



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

Case Reference : **LON/00AW/LDC/2014/0059**

Property : **Ashburnham Mansions,
Ashburnham Road, London SW10
0PA**

Applicant : **Ashburnham Mansions Limited**

Representative : **Mr C Harniman, Preside, Managing
Agents**

Respondents : **The Long Lessees of each of the
flats within Ashburnham Mansions**

Representative : **N/A**

Type of Application : **Section 20 Landlord and Tenant
Act 1985 – to dispense with
consultation requirements**

Tribunal Members : **Judge John Hewitt
Mrs Jenna Davies FRICS
Mr Leslie Packer**

**Date and venue of
Hearing** : **28 July 2014
10 Alfred Place, London WC1E 7LR**

Date of Decision : **26 August 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the consultation requirements imposed by section 20 Landlord and Tenant Act 1985 (the Act) shall be dispensed with in respect of two projects undertaken by the applicant, namely:
 - 1.1 Repairs works to two of the balconies at the property carried out in 2012 at a cost of £50,815.56; and
 - 1.2 Electrical works to the fire escape system, emergency lighting, fire alarm and other related works carried out in 2012 at a cost of £36,196.90;
2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. Ashburnham Mansions is a three block apartment development, comprising 62 flats in all. The blocks have the appearance of being Edwardian and retain a number of period features.

Each block is of five storeys in height.
4. All, or most, of the flats have been sold off on long leases.
5. At some time in the past the freehold interest was vested in Daejan Properties Limited. In 1982 the applicant company acquired the freehold interest. The applicant is controlled by the long lessees, all of whom have one share in the company, save for Daejan Properties which retains a leasehold interest in seven of the flats, but which did not participate in the acquisition of the freehold and which is not a member of the applicant.
6. In 2008 the applicant appointed Managed Properties Limited, trading as Preside, to be its managing agent. The principal of Preside is Mr Christopher Harniman, who has also been appointed as the secretary of the applicant.
7. In 2013 Mr Raymond Widdicombe, the long lessee of flat 5 Ashburnham Mansions, made an application under section 27A of the Act. It was allocated Case Ref: LON/00AW/LSC/2013/0552. The decision on that application (the 27A application) is dated 11 December 2013 [55]. A number of issues were raised in the 27A application.
8. Two of the decisions arrived at on the 27A application were that the landlord had not consulted properly on two projects carried out in

2012. One project concerned repair works to two balconies. The other concerned electrical works and repairs mostly connected with the fire alarm system, and the provision of emergency lighting. The tribunal dealing with the section 27A application did not make any determinations on the reasonableness of the costs of the two sets of works because it accepted Mr Widdicombe's primary case that his contribution to the costs of those projects was limited to £250 each [59] by virtue of the statutory cap. Paragraph 13 of the decision [58] noted that at that time the landlord had decided not to make an application pursuant to section 20ZA of the Act and expressed no view as to whether such an application might have succeeded or whether such an application could now be properly made.

9. On 26 March 2014 the applicant made an application pursuant to section 20ZA in relation to the above mentioned two projects which were dealt with in the section 27A application [1].
10. Directions were given on 17 April 2014 [11] and these were varied on 21 May 2014 [15].
11. The application was served upon all of the long lessees and they were invited to indicate if they wished to support or oppose the application. Of those who replied some long lessees supported the application and some opposed it.
12. The application came on for hearing on 18 June 2014. It was considered that the case was not ready for trial and further directions were given. At that time the long lessees who were considered to be actively opposing the application were identified as Mr Widdicombe of flat 5 and Mr Andrei Greenberg of flat 6. Later it became clear that Ms Caroline Gill of flat 40 also wished to oppose the application, but in the event Ms Gill did not attend the hearing. By letter dated 12 July 2014 Mr Greenberg clarified his position.
13. The application came on for hearing before us on 28 July 2014. The applicant was represented by Mr Harniman and he was accompanied by a Miss A Lorenzo who is a director applicant. Mr Greenberg, who more recently has been appointed as a director of the applicant, was also present. He explained that he was not opposing the application but wished to observe the proceedings and to have an input if appropriate. Mr Widdicombe was also present and he did wish to oppose the application.
14. Oral evidence was given by Mr Harniman and Mr Widdicombe, both of whom, were cross-examined and both of whom answered questions put to them by members of the tribunal. Extensive reference was made to the trial bundle containing in excess of 400 pages which had been provided to us. Mr Harniman and Mr Widdicombe both made oral opening and closing submissions.

