



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

- Case Reference** : CHI/21UD/LDC/2021/0017
- Property** : Primrose Court and Iris Court, St Leonards on Sea, East Sussex TN38
- Applicant** : Celandine Drive (Area D) Management Company Limited
- Representative** : Mr James Castle of Counsel instructed by J B Leitch Limited
- Respondent** : The Lessees of Flats 6,9,10& 11 Iris Court and Flats 7,8,10, 12 Primrose Court.
- Representative** : Ms Faisey and Ms Ellwood
- Type of Application** : To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
- Tribunal Member(s)** : Judge J Dobson  
Mr N Robinson FRICS
- Date of Hearing** : 8th June 2021
- Date of Decision** : 30th June 2021

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**DECISION**

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## **Summary of the Decision**

1. **The Applicant is refused 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 in respect of major works, being works to the roof of Primrose Court.**

## **The background**

2. The Applicants applied for dispensation under section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) from the consultation requirements imposed by section 20 of the 1985 Act.
3. The major works in question related to the roof of Primrose Court, albeit that the Respondents are the lessees of flats both of that block and of another block, Iris Court. Each block is four storeys high, containing four flats on each floor, giving a total of sixteen flats in each block and so thirty-two flats in combination. The blocks are not joined in any manner.
4. The Tribunal understands that the blocks were built approximately in or about 2008/9 by Bovis Homes. The NHBC guarantee had expired prior to the works to the roof attended to in 2020 and no doubt ten years after it came into place, although precisely when was not clear.
5. A section 20 consultation process was commenced by the Applicant in November 2020 in relation to works to the roof. That process was not completed. Two estimates were obtained for repair works to the roof and produced in evidence, one from Extreme Contractors Limited (“Extreme”)- in the sum of £12,262.80- dated 4th November 2020 and one from Westerham leadwork And (capital as shown on the estimate) roofing- in the sum of £13,750, undated. Neither contractor is stated on its estimate to be VAT registered.
6. The current freeholder, Bow Estates Limited, has had no involvement in this matter.

## **The Lease**

7. A sample lease dated 30th April 2009, of what was originally Plot 75 and subsequently renumbered as Flat 5 Primrose Court, was provided with the application (“the Lease”). The Lease is tripartite. The Applicant management company was a party to the Lease when that was granted.
8. The Tribunal understands that the leases of the other properties are in the same or substantively the same terms. Nothing specific turns on the provisions of the Lease. However, the provisions relevant to works are briefly touched on below by way of context.

9. The Applicant, as the management company, is responsible for repairs and other services and the lessees agree to pay service costs. The relevant provisions in relation to that are contained in and the Sixth and Seventh (particularly Part 2) Schedules. The roof, together with other structural elements and some additional elements, is specifically excluded from the demise to the lessees as set out in the First Schedule.
10. For reasons that are not completely clear but which do not impact on this Decision, the provisions of the Lease entered into require each of the Flats of both Primrose Court and Iris Court collectively to contribute to repairs to one or other or both of those blocks. Hence all of the lessees of flats in both blocks being named as the original respondents to the application.

### **The Law**

11. Section 20 of the Act and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement to consult has been dispensed with by the Tribunal. An application may be made prospectively or retrospectively.
12. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation “if satisfied that it is reasonable to dispense with the requirements”.
13. The approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.
14. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced financially, in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were “a means to an end, not an end in themselves”.
15. The factual burden of demonstrating “relevant” prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process.
16. The lessees may be able to demonstrate prejudice in a simple case by obtaining a cheaper quote or may need to obtain expert evidence.

17. If a lessee advances a credible case for having been prejudiced, the lessor must rebut it. It may be sufficient for the lessees to raise a prima facie case.
18. It is appropriate for the Tribunal to be sympathetic to the lessee(s), including resolving any doubts in the lessee's favour.
19. The more egregious the lessor's failure, the more readily a Tribunal will be likely to accept prejudice has been caused.
20. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

“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- i.e. as if the requirements had been complied with.”
21. The “main, indeed normally, the sole question”, as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.
22. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act. The question is not one of the reasonableness of the charges of works arising or which have arisen, which would be addressed in the event of an application made under section 27A of the Act. That was referred to by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), in which it was also stated that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer on the part of an applicant to an argument of prejudice being caused to a Respondent arising from a failure to consult. The point does not appear controversial and hence the Tribunal did not consider it necessary to refer the parties to that case in advance of this Decision.
23. If dispensation is granted, that may be on terms. (However, as correctly noted by the Applicant's Counsel during the hearing of this matter, that most obviously relates to prospective applications, rather than a retrospective grant or otherwise of dispensation as this now is. It is not easy to identify relevant conditions where the works have already been undertaken.)

