FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LDC/2020/0168**
HMCTS code (paper, video, audio)	:	**P: PAPER REMOTE**
Property	:	**Harmony Building, 31 City Island Way, London, E14 0QE/0QF**
Applicant	:	**Clearstorm Limited**
Representative	:	**Ballymore Asset Management Limited**
Respondent	:	**Clarion Housing Association**
Representative	:	**Weightmans LLP, Solicitors**
Type of application	:	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	:	**Judge Robert Latham**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**20 April 2021**

DECISION

(i) The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985.

(ii) It is a condition of the dispensation that the Applicant (a) pays the Respondent £2,650 within 21 days in respect of the costs which it has

incurred in respect of this application; and (b) does not pass on any costs relating to this application through the service charge.

Covid-19 pandemic: description of hearing

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was P:PAPER REMOTE. The Directions provided for the application to be determined on the papers unless any party requested a hearing. No party has requested a hearing. The Tribunal has had regard to the documents specified at paragraphs 9 and 11.

The Application

1. The Tribunal has received an application, dated 24 September 2020, seeking retrospective dispensation from the consultation requirements of section 20 of the Landlord and Tenant Act 1985 ("the Act"). The applicant has been brought by Ballymore Asset Management Limited (BAML) who are the managing agents for the landlord. The Respondent is Clarion Housing Association ("Clarion"). They have been represented by Wightmans LLP, Solicitors, in this application.

2. In its application, BAML stated the landlords to be Clearstorm Limited and Blazecourt Limited. In an email, dated 1 April 2021, BAML state that the relevant landlord is Clearstorm Limited. Blazecourt Limited were named through "an administrative error". The Tribunal therefore removes Blazecourt Limited as a party to this application.

3. It is essential for an applicant applying for dispensation to identify the relevant respondents to the application. The application refers to the block as consisting of "104 social leasehold apartments". No leases were attached to the application. There were potentially a number of sub-lessees who might be liable to pay the service charge (see the decision of the Upper Tribunal in *Foundling Court & O'Donnell Court v Camden LBC* [2016] UKUT 366 (LC); [2017] L&TR 7 ("Foundling Court").

4. The only respondent identified was Clarion. The Clarion lease was not attached to the application. The only address given for Clarion was that for BAML. The application was delayed whilst these procedural issues were resolved.

5. On 4 December 2020, the Tribunal gave Directions. By 15 December, BAML was directed send to each of the leaseholders by email, hand delivery or first-class post, copies of the application form and the directions, together with a properly itemized invoice/quotation in respect of the work (showing costs), together with an expanded explanation of precisely why all valves have had to be replaced, and the work executed urgently. It is apparent that the Procedural Judge

considered that there might be leaseholders, apart from Clarion, who would be affected by the application.

6. On 6 January 2021, Clarion complained that BAML had failed to comply with the Directions. On 20 January 2021, the Tribunal set a new timetable. On 19 January 2021, BAML provided Clarion with a number of work/job sheets which provided "some information surrounding the works carried out".

7. On 8 February 2021, Clarion responded to the application. Their primary submission is that Clarion has suffered relevant prejudice due to the BAML's failure to follow the statutory consultation procedure and their application for dispensation should be dismissed. The effect of this would be that Clarion would only be required to contribute a total of £250 towards the cost of the works under their headlease.

8. Alternatively, Clarion submit that any dispensation should be granted on terms:

   (i) Clarion's liability to pay for the works be reduced by such sum to be determined, to take into account the relevant prejudice caused to the respondent due to applicant's failure to follow the statutory consultation; and

   (ii) BAML should pay Clarion's reasonable costs on the basis it was reasonable for the respondent to test the applicant's claim for a dispensation in order to reasonably canvass the relevant prejudice suffered.

9. On 12 March 2021, the Tribunal sought to determine this application. BAML had provided an electronic bundle which consisted of 63 attachments. There was no statement setting out the background to this application. It was extremely difficult to navigate the electronic bundle.

10. The Tribunal, having regard to the decision in *Foundling Court,* was concerned that there were potentially sub-lessees who should have been joined to the application. However, little was clear from the mass of documents which had been filed. The Tribunal therefore gave further Directions.