Findings of fact

15. Having regard to the oral and documentary evidence presented to us we make the findings of fact set out below:

15.1 The directors of the applicant set in place a planned programme of works to the development in order to address what were considered to be years of neglect by the previous freeholder.

The balconies

15.2 In particular there was a concern that most of the balconies had been declared unsafe and were in need of substantial and costly repairs. In the meanwhile the balconies had been condemned as being unsafe and were not available for use.

15.3 The nature and extent of repair to each balcony varied and the view was taken that the precise extent of repair could only be ascertained once opening up works had been undertaken. However, by March 2010 Mr Rigby of ARA Structural Engineers had drawn up a specification for repairs to the balconies.

15.4 Preside suggested that quotations for repair be sought on a day works basis due to a difficulty in one or some contractors in preparing a fixed price quotation.

15.5 On 1 March 2010 the applicant gave to the long lessees a notice of intention to carry out qualifying works. A copy is at [180]. It states it was given pursuant to section 20 of the Act.

The proposed works were described as being:

“Reinstatement or repair and redecoration of the front exterior balconies and keystone lintels of the residential blocks comprising 1-55, with the exception of those balconies which have already been the subject of reinstatement or repair, which should only require redecoration.”

It was envisaged that scaffolding would be erected to carry out the works and the notice included reference to other works which might usefully be carried out whilst the scaffolding was in place.

The notice made reference to three quotations which had been obtained on a day works basis:

	Paul Adams & Co	Beeches Builders	VG Construction
Per man	£293.75		
Foreman		£276.13	£270.25
Carpenter/skilled tradesman		£246.75	£235.00

Semi-Skilled tradesman (Labourer)		£ 193.88	£199.75
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VG Construction also gave a provisional estimate of £260,850 for replacing all of the balconies (but excluding scaffolding, decoration and professional fees)

Paragraph 11 of the notice invited observations on the proposed works to the balconies to be submitted by 31 March 2010.

- 15.6 Mr Widdicombe said that he had received the notice but he had not submitted any observations in response to it.
- 15.7 In September 2010 the applicant obtained a fixed price quote from Bastows to repair four balconies [217]. It is in the sum of £87,196.53 + VAT. Later in February 2011 that estimate was revised to £65,067 + VAT [214], but for only two balconies.
- 15.8 The directors of the applicant took time to consider the best way forward. There were a number of competing implications including cash flow due to arrears of service charges and court and LVT proceedings with some lessees, including Mr Widdicombe.
- 15.9 On 5 March 2012 the applicant gave to the long lessees a first stage notice of intention to carry out qualifying works. A copy is at [184]. It states it was given pursuant to section 20 of the Act.

The proposed works were described as being:

“Reinstatement or repair and redecoration of the front exterior balconies and keystone lintels of flats 9 and 12 of the residential block comprising flats 1-15.”

As before, it was envisaged that scaffolding would be erected to carry out the works and the notice included reference to other works which might usefully be carried out whilst the scaffolding was in place.

Paragraph 7 of the notice invited observations on the proposed works to be submitted by 4 April 2012.

- 15.10 Mr Widdicombe said that he had received the notice but he had not submitted any observations in response to it.
- 15.11 In late May 2012 Mr Harniman had a site meeting with VG Construction who gave him a fixed price estimate for the repairs to the balconies of flats 9 and 12. Later, by a letter dated 9 June 2012 [189] the oral fixed price estimate was put into writing. The

amount of the estimate was £37,840 (excluding structural engineers and building control fees, where applicable, and VAT at prevailing rates).