### **The history of the case**

24. The Tribunal gave Directions on 26th February 2021 explaining that the only issue for the Tribunal is whether it is reasonable to dispense

with the statutory consultation requirements and the issue is not the question of whether any service charge costs are reasonable or payable. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any, setting out a timetable for the exchange of documents between the parties and the preparation of a bundle of documents required for the determination of the application. The Directions provided that the application would be determined on the papers without a hearing in accordance with rule 31 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 unless a party objected in writing to the Tribunal within 14 days of the date of receipt of the Directions.

25. The history thereafter was more involved than usual in a case of this nature.
26. Paragraph 13 of the Directions required the Applicant to send to the Tribunal a bundle by 1st April 2021. The Applicant failed to do so. The various documents sent in did not comply with the Tribunal Guidance. The Directions contained a warning that if the Applicant failed to comply the application would be automatically struck out. On 9 April 2021, the Tribunal struck out the application. On 14 April 2021, the hearing bundle was received. By an Application dated 28 April 2021, solicitors recently appointed to act on behalf of the Applicant applied for the case to be reinstated and the Tribunal agreed to the application and reinstated the case. The Tribunal also gave the new representatives an opportunity to review and if necessary, amend the bundle, requiring the Applicant to either confirm that the Tribunal may proceed to make its determination relying upon the bundle already received or send a revised copy.
27. Judge Dobson subsequently considered the bundle and the suitability of the application to be dealt with on the papers. There were 9 objections to the application of which one, from Ms Warrick, objected to a paper determination. Whilst her reply form was dated more than 14 days after the date of Directions, it was unclear when the Applicant served the application and the Directions on the Respondents, which the Applicant had not confirmed, notwithstanding the Direction to also do that. The application was listed for a hearing.

### **The Hearing**

28. The hearing was conducted remotely as video proceedings. The Applicant was represented by Mr Castle. Ms Faisey and Ms Ellwood attended as Respondents who had objected to the application and who they stated had agreed to represent the Respondents generally, most of whom the Tribunal was told were unable to attend due to work commitments or similar. The Tribunal has referred to Ms Faisey and Ms Ellwood above as representatives simply to distinguish them from the objecting lessee Respondents generally. However, no

authority was produced from the other Respondents and so the Tribunal treated them during the hearing as representing themselves, rather than considering them able to be treated as representatives of the other Respondents. Nothing turns on the matter.

29. The Tribunal also received oral evidence from Ms Hannah Cook- of the Applicant's managing agent, formerly Chamonix Estates Limited ("Chamonix") and now called Firstport Property Services Limited- on behalf of the Applicant and Ms Faisey and Ms Ellwood on behalf of themselves as Respondents. The Tribunal is grateful to all of the attendees for their assistance at the hearing.
30. That receipt of oral evidence from Ms Cook followed the Tribunal allowing, by a very fine margin, the Applicant to rely on a very late witness statement by Ms Cook, with a small set of enclosures. The statement was signed only the day before the hearing and the Applicant applied to rely on it only late afternoon of the day before the hearing, emailing the application and statement to the Tribunal at 4pm, albeit on a day on which the Tribunal caseworker's emails stated clearly in the footer she did not work. The information provided to the Tribunal was that the application was only sent to the Respondents at the same time. It could not be said on behalf of the Applicant whether all of them had sight of it, albeit that the two Respondents who attended representing the nine had seen it.
31. Mr Castle stated that the witness statement did not add a great deal but did set out as facts matters which would otherwise need to be inferred. There was confirmation of the actual cost of the major works and certain communications accepted to be new. Ms Faisey asserted that there was a lot of information received very late and which could have been provided long before, including emails the Respondents were not parties to.
32. There was merit in Ms Faisey's comments, whereas the reason for the late statement was essentially that Mr Castle had advised the service of it, where no mind had apparently been directed to that previously. However, there was potential merit in being able to hear from Ms Cook and nothing was contained in at least the statement itself which the Tribunal considered prejudiced the Respondents unduly, despite its extremely late provision.
33. The position was less clear in relation to the enclosures. However, on a fine balance and applying the over-riding objective, the Tribunal determined that it was appropriate in this instance to allow the admission of the witness statement and enclosures, despite its unacceptably late provision. Parties should sensibly expect that such late provision of a witness statement will result in the Tribunal refusing to admit the evidence in the overwhelming majority of cases.

