



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

**Case Reference** : **MAN/00EJ/LDC/2020/0020**

**Property** : **Burn Hall Estate, Darlington Road, Durham,  
DH1 3SR**

**Applicant** : **Burn Hall Estate Management Ltd**

**Respondents** : **The various Respondents referred to in  
Annex A.**

**Type of  
Application** : **Landlord and Tenant Act 1985 – s 20ZA**

**Tribunal  
Members** : **Judge JM Going  
IR Harris MBE FRICS**

**Date of decision** : **11<sup>th</sup> of August 2020**

**Date of  
Determination** : **17<sup>th</sup> of August 2020**

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**DECISION**

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## **The Decision**

**The Tribunal grants the application to dispense with the statutory consultation requirements in respect of the works.**

### **Preliminary**

1. By an Application (“the Application”) dated 26<sup>th</sup> March 2020 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 works to deal with the replacement of a sewage treatment plant (“the works”) serving the various dwellings at the property (“the Estate”). The Applicant considers that the works should be carried out urgently.
2. The Application was received at the beginning of the national lockdown in response to the covid 19 pandemic.
3. The Tribunal issued Directions on 3<sup>rd</sup> July 2020.
4. The Applicant provided written submissions with its statement of case and as part of the Directions was mandated to send copies to each Respondent by 17<sup>th</sup> July 2020. None of the parties requested a hearing.
5. None of the Respondents has indicated to the Tribunal any objection to the Application.

### **The facts and background to the Application**

6. The Tribunal has not inspected the Estate, but understands from the papers that 22 of the 25 dwellings on the Estate utilise a sewage treatment plant which directly discharges into the adjoining River Brownney.
7. Each Respondent owns a dwelling on the Estate. Each is also a member of and a shareholder in the Applicant, which is the freehold owner of the Estate and the management company set up to manage its common parts and common services.
8. The Applicant has provided a bundle of documents containing the Application, a statement of its case, evidence of newsletters sent to, and open meetings with the Respondents, explanations and evidence of what is wrong with the present sewage treatment plant, a timeline of the actions that it has taken, and evidence that the outflows from the sewage treatment plant fail the Environment Agency’s tests.
9. None of the evidence provided has been disputed.

10. In 2016 the plant failed and had to be replaced urgently. A new tank was installed in October 2016, but in March 2017, when it was being emptied, a manufacturing fault was noted and reported. Some works were undertaken but further issues were reported in December 2017. An outflow test failed in March 2018. The contractors who had installed the new tank sent a written report with recommendations for improvements in July 2018, and agreed to make changes to improve performance in September of that year. However sadly the problems continued and a report stated that “the internal wall to the media chamber is seriously bowed – due to the amount of sludge in the final chamber, it is highly likely that there is a fracture somewhere in the internal wall.” The contractors failed to respond to various prompts and the problems continued.
11. Different engineers inspected the plant in October 2019 including a firm acting for the Applicant’s insurers. Their conclusion was that the “the damage to your sewage treatment plant is considered to be due to manufacturers defects. The sewage treatment plant is beyond repair and requires replacement due to the total amount of deformed sections.”
12. The newsletters sent by the Applicant to the Respondents referred to a rapidly moving situation, various open meetings setting out the steps being taken to address the problem, the conclusion that the plant has to be replaced, the steps taken to try and obtain various quotations from different contractors, and the Application to the Tribunal.
13. After completing various due diligence measures the Applicant is keen to allow its preferred contractor to proceed with the works as soon as possible.

### **The Law**

14. 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.
15. 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: –
  - give written notice of its intention to carry out qualifying works, invite leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought;
  - obtain estimates for carrying out the works, and 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;

- make all the estimates available for inspection; invite leaseholders to make observations about them; and then have regard to those observations;
- 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, if that is not the person who submitted the lowest estimate.

16. 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.”

17. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others* (2013) UK SC 14 (“*Daejan*”) 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 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 tenant’s case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenant’s 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 compensate the tenants fully for that prejudice.

### **The Tribunal's Reasons and Conclusions**

18. The Tribunal began with a general review of the papers, in order 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).
19. 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.
20. Having carefully considered the evidence before it, and using its own knowledge and experience, the Tribunal concluded as follows.
21. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
22. The Application does not concern the issue of whether or not service charges will be reasonable or payable.
23. Applying the principles set out in Daejan the Tribunal has had to consider whether there was any prejudice that may have arisen out of the conduct of the Applicant, and whether it is reasonable for it to grant dispensation.
24. The Tribunal is satisfied from the Applicant's evidence that it has consulted with all of the Respondents on a regular basis since the problems with the sewage treatment plant became apparent, and there have been ample opportunities for each of the Respondents to make observations, call for further estimates, and participate in a process of trying to resolve a problem shared by them all.
25. The Tribunal, in the absence of any written objections from any of the Respondents, and having regard to the steps that have already clearly been taken by the Applicant, has concluded that that none of the Respondents will be prejudiced by dispensation from the statutory consultation requirements being granted for the urgent replacement of the present sewage treatment plant.
26. The Applicant has made out a compelling case that all of the works are necessary appropriate and urgent. The Tribunal agrees that the works are vital.

27. The failure of the sewage system means that the Applicant, and thereby effectively also the Respondents, are at risk of a fine or other enforcement action from the Environment Agency, and the potential revocation of the Estate's discharge licence.
28. It is clear that the circumstances have the potential to severely impact on the health, safety, utility and comfort of the Respondents and their visitors, and the wider environment.
29. Although the formal statutory consultation has not taken place the Tribunal is satisfied that to insist on it now would incur unacceptable delay.
30. For all these reasons, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements in respect of the works.
31. However it is emphasized that nothing in this determination should be taken as an indication that the Tribunal considers that the anticipated service charge costs resulting from the works are likely to 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 A**

Mr B Dunne & Ms B Bonar  
Mr J Symonds & Ms J Symonds  
Mr & Mrs S & N Taylor  
Beauvoir Trust  
Mr R B Schalks  
Mr & Mrs D Garnett  
Mr & Mrs A Newington  
Mr & Mrs I Hodgson  
Mr D Nairn  
Mr & Mrs B English  
Mr PS Murthwaite  
Mr M Hammond & Ms A Hammond  
Ms R Flowers  
Mr & Mrs D Eddlestone  
Mr & Mrs D Weston  
Mr & Mrs T Walker  
Ms S Howlett  
Miss L Swinburne  
W T Woon  
Mr L Taylor & Ms L Taylor  
Mr A Bell & Ms F Ord  
Mr & Mrs R Hall  
Mr D Stoker  
Mr & Mrs I Forsyth  
Mr J Walker & Ms H Walker