal questions the Applicant's choice to rely on the quotation from Envirowise Limited for the technical justification of the scope of its proposals. The quotation did not analyse the merits of locating the soakaway on Mr Sellick's land or consider alternative possibilities. The Tribunal considers that it may have been more appropriate for the Applicant to have commissioned the services of an appropriately qualified engineer before bringing the application to the Tribunal.

25 (7) The Tribunal agrees with the Respondents' assertion that they have not been given sufficient information and time to evaluate the Applicant's proposals for the sewage treatment works. The Tribunal considers that to separate out the acquisition costs of the easement from the obligation to consult on the works distorted the value of the consultation exercise because it presupposed that the location of the soakaway on Mr Sellick's land was a given. In this respect the Tribunal in the absence of further information shares Mr Boyes' reservations about whether the problem would recur if the proposals in their present form went ahead.

## Decision

35 25. The Tribunal concludes from the facts found that the application to dispense with the consultation requirements on the acquisition costs of the easement was premature. The Tribunal is satisfied that the Applicant did not adduce persuasive evidence that consulting on the acquisition costs of the easement was meaningless. The Applicant has provided no evidence to substantiate its assertion that the soakaway must be located on Mr Sellick's land. In this respect the Tribunal finds that the Respondents would be severely prejudiced if dispensation was granted because they might be paying under the service charge for inappropriate works.

**26. The Tribunal is, therefore, satisfied that it is not reasonable to dispense with the consultation requirements on the acquisition costs of the easement, and accordingly refuses the application.**



27. The Tribunal approached the application on the grounds presented to it by the Applicant. Had the Tribunal been inclined to grant the application, the Tribunal would have sought further representations from the parties before making its final decision. The objects of those representations would have been whether clause 3(4) of the lease<sup>2</sup> covered the costs of acquiring the easement or was restricted to those costs directly connected with the repair and maintenance of the sewage treatment works. Further whether the acquisition costs were costs incurred in carrying works on a building in the context of section 20. The parties may wish to bear in mind these two questions if the dispute on acquisition costs is resumed before the Tribunal.

28. The Applicant indicated that it would not be seeking to recover its costs in connection with these proceedings through the service charge. The Tribunal, therefore, with the consent of the parties made an order to that effect under section 20C of the 1985 Act.

**JUDGE TILDESLEY OBE**

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<sup>2</sup> Clause 3(4) of the lease states that

“To contribute a fair proportion to be assessed from time to time by the landlord of

a) any reasonable costs incurred by the landlord in respect of the drainage treatment works whether for the repair, maintenance or cleaning the same or otherwise.....”.

## RIGHTS OF APPEAL

- 5           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.
  
- 10           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.
  
- 15           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.
  
- 20           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