34. The Tribunal also records that in the event it transpired that Ms Cook could only assist to a limited extent. She is the regional manager in whose region Primrose Court is situated but she is not directly involved in the management of it on a day to day basis. More significantly, she was not even the regional manager at the time relevant matters, the period until March 2021, and had no dealings at all with Primrose Court at that time. Both the actual manager and the regional manager with wider responsibility during the relevant period had left the company.
35. The Tribunal does not by way of the above criticise Ms Cook, who could only give evidence of such matters as she was properly able to and cannot help that she did not deal with Primrose Court at the time. However, it did mean limited assistance could be provided to the Tribunal to supplement the sparse case originally presented by the Applicant. It also meant that the comment in the statement drafted for Ms Cook that she was “appropriately placed to comment” was somewhat questionable at best.
36. A more modest issue, but one worthy of brief mention, arose in relation to the giving of evidence by Ms Faisey and Ms Ellwood. Both had provided a response to the application stating their objection to it and both had provided statements setting out the basis for their objection. Those statements did not in either instance contain a statement of truth.
37. However, the Directions had not referred to the need for any such statement to be endorsed with a statement of truth. It was of no great surprise that unrepresented parties had not identified the merit of such a statement of truth, not least where the Applicant had not at that time served a witness statement endorsed with one. The Tribunal obtained confirmation that the contents of their respective statements were true from each of the two Respondents and that they understood the importance of their oral evidence being true, on which basis the Tribunal was content to receive oral evidence from each.
38. Mr Castle served and filed a Skeleton Argument on behalf of the Applicant, which he supplemented by oral closing submissions. Closing submissions were also made by Ms Faisey, to which Ms Ellwood did not wish to add anything, the two having agreed that Ms Faisey would take the lead. There is no need to refer to anything specific said by Ms Faisey in closing in light of the Tribunal’s determination and so lack of reference to her closing remarks hereafter should be taken as reflecting no more than that.

### **Consideration**

39. Having set out the law above, the Tribunal will set out its findings of fact and the evidence on which facts were found- the Tribunal has not set out all of the evidence received on paper or orally where that is

not relevant to the findings made but in the event has dealt with the relevant evidence in some detail. The Tribunal will then apply the relevant law to that and explain the determination made, making reference to such of the Skeleton Argument and oral submissions as appropriate.

40. The Tribunal found the key question to be whether the Respondent had established at least a prima facie case of prejudice. The Tribunal addresses matters at somewhat greater length than usual in these cases but mindful of the Decision arrived at.

#### The facts and relevant evidence

41. Problems arose with the roof approximately five years ago according to an email sent by Ms Bullock. Some corroboration of that is found in the objection by Ms Joanna Porter, who refers to such a problem “at least three years ago”, suggesting that the NHBC guarantee was valid at that time. Ms Cook knew nothing of that, accepting that the NHBC would normally be contacted but not knowing whether it had happened in this instance.
42. Ms Bullock asserted in her email that problem to be different to the one prompting the major works. The Tribunal is unable to reach any finding as to whether or not that is correct based on the passing mention made but nothing turns on the matter for the purpose of this application. The Tribunal does note that the NHBC warranty would have remained able to be relied on at that time but considers that in the event that any now-relevant matter may arise from that, it is one as to the reasonableness of service charges demanded and not one as to this consultation process.
43. An issue also arose with regard to the roof in February 2020 or thereabouts, it appears arising from the same sort of issues as the current application. There are references from the Applicant and Respondents as to that issue, on which basis the Tribunal accepts that work was indeed undertaken.
44. The estimate from Extreme dated 4th November 2020 says, “On our initial investigation we found broken tiles, cracked valleys and no ventilation”, said to have been eliminated by repair. That comment reads as referring to the works earlier in 2020 and the Tribunal accepts the works undertaken to be as described. No evidence was presented as to the cost of that work.
45. However, issues either continued or returned- it appears to be the latter, but it is not clear and not directly relevant for the purpose of this Decision. The lessee of Flat 17 Primrose Court contacted Chamonix 29th October 2020 complaining of water dripping through the ceiling. Whilst no direct evidence was provided, the Tribunal infers that prompted Chamonix to look to undertake further work.