- 15.12 On 25 May 2012 the applicant gave to the long lessees a notice of intention to proceed to carry out qualifying works. A copy is at [186]. It states it was given pursuant to section 20 of the Act. The notice made reference to day work rates and repeated the rates which had been given in the notice dated 1 March 2012 – see paragraph 15.5.

This notice was signed off by a Jane Munro, a property manager employed by Preside.

At the time this notice was given Mr Harniman was aware of the fixed price estimates given to him by Bastows and VG Construction but this information had not been passed on to Ms Munro.

The day work rates cited in the notice had not been updated and, in all probability, were then incorrect and provided no meaningful information to the long lessees.

- 15.13 Mr Widdicombe said that he had received the notice but he had not submitted any observations in response to it.
- 15.14 A contract for the works was placed with VG Construction. Invoices issued by VG Construction and ARA Consulting Engineers are at [191-196]. These show the costs incurred were:

VG Construction	£40,440.00
VAT	£ 8,088.00
ARA Consulting Engineers	£ 1,906.30
VAT	<u>£ 381.26</u>
Total	£50,815.56

The papers before us do not indicate whether Preside imposed any charge for managing the project.

Fire alarm, emergency lighting and electrical works

- 15.15 Over the years electrical wiring works within the blocks comprising the development have been undertaken by a number of contractors and no accurate wiring diagrams have been kept or made available to the applicant.
- 15.16 In late 2011 it became apparent that emergency lighting wiring installed some years previously was defective and the fire officer recommended it be replaced. He also made some

recommendations with regards to the fire alarm system, but he did not issue a formal report. The applicant took the view that while trunking in the common parts was opened up it would be sensible and cost effective to replace some fire alarm wiring. In addition there was some ancillary wiring works also to be undertaken.

- 15.17 By March 2012 the works to be carried out were clarified with some budget pricing totalling about £7,000 [209.37]. The directors decided to proceed. The view was taken by Preside that there three separate projects, none of which triggered the consultation requirements of section 20 of the Act. The contract sum to trigger formal consultation at this development is just over £14,000.
- 15.18 A contract was placed with Greenman Electrical without any formal consultation having taken place.
(We note that some of the invoices are issued by Greenman Electrical and some are issued by JG Electrical. The format of the invoices is identical and we infer the two firms are essentially one and the same. No VAT was charged.)
- 15.19 By letter dated 25 May 2012 [211] Preside wrote to the long lessees providing up to date information on a number of aspects concerning the development. Included was a detailed paragraph concerning the rewiring of the emergency lighting system and noting that it was considered sensible to wire the new fire alarm system throughout the common parts at the same time. It was said that this would avoid the cost of twice opening up the (trunking) enclosures and the resultant redecoration works. The letter expressed the expectation that the works would be completed by early July 2012.
- 15.20 A chronology of the electrical works is at [18.5].
- 15.21 In the event once opening up had taken place it was found that certain wiring could not be run in the lift shafts as planned and a more complex solution was required.
- 15.22 Copies of the supporting invoices for these works have been made available to Mr Widdicombe. The cost of works is listed on [18.6 – 7] and may be summarised as follows:

General works	£ 2,432.10
Escape lighting	£12, 731.47
Fire alarm wiring	<u>£21,033.33</u>
Total	£36,196.90

15.23 The tribunal which heard the section 27A application determined that there were not three separate projects but one project, which triggered the consultation requirements. Whilst not mentioned expressly that tribunal may also have borne in the mind the decision of Sir Andrew Morritt, then the Chancellor, in the case often cited as *Phillips v Francis* [2012] EWHC 3650 (Ch). Accordingly, that tribunal did not make any determinations on the reasonableness of the cost of the works; instead it determined that the statutory cap of £250 applied. Again that tribunal expressed a caveat as to any application which may be made pursuant to section 20ZA of the Act.

