



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

Case Reference : **MAN/00CM/LDC/2021/0014**

**HMCTS code
(audio,video,paper)** : **P:PAPERREMOTE**

Property : **33 Marlborough Street, Sulgrave,
Washington NE37 3BP**

Applicant : **Gentoo Group Limited**

Respondents : **Mr W.Tyrie and Mr B.Hart**

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

Tribunal Members : **Judge J.M. Going
J.Faulkner FRICS**

**Date of
Deliberations** : **15 July 2021**

Date of decision : **19 July 2021**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face to face hearing was not held because no one requested the same, and all the issues could be determined on the basis of the papers. The documents that the Tribunal was referred to were in the Application, those supplied with it, and Applicant's bundle, the parties submissions and statements, all of which the Tribunal noted and considered.

The Decision

Those parts of the statutory consultation requirements relating to the works which have not been complied with, are to be dispensed with, conditional upon the Applicant paying the reasonable costs of (1) Respondents in relation to investigating and challenging this Application, and (2) the costs of their surveyor's aborted attempt to inspect the property before the works were actually underway.

Preliminary

1. By an Application ("the Application") dated 1 March 2021 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 relating to the urgent repair of the balcony and brick parapet wall at 33 Marlborough Street, Sulgrave ("the works").
2. The Tribunal issued Directions ("the Directions") on 25 March 2021.
3. The Directions confirmed (inter-alia) that "It is considered that this matter is one that can be resolved by way of submission of written evidence leading to an early determination. If any party wishes to make representations at an oral hearing before the Tribunal they should inform the Tribunal in writing of within 21 days from the date of these Directions". After setting out a timetable for each party to provide statements and documents, the Directions confirmed "this matter will be dealt with by a determination on the papers received, unless any of the parties request a hearing."
4. Neither party requested an oral hearing, and each provided written submissions.
5. The Tribunal convened on 15 July 2021.

The property and the building of which it forms part

6. The Tribunal did not physically inspect the property. or the building of which it forms part, but has identified it on Google’s Street view, and has also had the benefit of the various photographs annexed to the Applicant’s building surveyors report.

7. The property is a first-floor flat, owned by the Respondents on a long leasehold interest. It is constructed over a block of garages, the freehold ownership of which is understood to be retained by the Applicant. The property includes a large external balcony which is bordered by a brick parapet wall.

8. It is understood that the property was at all the material times in tenanted residential occupation, rather than being owner occupied.

Facts and Chronology

9. The following timeline of events appears from the Application and the parties written submissions, and has not been disputed unless specifically referred to.

26 November 2020	Mr Teasdale a structural surveyor with CK21co when undertaking balcony surveys reported that: – “I am flagging up the loose brick as urgent as it should be repaired or taken off to avoid dropping off. The repointing is poor and requires remedial work as essential rather than general maintenance”.
26 November 2020	Instructions were relayed to the Applicant’s Building Surveyor, Mr Matthews stating “we need to urgently repair this leaseholder balcony as this has been picked up by a structural engineer as a risk to pedestrians...”
27 November 2020 and 28 November 2020	Mr Matthews reported “Our initial visit was on Friday 27 th November 2020 when the wall was designated as being in a dangerous condition and appropriate action was taken to secure the site with heras fencing” “the double skin brickwork parapet wall that bounds first-floor balcony has brickwork that is poorly secured with friable and deteriorated mortar”. He recommended access scaffolding and stated that “the double skin brick wall will need to be taken down 10 courses from the brick on edge top course the full balcony perimeter that is 12 linear metres and rebuilt”. Mr Matthews report included various photographs. His estimated cost was £1900-£2000.
30 November 2020	An email from Mr Nicholson the Applicants leasehold manager to various other people within the organisation refers to having spoken to the leaseholder as to the works and costs.