46. The report from the lessees also states that “Zac and his colleague” had attended. The Tribunal infers that Zac was from Extreme, given that the lessee knew who he was, most obviously consistent with having encountered him on a previous occasion, February 2020 being the most obvious time.
47. It is common ground that Ms Bullock wrote to the lessees by letter of 20th November 2020 starting the consultation process. The date was queried with Ms Cook in cross-examination by Ms Faisey but she was able to say that the computer system demonstrated that date and in any event the letter exhibited to the objection of Mr Richard Vernon, lessee of Flat 6 Iris Court, was so dated.
48. That letter states the problem as a leak in the roof of one of the flats caused by torrential rainfall in early February 2020 and adding works of replacement of vent tiles.
49. The letter adds one line of information about the intended major works, namely that the roofing contractors quoted for the tiles to be taken up, felt to be replaced and tiles to be relaid. There is, as discussed further below, no information as to the cost or whether alternative approaches had been considered.
50. The letter referred to enclosing a notice of intention setting out the steps of the consultation process. The letter also says, erroneously as it transpired, that:

“Several quotations will be provided and you will be provided with the opportunity to review these until the date given on the notice”.
51. The letter added:

“After this has occurred, we will then select the chosen contractor whose quality of work and quote is most reasonable.”
52. No specification was drawn up according to the evidence of Ms Cook, or consequently sent out, and the Tribunal accepts that with her access to the computer system of the agent, it is very likely that she would have been able to identify any such specification had there been one. Ms Cook quite properly accepted that as a matter of good practice that sort of information would normally be provided to the lessees.
53. Pausing to refer further to the Notice of Intention, that was only provided as evidence as an exhibit to the statement of Ms Cook. She could not say that it had actually been sent with Ms Bullock’s letter. The relevance of that is on the copy of the letter exhibited by Mr Vernon to his objection- see further below- he has annotated a large “X” and the words “Nothing received”. The placing of the “X” could indicate it relating to the Notice or to the estimates.

54. On balance, the Tribunal finds that the Notice was sent with the letter and the annotation by Mr Vernon relates to the estimates. No Respondent cited lack of receipt of the Notice and there is a difference between a Notice said to have been attached at the time and quotes (/estimates) said to intended to be sent later.
55. The notice provided that observations must be made within thirty days.
56. Ms Faisey did not respond, and Mr Castle put to Ms Faisey that she had not said what she would have done if consulted, which she accepted. She also denied receipt of the letter 20th November 2020, and that is consistent with her questioning of Ms Cook as to when it was sent, although the Tribunal can identify no reason why the Applicant's agent would not have at least attempted to send one to her, given that the system indicated a letter of that date and one was certainly received by Mr Vernon, given that he responded to it. There was no evidence as to why such a letter would have been sent to him and not the other lessees, indeed Ms Ellwood's evidence supports the conclusion that it was.
57. Mr Castle put to Ms Ellwood that she had received the letter 20th November 2020, which she accepted, and that she had not responded, to which she agreed. She said that the lessees were just told that there would be some works. Ms Ellwood was not very clear as to when she saw the letter and said she responded, although it was not entirely clear if that was to the letter or the later Notice. The Tribunal is unable to find on balance that she responded to either, given lack of clarity and lack of other evidence but does not discount that she may have done. Nothing turns on this point and so there is no need to dwell on it.
58. Mr Vernon did respond to that letter by an email of 30th November 2020, firstly suggesting that the roofer who "misdiagnosed the initial problem and carried out unnecessary works" should reimburse and not carry out future works, doubting that would prove to be the case, correctly at least on the second count. He also suggested that the problem described indicated there had been an issue with the design/construction of the roof. Rather more importantly, he asserted as follows:
- "The felt getting 'soaked' sounds a wrong diagnosis again as it's waterproof and meant to act as a secondary barrier! Should the felt have rotted at the front eaves only then this is a much easier remedy and would not necessarily mean a complete re-roof. I would strongly suggest that a second opinion is sought from a professional surveyor or roofing expert and not a roofing company who seek to profit from carrying out extensive works."
59. Mr Vernon thereby doubted the proposed works to be appropriate and argued for the instruction of an expert.

