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

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| **Case Reference** | : | CHI/45UC/LDC/2022/0030 |
| **Property** | : | Caen Stone Court, Queen Street, Arundel, West Sussex BN18 9FE |
| **Applicant** | : | McCarthy & Stone Retirement Lifestyles Ltd |
| **Representative** | : | McCarthy & Stone Management Services |
| **Respondent** | : | B Shortland Flat 4<br>P Stevens Flat 23<br>J De Courcy-Ling Flat 8<br>P Lillywhite Flat 18<br>M Hartley Flat 17<br>L Maple Flat 17<br>R Edworthy Flat 2<br>S Saer Flat 14<br>J Sewell Flat 1<br>J Millward Flat 22<br>B Parkinson Flat 12 |
| **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 Member** | : | Judge D Whitney |
| **Date of Determination** | : | 16th May 2022 |

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**DECISION**

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## Summary of the Decision

1. **The Applicant is granted dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements in respect of works undertaken to the lift under Invoice from Orona Limited dated 15th January 2022 subject to compliance with the below two conditions:**

   **(i) The Applicant serving on each leaseholder a copy of this decision;**

   **(ii) Within 28 days of this decision the Applicant must serve on the Respondents a witness statement explaining what information the Applicant had and relied upon (and attach copies of all documents, reports, emails or other correspondence) in making its decision to proceed with the proposal from Orona Limited and who instigated the proposal and why did it include the option undertaken.**

## The application and the history of the case

2. The Applicants applied for 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. The application sought dispensation from consultation in respect of works to replace the motor and ropes of the lift at the Property

3. The Tribunal gave Directions on 29th March 2022 explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question of whether any service charge costs are reasonable or payable.

4. The Directions provided that any party who objects should complete a pro forma which was attached to the same.

5. The Applicant has supplied an electronic bundle and references in [ ] are to pages within that bundle.

## The Law

6. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor intends to undertake major works with a cost of more than £250 per lease in any one service charge year 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 has been dispensed with by the Tribunal. An application may be made retrospectively.

7. 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".

8. The appropriate 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.

9. 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 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".

10. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

11. 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."

12. 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.

13. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

14. If dispensation is granted, that may be on terms.

15. The effect of Daejan has been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to

challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

## Decision

16. The application explains that the subject Property is a purpose-built block of 24 flats. The flats are 1 and 2 bed flats to be occupied by the over 60's.

17. The application provides that a homeowner became trapped in the lift which failed whilst in use. The lift was isolated and the contractor recommended certain replacements were undertaken due to obsolescence.

18. The Applicant has produced a copy of the report undertaken in July 2021 which identified no issues [32-33]. A copy of the report following the incident from the contractor Orona Limted is at [37] dated 16th December 2021. This identifies the motor is worn and the lift was left isolated. On 17th December 2021 Orona Limited issued a Proposal [39-41] for machine replacement and ropes at a cost of £12,844.98.

19. The Applicant authorised the works which were undertaken. The invoice for the works is dated 15th January 2022 [46].

20. The Applicant suggests it was necessary to undertake the works urgently as leaseholders rely on the lift to gain access to their flats. The Applicant arranged for the work to be undertaken by the contracted maintenance contractor who is a trusted contractor appointed to undertake maintenance following a tender process.

21. One leaseholder supported the Application. The 11 leaseholders listed as Respondent's all objected to the application. I note that nearly half of the leaseholders at the development object to this application.

22. They submitted one statement in objection signed by them all [72 & 73]. Essentially they ask why there was no consultation with them. Further they state that they thought given the failure was "sudden and unforeseen" there may be an insurance element. Further they challenge whether it is reasonable for the motor to have failed in a lift which is only 12 years old and would have expected a lifespan of 30 years.

23. In its reply [74 & 75] the Applicant suggests there was no insurance to cover the costs as this is a maintenance issue. The Applicant refers to CIBSE and states that it believes a lift will generally have a lifespan of 15-20 years and so a failure now did not cause concern. Also due to obsolescence repair was not possible.

24. I have considered all that has been said. In applying Daejan I must consider if there is any prejudice to the leaseholders and if so what if any conditions I should attach to any grant of dispensation.

25. I do accept that given this was the only lift at the development which serves the over 60's it is reasonable for the Applicant to ensure the lift is working as quickly as possible. Whilst I have seen the quote for the work I have not seen any report from the engineer who attended setting out what is required save for the "S. R. Worksheet" [37] which has little information. I would have expected some document to explain what was required and why, explaining that parts were no longer available and so replacement was required.

26. I am satisfied that it is unlikely any insurance would have been held to cover such an event. In any event if it was this would only go to the cost and not necessarily to the need to consult with leaseholders.

27. I am satisfied that such works were urgent and it was reasonable for the Applicant to arrange works to be undertaken without formal consultation. The application refers to letters sent to the leaseholders at the time of the incident but I have not seen the same. I accept in practice it may be prudent and sensible to appoint the maintenance contractor, given their knowledge of the lift and ability to undertake the works in a short period of time. I am told the lift was repaired by 11th January 2022 by the Respondents. It is reasonable however for the leaseholders to understand how and why the decision was reached.

28. Further I accept that lifts can require repairs and that on occasion due to obsolescence replacement is required. At this stage I can say little more as there is no explanation within the papers to this application as to why this is the route chosen.

29. I therefore propose to grant dispensation but subject to two conditions. The imposition of conditions is reasonable in my opinion so that the leaseholders know why the decisions were undertaken and the full reasons for the same. This will then provide them with the information so that they can understand the need for these works to be undertaken. If there is any prejudice this will in my judgment overcome the same as they will have all the information they would reasonably have obtained if a consultation had been undertaken.

30. I direct that dispensation is granted subject to:

    (i) The Applicant serving on each leaseholder a copy of this decision;
    (ii) Within 28 days of this decision the Applicant must serve on the Respondents a witness statement explaining what information the Applicant had and relied upon (and attach copies of all documents, reports, emails or other correspondence) in making its decision to proceed with the proposal from Orona Limited

and who instigated the proposal and why did it include the option undertaken.

31. For completeness I confirm in making this determination I make no findings as to the liability to pay or the reasonableness of the estimated costs of the works.

## 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 to the First-tier Tribunal at rpsouthern@justice.gov.uk being 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