The law

16. The application before us is made pursuant to section 20ZA of the Act. That section provides that where an application is made to the tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

17. In *Daejan Investments Limited v Benson* [2013] UKSC 14 the Supreme Court (by a majority of three to two) gave guidance to tribunals as to the correct approach to adopt when determining applications under the section. In summary that guidance is:

17.1 The tribunal should focus on the extent, if any, to which tenants were 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 regulations;

17.2 That no distinction should be drawn between ‘a serious failing’ and ‘a technical, minor or excusable oversight’ save in relation to the prejudice it causes;

17.3 That the financial consequence to the landlord of not granting dispensation is not a relevant factor when the tribunal is considering how to exercise its discretion under section 20ZA; and

17.4 The nature of the landlord is also not a relevant factor.

The court also found that a tribunal has power to grant dispensation on such terms as it sees fit, provided those terms are appropriate in their nature and effect, and also that it may grant dispensation subject to the landlord accepting appropriate conditions.

18. It is clear from *Daejan v Benson* that the tribunal is to focus on prejudice to the tenants and the Court gave further guidance as follows:

- 18.1 The tribunal should identify the prejudice, if any, that the tenants would suffer if an unconditional dispensation was given. It should also identify the extent of that prejudice;
- 18.2 The tribunal should view the tenants' arguments in this respect, sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or perhaps carried out in a different way) if they had been given a proper opportunity to make their points;
- 18.3 The more egregious the landlord's failure, the more readily would the tribunal be likely to accept that the tenants' had suffered prejudice;
- 18.4 Once the tenant has shown a credible case for prejudice, the tribunal should look to the landlord to rebut it;
- 18.5 Tenants have an obligation to identify what they would have said, had the consultation requirements been met.

The gist of the case for Mr Widdicombe

19. The gist of Mr Widdicombe's written case is set out in his statement of case dated 4 June 2014 [26.7]. He complains about the inept way Preside managed the projects and alleges that they have acted dishonestly, fabricated documents and have sought to mislead shareholders. He is also critical about the delay on the part of the applicant in making its section 20ZA application, but he does not assert that it is not entitled to do so or that the tribunal is not entitled to determine it. As regards the electrical works Mr Widdicombe was critical that the supporting invoices in respect of labour costs gave very little information about what work was actually undertaken on site to justify the cost invoiced.
20. During the course of the morning session the effect of the *Daejan v Benson* case was outlined to Mr Widdicombe and he was urged over the lunch break to give careful consideration to the question of prejudice and that he should focus on that when formulating his final submissions.
21. In his final submissions Mr Widdicombe said that in respect of the electrical works he had received no prior notice and had not been provided with the March 2012 estimate prepared by Greenman Electrical. He said the invoices for labour are simply based on day work rates and give him no information as to what work was done or the proper value of it. Mr Widdicombe submitted that prejudice arose from the absence of competitive tenders and the work was placed with a favoured contractor on a day works basis with no control or supervision

22. To a large extent Mr Widdicombe adopted the same position with regard to the balconies.
23. Mr Widdicombe was concerned that if dispensation were granted it would set a precedent and that in the future the applicant would simply fail to consult on any project.
24. Mr Widdicombe was also critical that the directors of the applicant react poorly to challenges and he complained about being 'frozen out' because in the past he has made several applications to the LVT. Mr Widdicombe does not live in his flat and he rarely attends annual general meetings of shareholders because he considers it is 'just people talking' and he prefers his issues or queries to be done on paper. He also complained that Preside were not good at answering his letters.

The position of Mr Greenberg

25. Mr Greenberg is a long lessee and was recently elected a director of the applicant company.
26. Mr Greenberg had filed written submissions with the tribunal and he was present throughout the hearing.
27. We invited Mr Greenberg to make final submissions to us. He said that he did not see any reason why the tribunal should refuse the application. He somewhat adopted Mr Widdicombe's fears that there might not be full and proper consultation in the future. He also agreed that the development had not been well managed in the past; and that now he was a director he hoped to have the opportunity to bring about an improvement.
28. Mr Greenberg also submitted that it would not be appropriate for the applicant to have to bear the costs of this application. He felt that Preside should bear them.