60. Ms Bullock replied to Mr Vernon by email dated 1st December 2020 that:

“All works which have been carried out on the roof at Primrose Court have been required. There were no tile vents on the side of the roof of the leak and the valley needed to be repaired. Due to the age of the building we would be unable to go back to the developer in regards to the roof. This would be due to their warranty expiring around two years after completion of the apartment block. We are also unable to approach the NHBC warranty as this is only valid for a period of ten years and the block is older than this by around a year. The insurance company will not cover any works as they are not classed as storm damage, this has been even from the initial leak when raised, but classified the works as preventative measures due to the felt needing replacement. It would seem that the position of the building is the reason these issues have occurred over time during extreme weather.

We will be collecting several different options and quotes during this process, these are then provided to residents.”

61. That reply indicated that further contact would be made. Whilst it did not state that an independent expert would be instructed, it indicated, by the reference to “collecting several different options” that the works would not necessarily be those originally proposed. Equally, the promise of provision to the lessees was repeated.

62. Mr Vernon responded by that by a further short email dated 2nd December 2020, in which he stated:

“I’m afraid I beg to differ. If the felt has rotted then this would have taken many years to occur and would therefore take it back within the NHBC period. Also, if the rotting of the felt is deemed to be due to poor initial workmanship then this would be an issue for the NHBC/ Builder to respond to. I, again, would politely request a written opinion from a professional chartered building surveyor and that my comments and observations are circulated to other interested parties.”

63. Mr Vernon thereby doubted that the felt would have rotted due to the extreme weather referred to and in effect that the apparent plan to deal with the perceived problem was correct.

64. Whilst it was suggested in closing by Mr Castle that the Applicant’s agent had decided that there was no need for expert opinion, there was no evidence provided of such a decision having been made or considered properly, merely that unfulfilled promise of “collecting different options and quotes” in response to Mr Vernon. The most that Ms Cook could say in evidence was essentially that the approach was ordinarily likely to depend on the extent of the works and that the repair was probably considered appropriate because the two quotes were of similar value. Ms Cook was able to offer no evidence that the instruction of a surveyor or other expert had been considered or explored.

65. It is common ground that in any event, the Applicant's agent did not seek the opinion of any chartered building surveyor or other appropriate expert separate to the roofing companies who had been asked to provide estimates for work. That is to say both prior to commencing the consultation process and in response to the particular observations of Mr Vernon.
66. No further explanation for that or other response was provided by Chamonix following the further email from Mr Vernon. The evidence is that Ms Bullock did not reply at all.
67. The Applicant accepted that the promised estimates for the costs of work which were obtained were also not sent to the Respondents and Ms Cook agreed that there was no evidence of them being.
68. The Applicants provided no evidence of other communication with the Respondents as to the nature or cost of the works, as to the approach taken to the comments of Mr Vernon or as to the fact that the consultation was not to be proceeded with. Ms Cook understandably could not say why the estimates and/ or other information were not sent but she agreed that there was no evidence of information being shared.
69. The Respondents plainly did not have until the relevant date to consider the estimates/ quotes from potential contractors because they were not provided.
70. Ms Cook accepted that the lessees had no way of knowing the cost of the works. Ms Cook was understandably reluctant to comment very specifically on how matters had been handled at the time, when she had not been involved.
71. In the absence of any evidence, the Tribunal finds that none of the above steps were taken and so the most that the Applicants knew was that there would be some works in relation to the problem mentioned in the 20th November 2020 letter. The Notice, which invited quotes, simply mentioned felt being replaced and tiles relaid.
72. As a matter of simple fact, the Respondents did not obtain any alternative estimate or quote.
73. Ms Cook noted in her oral evidence that the agent went with the cheapest quote. That is correct in as far as it goes.
74. The Tribunal finds that the most likely scenario, and on balance the position the Tribunal finds to be the correct one, is that the lessees, other than Mr Vernon who appears to have had experience in and interest in such works, were expecting to receive further information, including the promised "several quotations" and were affected to at least some extent in their approach by that, including the potential seeking of alternative estimates or quotes.