11. Pursuant to these Directions, the parties have filed a Joint Response to the issues raised by the Tribunal. In an email dated 1 April 2021, BAML have added additional observations. On 5 April, Weightmans emailed adding a number of observations in red. The Respondent have also provided a Statement of the Costs, totalling £2,650, which they contend that the Applicant should be required to pay as a condition of dispensation being granted.

The Law

12. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. A summary of those requirements is set out in *Daejan Investments Ltd v Benson* ("*Daejan*") [2013] UKSC 14; [2013] 1 WLR 854, the leading authority on dispensation:

> 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.

13. Section 20ZA (1) of the Act provides:

> "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 or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

14. The Tribunal highlights the following passages from the speech of Lord Neuberger in *Daejan*:

> (i) Sections 19 to 20ZA of the Act are directed towards ensuring that tenants are not required to (a) pay for unnecessary services

or services which are provided to a defective standard (section 19(1)(b)) and (b) pay more than they should for services which are necessary and are provided to an acceptable standard (section 19(1)(b). Sections 20 and 20ZA are intended to reinforce and give practical effect to these two purposes.

(ii) A tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

(iii) A tribunal can impose conditions on the grant of dispensation under section 20(1)(b). It is permissible to make a condition that the landlord pays the costs incurred by the tenant in resisting the application including the costs of investigating or seeking to establish prejudice. Save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

15. The current application is somewhat different from the facts in *Daejan* in that the reason for the landlord's failure to comply with the statutory consultation requirements was the urgency of the works. Whilst the urgency of works may make the statutory consultation timetable impractical, a landlord should still seek to follow the spirit behind the statutory provisions. The landlord should seek to consult any relevant tenants about the scope of the urgent works that are required. The landlord should also seek to test the market to ensure that best value is secured. A tenant may be able to identify a contractor from whom an estimate might be obtained.

The Background

16. Harmony Building consists of 104 social leasehold apartments all of which are held by Clarion. Clarion's long lease, dated 4 Mach 2016, is the only long lease granted for the building. Clarion has rather granted a series of social tenancies, which are presumably "assured tenancies". Whilst the social tenants are required to pay a variable service charge, the cost of these works will not be passed on to them. The reason for this is that section 11 of the Landlord and tenant Act 21985 imposes the liability for these works on the landlord. They are therefore treated as "non-recoverables".

17. BAML assert that the cold water supply valves which are in each flat started to seize up and fail. It seems that this problem was first identified in July 2020. This posed risks to the supply of cold water within the building and the flats. The supply to individual flats were at risk. It could also have affected the fire safety sprinkler system. The valves were installed in 2015 prior to the granting of the relevant lease held by

Clarion. The average life expectancy of these valves is around five years. The proposal to replace the valves came from a routine PPM when two valves snapped during isolation and valve testing. BAML's service partner recommended the replacement of all valves in the building. With the current level of seizures, the landlord was unable to service and maintain the pressure reducing valves in the building posing H&S fire risks, potential water pressure loss, loss of services and potential leaks.

18. NG Bailey are the Applicant's Mechanical and Engineering maintenance contractor. They utilise secondary companies to carry out elements of the contracted annual maintenance/servicing. Vali Group are one of these contractors. On 31 July, Vali Group provided NG Bailey with an estimate in the sum of £15,381 to supply and install new isolation valves. On 4 August, NG Bailey notified the Applicant that the total cost of the works was £16,534.58, including their management fee. To this, VAT needs to be added. It seems that this was the only estimate that NG Bailey sought. On 6 October, the Vali Group confirmed that they had completed the work.

19. On 9 October 2020, BAML first notified Clarion about the proposed works and that an application had been made to this tribunal. BAML did not enclose a copy of their application, albeit that it was dated 24 September. Neither did BAML give any explanation as to why there had been no consultation about the proposed. The email stated:

> "With several of the current valves now seizing we are no longer able to service or maintain the pressure reducing valves within the block, posing H&S Fire risks, potential water pressure loss, loss of services and potential leaks within the building. We have therefore had to instruct the chosen service partner to carry out the replacement of all valves urgently. The order has been issued and works are due to be undertaken within the next four weeks. The total cost of the works comes to £19,841.50 inclusive of VAT, with section 20 triggered due to the largest of the apartments within the building (higher square footage)".