22 December 2020	An internal email to Mr Nicholson refers to 2 quotations having been obtained the first for £4282.80 (including VAT) and the second for £4110.80
25 January 2021	Copies of the 2 quotations were emailed to the Respondents' letting agents with it confirmed that the Applicant "will be proceeding with AJ Bennetts asap and will be in contact to let you know when these will commence"
16 February 2021	One of the Respondents emailed the Applicant stating "I am the co-owner of 33 Marlborough, a property in Washington which I believe has an issue with the brickwork and the balcony. I apologise for this late response to your enquiry, frustratingly the information about the repair required has just come across my desk for the first time from my lettings agent. All I have from them is the Marlborough report PDF..... Thank you for arranging for a surveyor and quotes for the work, we are keen to rectify the situation as soon as possible and do understand the urgency. However I noticed on the Marlborough report PDF that the estimated cost of the works given by your surveyor was circa £2K whereas the quotes from the two building companies came in at double that estimate. Given the discrepancy I have instructed our surveyor to take a look himself and get some quotes of our own. I will keep you in the loop."
24 February 2021	Following a prompt from the Respondents on 23 February 2021, the Applicant replied, at 14.40, saying "Thank you for your email and please accept my apologies for not responding before now. I will shortly send the information which has previously been sent to Angel lettings. Our contractor has actually been on site today, but was told what they could not carry out the works by a resident from the property. They stated this was because a solicitor was involved and other prices were being sought. Unfortunately as we are the landlord and responsible for these works we do need to carry these out, particularly when there are health and safety concerns. It would therefore be much appreciated if you could discuss with the resident and make this clear".
24 February 2021	Mr Hill MRICS, the Respondents' surveyor, emailed them stating "when I arrived at the property today contractors... were removing both skins of brickwork. I had a discussion with the foreman who advised they had been instructed by Gentoo.."
1 March 2021	The Application was made to the Tribunal.
26 March 2021	The Applicant stated that the works were completed.

The Applicant's submissions

10. The Applicant in the Application confirmed that “the balcony to the property needs to be repaired as it has been identified as a health and safety risk to pedestrians and users of garages below. The brickwork parapet has loose brickwork and repointing is poor and needs to be renewed.” A specification was confirmed and it was stated “Prices have been obtained ... Works have commenced on 25 February 2021 ... The owners have been advised of the urgent repair required, and the safety issues, prices have also been provided to owners, these have been via telephone contact and email”.

11. In its statement of case, the Applicant restated the reasons for the Application and provided photographs saying “The area was made safe initially however there is still a risk due to the brickwork not being stable we now need to have the work carried out as a matter of urgency and the consultation process would delay the works further”.

12. Copies of various internal and external emails, some of which are specifically referred to in the timeline, as well as the surveyors report and a quotation were all exhibited.

The Respondents responses

13. The Respondents explained their reasons for challenging the Application. “The landlord is submitting the request based on two points:

- the job being too urgent to have carried out a section 20 process
- to consult would delay the works further...

And quoted that part of the Application which stated... *There is still a risk due to the brickwork not being stable we now need to have the work carried out as a matter of urgency and the consultation process would delay the works further....*

However the Landlord has not acted in a manner to support these claims. They have taken three months to carry out the works and are making misleading statements in the application claiming the job is outstanding thus this dispensation application needs to be granted, when in fact the job has been completed but not at a rate that reflects its stated urgency.... Three months would have allowed for a proper section 20 consultation to have taken place, and vitally, for me to have provided the name of the contractor from whom the landlord should have tried to obtain an estimate as per the section 20”.

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 go through a 4 stage process: –

- Stage 1: Notice of intention to do the works

Written notice of its intention to carry out qualifying works must be given to each tenant and any tenants association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought, 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 a nominee identified by any tenants or the association.

- Stage 3: Notices about estimates

The Landlord must 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 and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

The Landlord must 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, unless, either the chosen contractor submitted the lowest estimate, or is the tenants' nominee.

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* 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, which are part and parcel of a network of provisions, is to give practical support 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 – provided that any such terms are appropriate in their nature and their effect, 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 and compensate the tenants fully for that prejudice.