75. The Tribunal confidently infers from the available evidence, that Mr Vernon would have maintained his position in the face of ongoing consultation.
76. The Tribunal finds there to be no good reason advanced on behalf of the Applicant, indeed no reason at all, as to why the Applicant's agent failed to respond further to Mr Vernon and why there was no further communication with the lessees ahead of the undertaking of the works, including providing the estimates and any other options. That includes a lack of reason why the consultation process was not further pursued, given the timescale between the letter November 2020 and the works themselves.
77. The lack of continuation of the consultation prevented, on a formal level at least, the need for ongoing communication about the works. It did not alter the considerable merit in having continued further with the consultation or in communicating in a less formal manner, although the Tribunal has little doubt that there would have been pressure on Ms Bullock to further address the issues raised by Mr Vernon and explain lack of engagement with a surveyor or other roofing expert.
78. The above position is not altered by the fact that there is evidence of ongoing problems to Flat 17. The Lessee contacted Ms Bullock again on 21st December 2020 complaining of ongoing problems with water penetration. There is no reason to doubt the contents of the further email. The Tribunal has no difficulty in finding a need for works to be undertaken.
79. The Applicant applied to the Tribunal on 4th January 2021. Ms Bullock stated in the application that the roof issue was getting progressively worse and that with heavy rainfall, water is leaking "heavily" into flat 17. The application was electronically signed by Ms Bullock. The picture painted is of an acute situation.
80. However, as referred to again below, the Tribunal received no evidence of any of that being correct. Ms Bullock did not explain in the form how she knew the statement to be correct, including as to deterioration of the roof, in relation to which there was no suggestion of her possessing expertise and there is no evidence of ongoing deterioration at the time. The Tribunal treats those statements in the application form with considerable caution.
81. The application described the works as take up the tiles, replace the felt and relay the tiles, so along relatively similar lines to the quotes. It is said that three quotes had been obtained, although there has been no other reference to a third one and no third one has been produced. It was said that there was more frequent water ingress and further damage to flat 17. As noted above, no evidence has been provided to support that. It merits noting that ordinarily

demonstrating water ingress and worsening damage is achieved fairly simply by photographs and other evidence from the relevant lessee or by similar uncomplicated means.

82. More particularly, the application asserted that in the event of heavy rain and strong winds, rain was pushed up underneath the roof tiles and damaged the roof felt. It was said that on first investigation, the roof suffered from cracked valleys, broken tiles and no ventilation, apparently referring to the work earlier in the year by Extreme. The Applicant stated that it sought dispensation from consultation because of “ingress of water into flat” (17).
83. It is possible that there was ongoing water damage to flat 17 in relation to which urgent work was only appropriate and even that there was ongoing deterioration to the roof, albeit rather less likely in itself to need urgent work but for damage to the flat. However, there a complete lack of evidence for any of that. Indeed, the picture sought to be painted of a very urgent situation with considerable ongoing damage to flat 17 is at odds with the timescale for the works and where it is far from clear that Ms Bullock had a basis for accuracy of her comments.
84. The Tribunal finds it more likely that Ms Bullock wished to proceed with the instruction of one of the contractors and not to address the issues raised by Mr Vernon and otherwise to have to address issues which may arise in the ongoing consultation process. That is consistent with the lack of engagement by her.
85. In or about mid- March 2021, some 5 months after the report by the lessee which prompted the consultation letter in November 2020, the works are said, by Ms Porter in an email sent to the Tribunal with her objection, to have been completed and that has not been disputed. It is right to say that in making the observations in the preceding paragraph, the Tribunal has no evidence as to the exact start date for the major works. That said, and as referred to in relation to the objections received, it was said in one objection- that by Mr Barry Clarke- that the works did not commenced for a few weeks after the scaffolding was erected. The scaffolding is said by Ms Warrick in her objection to have been erected on a Saturday morning and Mr Clarke’s objection puts it before 21st January 2021.
86. The Tribunal infers on the evidence available and applying its expertise in relation to likely timescale for given works that the works, would have been unlikely to have commenced before late February 2021. If the Tribunal is incorrect as to that date, it was well within the Applicant’s gift to have supplied the correct date.
87. The actual cost of the works was £12,402.00, just above the estimated sum.

