FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/ 21UD/LDC/2019/0005
Property	**:**	33/34 Magdalen Road, St Leonards on Sea, East Sussex TN37 6ET
Applicant	**:**	Fable Estates Limited
Representative	**:**	Bridgeford & Co
Respondents	**:**	Mrs L A Fearn Amelia-Wessing Limited Mr F T & Mrs K A G Mwambingu Miss S Farquharson Ms A Kolb
Representative	**:**	
Type of Application	**:**	To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	**:**	Mr D Banfield FRICS
Date of Decision	**:**	21 March 2019

DECISION

The Tribunal therefore refuses the application.

Background

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

2. The Applicant explains that urgent repairs are required to the roof due to water ingress and to prevent potential structural damage and additional costs.

3. Directions were made on 24 January 2019 and amended to accommodate changes in ownership on 29 January 2019. The Directions indicated that the application would be determined on the papers in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected. No objection has been received and this determination is therefore made reliant on the application and documents received from the parties.

4. The Directions noted that those parties not returning the form and those agreeing to the application would be removed as Respondents

5. Replies have been received from 6 of the 8 lessees 5 of which objected to the application. The 2 lessees who did not respond and the 1 lessee agreeing to the application have been removed as Respondents as indicated in the Directions.

6. The only issue for the Tribunal is if it is reasonable to dispense with any statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be reasonable or payable.**

The Law

7. The relevant section of the Act reads as follows:

   20ZA Consultation requirements:
   a. (1) Where an application is made to a Leasehold Valuation 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.

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

   b. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

c. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
f. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
g. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
h. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
i. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

9. The applicant describes 33/34 Magdalen Road as two mid-terrace properties built in the 1850s and converted to form 8 flats.

10. A report from VDBM Chartered Surveyors dated 10 December 2018 refers to instructions received on 12 November 2018 in connection with S.20 procedures and is to "highlight the condition of the condition of the chimneys, main roof, rainwater goods, external walls and flashings.

11. The report refers to various defects and the section "Key Risks" states "As a result of the slipped roof coverings to the rear elevation on 33, and the insufficient lead flashing detailing to the base of the masonry chimney stack there is the possibility that the ongoing water leak has affect (sic) the structural adequacy of the main roof. The poorly rendered chimney stacks to the rear elevation of 33 and 34 could be allowing further water intrusion to affect the internal condition of the dwelling, without further investigation to the roof void and an element of opening up works to the roof we cannot determine the full extent of the defects. If left the costs associated with any repairs will increase for the Freeholder and/or Leaseholders"

12. The report continues by referring to the need to obtain Building Regulations and Conservation Area approval and the need to serve Notice on the adjoining owner under the Party Wall etc Act.

13. Under the heading "Procurement" the report recommends that the best route for repairs is "a competitive tender exercise for access, protection, roof, rainwater goods, masonry, chimneys, flashings and decorations to the chimney and walls"

14. Under "Conclusion & Recommendations" the report states " The roof works are considered to be of a high priority to building which should be carried out in the near future to prevent potential structural damage and additional cost to the Freeholder and Leaseholders where applicable. The most competitive cost of all repairs required cannot be confirmed until the works are correctly procured. We recommend a schedule of repairs to the affected areas be prepared, tenders sought and independent quality management of the works at practical completion."

15. The objections received from the Lessees are in respect of;

    - The wish to put forward a potentially more competitive quote.
    - That these works are not an emergency and that the lessees should be consulted on the likely costs involved.
    - That the need for works has been known by the Freeholder for some time and a copy of the surveyor's report has not been provided
    - Whilst not disputing that the works need to be done much of the items referred to should have been included in previous works in 2012 and 2015. The freeholder has known about the need for works for some time and by now could have started the S.20 process and completed the works. Previous works have been badly carried out and poorly supervised with work signed off as completed when not carried out.

16. In a detailed response from Ms Kolb the following points are made;
    - Works need to be done, I have been asking for them since 2015 when I realised the Bay roof was leaking into my flat. I was assured my leaks would be attended to, but they were not.
    - Despite being signed off by Bridgeford much of the work proposed in the previous Major Works contracts was not done.
    - I was told that there had been a deal with the new owner of the upper maisonette at No 34 to get works done.
    - We need to know the backgrounds and track record of anyone doing works.
    - Would be prejudiced without having a say towards contractors and what is being proposed.
    - No plans to address all the other much needed works.
    - Poor track record of Bridgeford and the landlord
    - Situation no more urgent than when flat bought 3.5 years ago.

- None of the numerous survey reports say consultation should be dispensed with
- The applicant's survey does not mention any emergency and clearly states the section 20 process should be carried out
- Wrong time of year to start work

17. In replies to the individual lessees Bridgefords say that;
    - Lessees may nominate contractors
    - They rely on the advice given in the survey report
    - They have no knowledge of any "deals"
    - They have attempted but failed to resolve the water ingress
    - They will communicate with all lessees prior to the work starting and the application for dispensation is not intended to shut leaseholders out of the process.
    - The work is considered to be an emergency due to water ingress into a number of flats
    - They are carrying out the surveyor's recommendation to carry out the works.

Determination

18. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with the requirements.

19. For dispensation to be given the works concerned do not need to be classified as an emergency. The issue is whether by failing to consult the lessees will suffer prejudice.

20. It is clear that the issue of damp penetration has been in existence for some time. The report by Meridian dated 28 September 2017 whilst mainly concerned with the poor standard of works previously carried out also refers to repairs which were necessary to address the problem of damp penetration. At paragraph 5.9 it is stated "it is essential that the remedial works are actioned without delay as the external works will need to be undertaken over the next few weeks to avoid the winter months. It will not be acceptable for the ongoing water ingress to continue over the winter months fast approaching."

21. Five of the eight lessees object to the application. Some at least must be those who are affected by the damp penetration and rightly point out that if consultation had been started when the problem was identified the consultation process would now be complete.

22. Whilst dispensation may be given where works are not classified as "emergency or urgent" that is the reason put forward by Bridgeford in support of the application and as supported by the VDBM survey.

23. However, VDBM's report refers to going through the section 20 process and obtaining competitive tenders. As such it does not support this application.

24. Stripped of this evidence in support the Tribunal finds the lessees' concerns that they will be prejudiced persuasive and despite the Applicants assurances to involve the lessees in the process consider that they would be better protected by ensuring that the full consultation requirements of Section 20 are followed.

25. The Tribunal therefore refuses the application.

D Banfield FRICS
21 March 2019

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 the Regional office, which has been dealing with the case. 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.

2. 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.

3. 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 appeal is seeking.