The position of the applicant

29. Mr Harniman also made final submissions. He re-stated that as regards the balcony works competitive tenders were taken as long ago as March 2010 and that there were difficulties with the size, scale and cost of the project which impeded progress. He also relied upon competitive tenders submitted by VG Construction and Bastows.
30. Mr Harniman accepted that the May 2012 notice was most unhelpful in citing the March 2010 day work rates when at the time his colleague Ms Munro prepared that notice, he had in fact agreed a fixed price with VG Construction. Mr Harniman readily accepted that it would have been more meaningful to long lessees if up to date information had been provided.

31. As to the electrical works Mr Harniman said that originally the view was that there were three separate projects none of which triggered the consultation requirements. Further the scope of works was progressive and once opening up works were undertaken the need for more extensive works became apparent.
32. Mr Harniman also wished it to be clear that his role as managing agent was to carry out the decisions of the board. Whilst he was in a position to give advice to the board, it was for the board to decide when and how to proceed.

Discussion

33. The guidance given by the Supreme Court is quite clear. In the first instance it is for the lessee challenging a section 20ZA application to discharge the burden of proof that the failure to consult in accordance with the regulations, whether that be a total failure or a partial failure, has caused the lessee to suffer prejudice.

The balconies

34. Mr Harniman readily accepted that Preside's handling of the consultation on this project was inept and that his firm had not shone. We can readily understand the practical difficulties facing the applicant and its advisers in terms of the uncertainty about the exact nature and cost of repair to each balcony, wildly differing fixed price quotations, cash flow issues, service charge arrears and managing LVT and court proceedings. That coupled with lessees and/or directors who have different views on priorities and time scales.
35. That said, and as we infer that Mr Harniman acknowledged, professionals could and should do better. It was particularly unhelpful to give section 20 notices which cite day work rates without any guidance as to quantities or the number of days – and hence cost – likely to be incurred. To do so in March 2012 citing March 2010 rates, and at a time when Preside had at least two current fixed price quotations to hand was even less helpful.
36. But the lessees, including Mr Widdicombe, were given two notices of the intention to carry out works to the balconies of flats 9 and 12 and were invited to make observations. Mr Widdicombe chose not to make any observations. A degree of effort was made to comply with the regulations even though the applicant did not achieve full compliance.
37. There was no evidence before us upon which we could rely with any confidence to support Mr Widdicombe's allegation of dishonesty and deliberate attempts to mislead. The relationship between Mr Widdicombe and the applicant and Preside has clearly reached a low ebb and Mr Widdicombe appears reluctant and unwilling to accept as genuine anything that is said to him.

38. On this topic Mr Widdicombe was unable to put before us any prima facie case that the failure to comply with the regulations fully caused him any quantifiable prejudice. He had an opportunity to make representations but chose not to make any. Mr Widdicombe did not tell us what observations he would have made had he chosen to do so.
39. We note Mr Widdicombe's concern that the applicant might see the granting of dispensation on this occasion as setting a precedent and result in the applicant choosing not to consult properly on future occasions. We consider that concern may be misplaced. The applicant company is a non-trading company owned by a majority of lessees. Its main income is the service charges. Dispensation on a future occasion cannot be assumed, and any such dispensation that may be granted may be subject to conditions and possibly onerous financial conditions. We have no doubt the directors and their advisers will now be acutely aware that in the event of a failure to consult properly there is a real risk that full service charge recovery may not be achieved and that they will need to plan how to fund any shortfall. We consider this to be a significant deterrent to a slipshod or cavalier approach to consultation on future projects.
40. For the above reasons we find it reasonable to dispense with the requirements of section 20 in respect of this project.