88. The Tribunal finds there was time available for the Applicant's agent to have responded further to Mr Vernon, to have considered whether to obtain expert advice and to have obtained such if considered appropriate after the letter in November 2020 and before the likely start date of works in late February 2021. There were approximately eleven to twelve weeks between Mr Vernon raising matters and that likely commencement. Mr Vernon noted in his objection- see below- that he did not hear from his email in December 2020 until receipt of this application in March 2021.
89. There was also ample time to provide the promised estimates/ quotes. The failure in that regard was not a consequence of time pressures.
90. Nine objections were received to the application, dated variously in March 2021. Those were from Mr Vernon, from Ms Faisey and Ms Ellwood and from lessees of six other flats. Save that of Mr Vernon referred above, none of those asserted having responded to the aborted consultation process or otherwise raising matters ahead of the application being served.
91. Mr Vernon stated in the objection that he is a building surveyor by trade, specialising in building defects, and that he considered that water running under tiles is not that rare and further that felt rotting at the eaves is not that rare. He stated that does not usually require a complete re-roof and that localised repair is an acceptable cure. He indicated dissatisfaction with the roofer's diagnosis in light of the previous works. He correctly said that his suggestion to Emily had been that before what he described as "very expensive works" proceeded, a building surveyor should be appointed to give a professional view and recommendations.
92. It is appropriate to carefully note that Mr Vernon did not refer to being a building surveyor in his response to the letter dated 20th November 2020 but only in his statement sent with his objection dated 21st March 2021, by which time the works were complete. The information provided by him in March 2021 must not be conflated with that in late 2020. The Tribunal finds that there is no evidence that Ms Bullock was aware of the nature Mr Vernon's work and any consequent expertise at the time of the consultation and hence that she should have given any additional weight to Mr Vernon's comments because of it.
93. The other objections essentially covered the following:
  - i) complaint about the Applicant's failure to provide any quotes at an earlier stage;
  - ii) suggested that the original construction had been defective and that there had been ongoing problems over the years; noted that the quotes had not been provided and (Ms Faisey said and it was not challenged) Chamonix stated even as late

- as 2nd March 2021 that they would send quote information prior to the works but in fact the works had already started and were nearing completion;
- iii) asserted- wrongly in itself- that the lessees had not been given the opportunity to supply other quotes;
  - iv) observed that by the time of this application being made scaffolding had already been erected, although the works were not commenced for a few weeks after;
  - v) commented that by the time that objections were due, the works had been completed;
  - vi) noted that the proposed work was not based on any survey, queried the need for Iris Court lessees to contribute although the simple answer to that lies in the terms of the Lease and expressed dissatisfaction with how the works had been undertaken;
  - vii) the Respondents were, perhaps understandably, dubious about accepting the opinion of contractors who would be paid for the, not insignificant, work they suggested to be required.
94. Whilst the Tribunal accepts that the Applicant's agent proceeded with the contractor who gave the cheaper of the two quotes, the Tribunal finds that there is no evidence, save that the contractors quoted for given work, that the work was that appropriate and that there was no other, less expensive work, which may have been identified if separate expert opinion had been obtained. There is not even any explanation, save insofar as briefly indicated by the agent in the application itself, as to why it was considered that the given work was that appropriate.
95. Ms Cook accepted in her evidence, entirely fairly, that she did not know that the correct work had been undertaken. The Applicant had provided no evidence from anyone else able to support the agent's approach.
96. It merits noting that the Tribunal was unable to determine on the evidence what the cost of scaffolding had been. It also merits noting that in the experience and expertise of the Tribunal, roofing felt may very well be sufficient in itself to prevent water penetration. Whilst it is not implausible that rain may damage roof felt, neither it is obvious why it would have done so in this instance. The Tribunal also asked Ms Cook whether the work had been undertaken to a section of the roof as opposed to the whole roof as the estimates suggested but she did not know and so could not assist.
97. The estimates gave no sufficient information on which to reach any such specific determination had it been necessary to do so. Most notably for these purposes, they in no way explained the basis for the presumed opinions of the roofers and why those should be taken as correct.



98. Overall, the application had not been at all well explained or supported by relevant evidence, whether on issue or in compliance with Directions.