The Tribunal's Reasons and Conclusions

18. The Tribunal began with a general and careful 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. 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. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –

- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.
- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Respondents retain the ability to challenge the costs of the works under section 27A of the 1985 Act.

- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, and very rarely less than three months, even in the simplest cases.
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained “the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)....”

21. Having carefully considered the evidence before it, the Tribunal found that the Applicant had made out a compelling case that the works were necessary, appropriate and urgent on health and safety grounds.

22. The Tribunal agreed, particularly in the light of both Mr Teasdale and Mr Matthews’ unambiguous assessments, that once the problem was highlighted, there was an urgent need to make the building safe without delay. The photographs and testimony provide clear evidence that sections of the top coping course of bricks were so loose that they had been balancing precariously, and had to be removed. With the cavities between the inside and outside skins exposed, the risks of further damage or collapse accelerated by winter weather, high winds, or frost was clear.

23. Clearly whilst the parapet remained in a dangerous condition there were inherent dangers to those occupying the property, anyone visiting the same, and anyone who happened to be underneath it.

24. The Tribunal has had to weigh the balance of prejudice between, on the one hand, the need for swift remedial actions, and on the other hand the legitimate interests of leaseholders in being properly consulted before major works begin.

25. In the circumstances it has decided that it was, and is, reasonable that dispensation be granted.

26. The Tribunal is satisfied that to now insist on the completion of the consultation requirements, when the works have long since been completed, would be otiose.

27. The Tribunal then turned to question of what, if any, conditions should be attached. The Tribunal has power to grant dispensation on such terms as it thinks fit – provided that any such terms are appropriate in their nature and effect.

28. Applying the principles set out in *Daejan* the Tribunal focused on the extent, if any, to which the Respondents have been or would be prejudiced by a failure by the Applicant to complete its compliance with the consultation requirements.

29. The factual burden of identifying some form of relevant prejudice falls on the Respondents.

30. There is no evidence that the Respondents disputed the extent of the defects, or objected to the removal and repair of what had become a dangerous structure. Indeed, the nature of the defects were such that they should have been well-known to the Respondents for some time.

31. Nor have the Respondents lost the right to challenge the extent of any service charges resulting from the works.

32. Nevertheless, the Tribunal accepts that the Respondents have identified a potential prejudice, caused by the Applicants delay in making its application for dispensation. The Applicant, as evidenced by internal emails, knew full well that dispensation would be required at the end of November 2020, yet, for reasons that are not explained, did not submit the formal application until after the works were well underway some 3 months later.

33. The Respondents were entitled to believe that they would have the protections afforded by the consultation requirements up until they were first and formally advised of the dispensation application. The prejudice or potential prejudice to the Respondents is that they missed the opportunity to nominate their own contractor for the Applicant to consider and comment on, and to test the specification and the Applicant's own contractors estimates. Some of that was due to the Respondents and/ or their agents own delays, and the Tribunal is also aware that they cannot be absolved from not knowing about a problem which the Tribunal has little doubt was or should have been self-evident for some time.

34. Nevertheless, the doubling of the Applicant's own building surveyors initial estimate, the lack of a prompt response to Respondents' email of 16 February 2021, and beginning the works, knowing that the Respondents wanted to allow their own surveyor to make an assessment, without allowing time for that to happen, was prejudicial. If nothing else, the Respondents' surveyor was engaged in making a fruitless inspection of the property. As confirmed in *Daejan* once relevant prejudice has been identified the Tribunal should be sympathetic to the leaseholder's case.

35. Notwithstanding that dispensation is being granted, the Tribunal has found that it was reasonable for the Respondents to incur costs both in considering the Application and making representations to the Tribunal.

36. In the circumstances, the Tribunal has decided that it is reasonable to impose as a condition of the dispensation being granted, that the Applicant pay both the Respondents own reasonable costs of responding to the Application, and the reasonable costs of their surveyor in attempting to review whether the works were necessary and the proposed costs reasonable.

37. Finally, it is emphasised that nothing in this decision should be taken as an indication that the Tribunal considers that any service charge costs resulting from the works will 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.