Fire alarm, emergency lighting and electrical works

41. The tribunal which determined the section 27A application has already decided that this was one project which should have been the subject of consultation. It is not for us to gainsay that decision. The question for us is whether it is reasonable to dispense with the need for such consultation.
42. We have accepted Mr Harniman's explanation that there was a genuinely held view that these works comprised three separate projects, none of which triggered the consultation requirements. Given the state of the law at the time we can understand why such a view was formulated even if it be wrong. We find that there was no deliberate decision made not to consult.
43. We also accept Mr Harniman's evidence that, once opening up works had taken place the project took on a new twist which resulted in a higher cost than originally envisaged.
44. We are satisfied that the works were reasonably required and, for the most part, were aimed at the welfare and safety of the residents and occupiers of the flats.
45. We reject the submission made by Mr Widdicombe that all concerned knew in November 2011 what the actual scope of the works would turn out to be, and that there was a deliberate decision to conceal that and not to consult. Again we reject the submission that the project was

tainted with dishonesty and a deliberate intention to mislead because there was no evidence put before us to support such a serious allegation.

46. Mr Widdicombe said he had seen the invoices which support the expenditure claimed. Mr Widdicombe complained that they provide scant information or evidence of the work actually carried out. But, Mr Widdicombe appeared to accept that realistically he is unable to show, at the present time, that it was unreasonable to carry out the works or that the works have been carried out to an unacceptable standard or at an unreasonable cost.
47. We find that Mr Widdicombe has been unable to persuade us that the failure to consult on this project has caused him any real or quantifiable prejudice.
48. For the above reasons we find it reasonable to dispense with the requirements of section 20 in respect of this project.

The way forward

49. In consequence of the decision of this tribunal to dispense with the need to comply with the consultation requirements of section 20, the caps imposed by the tribunal which determined the section 27A application are now lifted.
50. There was no determination by the tribunal which dealt with the section 27A application as to the reasonableness of the actual costs incurred on either of the two projects because that became theoretical once the tribunal determined that the £250 cap applied. In fairness to Mr Widdicombe it seems to us that if he now wishes to make a fresh application under section 27A in respect of either or both projects it is, as a matter of law and procedure, open to him to do so.
51. If Mr Widdicombe were to make such an application the burden of proof would rest on him. In the proceedings before us with regard to the emergency lighting, fire alarm and electrical works Mr Widdicombe acknowledged that he was unable to show that it was unreasonable to carry out the works or that the works have been carried out to an unacceptable standard or at an unreasonable cost. In these circumstances Mr Widdicombe will no doubt wish to think carefully what objectives may be achieved if he makes any further applications with regard to these works.

Post hearing correspondence

52. Subsequent to the hearing Mr Widdicombe has sent letters to the tribunal, dated 12 and 21 August 2014. He says that copies have been sent to the applicant.

53. Enclosed with the first letter was a copy of a notice issued by the applicant to convening an extraordinary general meeting of members of the applicant. The business to be transacted at that meeting is a resolution to remove Mr Greenberg as a director of the applicant. The notice states that grounds for doing so are Mr Greenberg's behaviour and attitude taken at board meetings, his association and dealings with a non-board member and his conduct with regard to these proceedings in which he was identified as a named respondent.
54. Mr Widdicombe submitted that the proposal to dismiss Mr Greenberg as a director is a further example of the board disapproving of those who may, or who may appear to, oppose its decisions and he says that it is another reason why dispensation should be refused.
55. The matters raised in the letters was not before the tribunal in evidence at the hearing. The issue is a private one for the members of the company to determine and is not directly or indirectly relevant or material to the question whether it is reasonable to grant the dispensation sought.
56. We would however make two observations to avoid any misunderstanding. It was a tribunal decision to name Mr Greenberg as a respondent. That may have been due to a misunderstanding on the part of the tribunal which made that decision. Shortly after that decision was communicated to Mr Greenberg he wrote to the tribunal to clarify his position, which was not hostile to the applicant. Secondly, the fact that Mr Greenberg was a named respondent did not of itself put him on the opposing side to the applicant. For technical reasons the rules under which the tribunal works require a party to be either an applicant or a respondent. There can only be joint or multiple applicants where all seek the same relief or remedy. On a section 20ZA application the only party which can be the applicant is the landlord or company which seeks dispensation. Any other party or person who wished to participate in the proceedings had, by necessity of our rules, to be a named respondent. The fact that a person is cited as a named respondent does not necessarily mean that that person opposes the remedy or relief sought by the applicant.

Judge John Hewitt
26 August 2014