FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LDC/2021/0064
Property	**:**	199 New Church Road, Hove, East Sussex
Applicant Freeholders	**:**	Martin White and Joan Morgan
Representative	**:**	Martin White
Respondent lessees	**:**	(1) Joan Morgan, Ground floor Flat (2) Sarah Brindley, First Floor Flat
Representative	**:**	
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Members	**:**	D Banfield FRICS Regional Surveyor M J F Donaldson FRICS MCIArb MAE
Date of Decision	**:**	8 September 2021

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works listed on the Notice of Intention dated 12 August 2021 conditional upon;

- **Mr Goacher be instructed to investigate and, if required remedy defects in the wall ties to the flank wall,**
- **to examine and if defective to arrange repairs to the first floor front bedroom window and**
- **ensure that the drain adjoining the front door is left in good order.**

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

Background

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act.

2. Numbers shown in [] refer to page numbers of the hearing bundle assembled by the Tribunal from the various documents submitted to it.

3. The Applicant explains that following an Order of the Brighton County Court dated 6th July 2021 [96] the Applicants as freeholders wish to proceed with works set out in a report of Mr Philip Goacher dated 25th January 2021 in compliance with that Order.

4. Judge Whitney made Directions on 14 July 2021 [98] seeking responses from the lessees with evidence of what they may do/have done differently if the Applicant were or had to comply with the full statutory consultation process and setting out a timetable for the exchange of cases leading to a determination on the papers.

5. For differing reasons both lessees objected to the application with Ms Brindley also requiring the matter to be determined at an oral hearing. [102&104]

6. Ms Morgan's objection was on the sole issue that full external decoration should be carried out at the same time as works to the front bay thereby utilising the scaffolding erected for that purpose. [102]

7. On 4 August 2021 the Tribunal issued Directions [121] for the matter to be determined at an oral hearing with both lessee's responses taken as their statements of case to which the Applicant could reply. It also indicated that if any party wished to give oral evidence they must send a signed and dated witness statement to the other party and to the Tribunal by 13 August 2021 for inclusion in the hearing bundle which the Tribunal would prepare.

8. The Applicants responded on 10 August 2021 [124] agreeing to Ms Morgan's addition of external decoration and rebutting Ms Brindley's various allegations and setting out the freeholder's intentions should dispensation be approved. [125] Ms Brindley then submitted a document dated 13 August 2021 entitled SB RESPONSE to S.20ZA APPLICATION. [126]

9. On 15 August 2021 the Applicant objected to the inclusion in the hearing bundle of Ms Brindley's statement on the grounds that it was a "Reply to my Reply (as Applicant)" and should be disallowed.

10. The Tribunal made further Directions on 25 August 2021 agreeing that such a reply was inappropriate and not in accordance with

Directions but that, given that none of the parties in this case are legally represented, it proposed to exercise some flexibility and allow Ms Brindley's second statement also setting aside the requirement for signed witness statements.

The Law

Part 2 of Schedule 4 to the 2003 Regulations. (see appendix for full text)

11. The requirements for consultation were set out in the Daejan case referred to below and summarised as;

> Stage 1: Notice of intention to do the works Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, 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 any nominee identified by any tenants or the association.
>
> Stage 3: Notices about Estimates The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
>
> Stage 4: Notification of reasons Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

12. S.20 ZA Consultation requirements:

> Where an application is made to a 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.

13. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following

i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

ii. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

v. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).

vi. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

vii. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

viii. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

The Hearing

14. The Hearing took place on Wednesday 8 September 2021 by way of a video enabled platform. The Tribunal members were located at Havant Justice Centre with the Applicant freeholders, Ms Morgan and Mr White, represented by Mr White together with Ms Brindley, the lessee of the first floor flat joining from elsewhere.

15. There were minor technical issues at the start of the hearing but once in progress the parties and the Tribunal were able to communicate satisfactorily.

16. The Tribunal explained that the only issue to be determined was whether the consultation requirements of S.20 should be dispensed with and then went through the four stages required as referred to at paragraph 11 above. As Judge Whitney had stated in his Directions, the Tribunal required evidence of what the Respondents would have done differently if the Applicant were or had to comply with the full statutory consultation process.

17. The Tribunal highlighted that if dispensation was granted the lessees would lose the right to nominate a contractor and for the freeholder to consider any observations made by the Respondents in response to the Notice of Intention. I also said that it was open to the Tribunal to grant dispensation "on terms" i.e. subject to conditions.