Application of the law

99. Mr Castle contended in closing submissions that the kernel of the question for the Tribunal applying *Daejan* was whether the Tribunal was satisfied that the Respondent suffered financial prejudice. That essentially accords with the summary of the law set out above.
100. The Applicant's Counsel, focussed his argument principally on the Respondents not, he submitted, having demonstrated what they would have done had they been consulted and indeed that they had done nothing in response to the November 2020, save in the case of Mr Vernon, whose comments he asserted were insufficient.
101. Mr Castle reminded the Tribunal that it is for the Respondent to demonstrate a prima facie case of prejudice. In relation to Mr Vernon's comments, Mr Castle argued that those did not amount to a prima facie case for the Applicant to meet. He submitted that Mr Vernon's comments amounted to him thinking that the works were not necessary and more limited works would suffice and that, whilst there was a suggestion of Mr Vernon having relevant expertise, there was no indication what type of surveyor he was or had been.
102. The Tribunal does not agree that the Respondent failed to demonstrate at least a prima facie case.
103. On a rather limited point, as noted above, in fact whilst Mr Vernon specifically referred to being a building surveyor specialising in building defects in March 2021, he had not done so earlier. As to whether he is a chartered surveyor is unclear but not relevant in the circumstances.
104. Rather more significantly and on a wider level, Mr Vernon raised relevant issues as to whether the proposed works were the appropriate ones and the merits of investigating that.
105. The Tribunal considers the approach taken on behalf of the Applicant to the consultation process and the works was very poor.
106. The lack of information was highly unsatisfactory. The Respondents did not know prior to the service of the application what work was proposed or at what cost, the Applicant's agent having not provided the estimates to the Respondents and having failed to provide any other information about the works. Whilst the Respondents were wrong insofar as it was asserted that they had no opportunity to obtain their own quotes, they did not know anything about other potential costings or much about the works envisaged for which quotes might be obtained. The Tribunal considers that it would have

been difficult for them to have obtained alternative quotes with the little they had to work with.

107. The finding that the promise that quotes would be sent to lessees, which they were not in the event, was very relevant in that context. Little weight can be given to the failure of the Respondents to reply where important promised information had not been provided to them.
108. Neither was there any cogent explanation for the cessation of the consultation process and the undertaking of the works. If it was because of continued damage and urgency as Mr Castle suggested, there was nothing, as he accepted, before the Tribunal providing evidence of that. Neither given the generally lax approach of the Applicant's agent does the Tribunal consider that such a potentially at least partially good reason can be inferred. Reliance might have been able to be placed to a limited extent on the contents of the application form but for the lack of confidence that the Tribunal has in the accuracy of Ms Bullock's statements made in that.
109. This is an instance in which the Applicant's conduct was significantly egregious and relevance of that as referred to by Lord Neuberger firmly applies. For the avoidance of doubt, the Tribunal has not considered conduct in failing to consult in the manner common prior to the decision of the Supreme Court in *Daejan*.
110. It cannot be known what the opinion of a surveyor or other expert would have been. It cannot be known what works would have been considered and estimated/ quoted for by any contractor who might have been put forward by the Respondent in the event of them being in possession of better information.
111. However, the key point is that the Tribunal considers there to have been real potential for there to have been appropriate work other than that undertaken and for their to have been reduced costs for such work. The Tribunal considers that the sketchy information contained on the estimates and lack of any explanation for the work described being the appropriate work, as opposed to any other and especially any lesser and cheaper work, provides significant scope for the work undertaken to have been less expensive if the consultation process had been completed and in the course of that an independent expert opinion had been obtained, as the Tribunal considers likely to have happened.
112. Notwithstanding the comments of the lessee of Flat 17 and the apparent merit on the basis of those for fairly urgent action, the work cannot have been considered by the Applicant's agent that pressingly urgent either. The work was not, whether it ought to have been or otherwise, undertaken especially swiftly after being reported in October 2020 and not until the end of the winter period. If work had been undertaken in the first few weeks after the report by the lessee,

the outcome of this application may or may have been different, but the balancing exercise would at least have been.

113. Whilst Mr Castle is correct that the cost of the major works per flat were not massively greater- £387.59- than the level which would be allowed in the absence of consultation, that is not a point to which the Tribunal considers great weight should be given, albeit that the greater the excess may be potentially the even greater argument there may be against granting dispensation in circumstances otherwise similar to these.
114. The Tribunal is persuaded that there is at least a prima facie case of prejudice and the Applicant has failed to rebut that.
115. The Tribunal has determined that the Respondents were prejudiced by the failure to consult.
116. The Tribunal consequently finds that it is not reasonable to dispense with the formal consultation requirements in respect of the major works to the roof of Primrose Court.
117. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the major works. The Tribunal has made no determination on whether costs up to the maximum sum which the Applicant may recover in the absence of consultation or that being dispensed with are reasonable or payable. If a leaseholder wishes to challenge the payability or reasonableness of such costs, then a separate application under section 27A of the Landlord and Tenant Act 1968 would have to be made.

### **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](mailto: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.