20. The email was inaccurate in stating that the works were to be undertaken within the next four weeks. The works had already been completed. On 9 October 2021, Clarion responded to this email stating that Sara Gohl, the officer to whom the email was sent, no longer worked for Clarion and that they were referring the matter to "their Section 20 Team". BAML received no further response from Clarion until 19 November 2020. BAML emphasise that when Clarion did request a copy of the application, they provided it on the same day.

21. On 8 February 2021, the Respondent filed their response to this application. Their primary submission is that Clarion has suffered relevant prejudice due to the BAML's failure to follow the statutory consultation procedure and their application for dispensation should be

dismissed. They argue that they have been denied the opportunity to investigate the following issues: (i) why had relatively new valves failed? (ii) was failure a result of defective design, water pressure/hardness, maintenance, faulty parts/workmanship or some other reason? (iii) was it more appropriate to deal with the cause of defects, and then only repair/replace defective valves at significantly lower cost, rather than replace all valves without question? (iv) were there any defects/issues covered by warranties/guarantees so as to enable costs to be recoverable from third parties rather than the service charge? (v) would tenants be seeing this questionable cost every five years for replacement valves if the root cause of the initial valve failure was not first properly looked into before replacement of the old valves? (vi) Were the applicant's chosen contractors sufficiently qualified to assess and resolve all the above issues?

22. By being deprived the opportunity to investigate these concerns, the Respondent argues that it has suffered prejudice including: (i) the old valves are now gone so there is no evidence which could be used to pursue third parties to recoup any costs which would represent a saving to the respondent; (ii) proper investigation as to cause of valve failures was not carried out, so as to be sure the new valves fitted are fit for purpose and will not similarly fail sooner than they should so as to render the costs of these works wasted.

23. The Respondent does not accept the issues with the valves were compromising the safety of the sprinkler system, so as to make the works as urgent as suggested. There was sufficient time for proper consultation to take place. In light of these factors, the Applicant's request for dispensation should be refused. Alternatively, it should be granted on the conditions specified in paragraph 8 above.

24. On 22 February 2021, BAML made a detailed response to these submissions disputing that any prejudice had arisen. BAML assert that failure to carry out the works would have presented a significant risk of flooding. They were justified in using the Vali Group as a trusted long term partner who have approved contractor status.

The Tribunal's Determination

25. The only issue which this Tribunal is required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements, and if so, whether to impose any conditions. **This application does not concern the issue of whether any service charge costs will be reasonable or payable**. However, as noted above, the statutory consultation procedures are part of the statutory armoury to protect lessees from paying excessive service charges or for works which were not reasonably required.

26. The Applicant contends that these works were urgently required and that they could not be delayed by the time required to comply with the statutory timetable. However, BAML has not explained why there was no engagement with Clarion between July 2020, when the problem first arose, until 9 October 2020. By this date, the works had been completed. Clarion was offered no opportunity to comment on the scope of the works that were proposed or on the procurement process in respect of the execution of those works.

27. This tribunal offers a simple fast track procedure where dispensation is required in respect of urgent works. This depends upon the landlord providing accurate information in its application, enclosing the relevant documentation and satisfying the tribunal that it has honoured the spirit, if not the letter, of the consultation requirements. That has not occurred in this case, as a result of which the costs incurred in connection with this application have been disproportionate.

28. No landlord can assume that this tribunal will grant dispensation when urgent works are required. It cannot deprive tenants on the important statutory protection that section 20 affords to tenants.

29. Given the cavalier approach adopted by the Applicant in this case, the Tribunal is satisfied that the Respondent was entitled to take legal advice on its response to this application including the costs of investigating or seeking to establish prejudice. It is therefore a condition of the dispensation that the Applicant (a) pays the Respondent £2,650 within 21 days in respect of the costs which it has incurred in respect of this application; and (b) does not pass on any of its costs relating to this application through the service charge.

30. It is not appropriate for the tribunal to determine on this application whether either the scope of or the cost of the works has been unreasonable. It would be necessary for Clarion to issue a separate application if it considers that it has grounds to do so. Clarion currently has no evidence either that the works were not required or that the cost of the works was unreasonable. However, should such evidence subsequently become available, the landlord will have to accept the consequences of denying its tenant its statutory rights before the works were executed. This is a matter which any future tribunal would be able to take into account.

Judge Robert Latham
20 April 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made **by e-mail** to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).