18. The Tribunal said that the Tribunal members had read the contents of the hearing bundle and invited the parties to add anything that they wished the Tribunal to consider in making its determination.

Evidence

19. At[138] is a Notice of Intention dated 12 August 2021 listing those works extracted from Philip Goacher Associates report of 25 January 2021 with the addition of "Full Redecoration" to the front rear and side elevations in accordance with Ms Gould's suggestion [103] in her response to Judge Whitney's Directions.

20. Ms Brindley also considered that the specification was inadequate and referred to problems with her bedroom window, that works were needed to the wall ties in the flank wall and to resolve the drainage issue adjoining the front door.

21. Ms Brindley repeated her doubts as to the ability of Mr White to adequately supervise the works.

22. Mr White replied that he was only recently aware of an issue with the bedroom window and the difficulty in carrying out investigations due to Ms Brindley refusing him access. With regard to supervising the works he confirmed that Mr Philip Goacher

would be instructed to act as contract administrator and administer the works. His own involvement would be simply to instruct Mr Goacher to proceed.

23. Ms Brindley said that she was willing for tradespeople to visit her flat to inspect the windows.

24. I asked all parties for their observation on whether, if the Tribunal was minded to grant dispensation a condition that Mr Goacher be instructed to investigate and, if required remedy defects in the wall ties to the flank wall, to examine and if defective to arrange repairs to the first floor front bedroom window and ensure that the drain adjoining the front door was left in good order.

25. Ms Brindley agreed that such conditions were acceptable and Mr White said that Mr Goacher had allowed a £1,000 contingency in his tender documents which could cover the additional items referred to.

26. Mr White said that under the terms of the lease the window frames were the Lessees' responsibility and then asked the Tribunal to make various Orders for access, prompt payment of service charge monies and for Ms Brindley to cooperate with Mr Goacher all of which I explained were not within the Tribunal's powers to make.

27. Ms Morgan said that her flat had mainly original fittings and needed little maintenance expenditure, she would however pay her 50% share for the works, mainly relating to Ms Brindley's flat.

28. All parties confirmed that they had said all that they wished to say.

Determination

29. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with those requirements. Guidance on how such power may be exercised is provided by the leading case of Daejan v Benson referred to above.

30. Judge Agnew ordered that the works should be carried out as soon as possible which suggests that the time taken in following the full consultation process would be unacceptable.

31. In their evidence neither lessee expressed a wish to nominate a contractor in response to the Notice of Intention and as such no prejudice has been demonstrated. Ms Morgan has proposed that full redecoration should be included and this suggestion has been accepted. Ms Brindley identified three items which she considers necessary and which she could have referred to in a response to the Notice of Intention. However, these, have been accepted by the parties as suitable conditions should dispensation is to be granted.

32. Given that these works are clearly necessary, seem long overdue for whatever reason, are the subject of an Order by Judge Agnew and no relevant prejudice has been identified **the Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works listed on the Notice of Intention dated 12 August 2021 conditional upon;**

- **Mr Goacher be instructed to investigate and, if required remedy defects in the wall ties to the flank wall, to examine and if defective to arrange repairs to the first floor front bedroom window and ensure that the drain adjoining the front door was left in good order.**

33. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
M J F Donaldson FRICS MCIArb MAE
8 September 2021

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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.

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.

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.

Appendix

The Service Charges (Consultation Requirements) (England) Regulations 2003

Notice of intention

1.—(1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a)to each tenant; and

(b)where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a)describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b)state the landlord's reasons for considering it necessary to carry out the proposed works;

(c)invite the making, in writing, of observations in relation to the proposed works; and

(d)specify—

(i)the address to which such observations may be sent;

(ii)that they must be delivered within the relevant period; and

(iii)the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2.—(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a)the place and hours so specified must be reasonable; and

(b)a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

4.—(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a)from the person who received the most nominations; or

(b)if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c)in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a)from at least one person nominated by a tenant; and

(b)from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a)obtain estimates for the carrying out of the proposed works;

(b)supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i)as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii)where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c)make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a)where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b)where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c)where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d)where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e)where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or

manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a)each tenant; and

(b)the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a)specify the place and hours at which the estimates may be inspected;

(b)invite the making, in writing, of observations in relation to those estimates;

(c)specify—

(i)the address to which such observations may be sent;

(ii)that they must be delivered within the relevant period; and

(iii)the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6.—(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a)state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b)there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.