FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LDC/2020/0094**
HMCTS code (paper, video, audio)	**:**	**V**
Property	**:**	**22 Camden High Street, London NW1 0JH**
Applicant	**:**	**Independent Developments Ltd**
Representative	**:**	**Pelham Associates**
Respondents	**:**	**Kate Percival, decd (22A)** **Rene Wilson (22B)**
Type of application	**:**	**Dispensation from statutory consultation requirements**
Tribunal	**:**	**Judge Nicol** **Miss J Dalal**
Date of decision	**:**	**6th October 2020**

DECISION

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(1) The Tribunal grants the Applicant dispensation from the consultation requirements in relation to the works to the ground floor roof at 22 Camden High Street, London NW1 0JH carried out in April and May 2020;

(2) There is no order as to the reimbursement of the Tribunal application or hearing fees;

(3) In accordance with section 20C of the Landlord and Tenant Act 1985, any costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents; and

(4) In accordance with paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, the Respondents shall not be liable for

administration charges comprised of any part of the Applicant's costs in these proceedings.

Reasons

1. This application for dispensation from statutory consultation requirements under section 20ZA of the Landlord and Tenant Act 1985 has been determined by remote video conference held on 5th October 2020. The attendees were:

   - Mr Tom Dewey of Pelham Associates on behalf of the Applicant; and
   - The Second Respondent, on behalf of himself and on behalf of Ms Rebecca Percival, daughter of the late Ms Kate Percival and a beneficiary of her estate which is currently in probate.

2. The documents which the Tribunal was referred to were in two bundles, one from the Applicant of 120 pages and one from the Respondents of 60 pages, the contents of which have been recorded where appropriate below. The Applicant was directed by the Tribunal to prepare a single bundle but omitted a number of documents, including the Respondents' statement of case and witness statements. The Tribunal was grateful to the Second Respondent for preparing his own bundle containing most of the missing documents.

3. The Applicant is the freeholder of the subject property, a terraced building with commercial premises on the ground and basement levels and 2 flats on the upper floors. Their agents are Pelham Associates. The Respondents are the lessees of the 2 flats.

4. On 19th February 2020 Mr Dewey emailed the Second Respondent to inform him that they had received reports of significant water ingress to the dental practice located in the commercial premises. He believed this was due to a defective downpipe and to some extent the existing roof covering. Temporary scaffolding had been erected. Mr Dewey promised an update later. The Second Respondent told the Tribunal he did not respond pending the promised update.

5. Mr Dewey told the Tribunal that the water ingress had affected the basement where the dental practice had their consultation rooms. The practice had had to close down pending resolution of the problem and so the situation was urgent. He concluded that, although the remedial works would be subject to consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003, there would not be enough time to complete the consultation process. Therefore, on 16th March 2020:

   (a) The Applicant applied to the Tribunal for dispensation from those requirements under section 20ZA of the Act (without that dispensation, they would be limited to recovering only £250 from each lessee); and

(b) Mr Dewey sent a letter to the Respondents informing them of the application and that they had two quotes for the necessary remedial works, the costs of which would be added to their service charge in due course and a breakdown of which would be provided on completion of the works.

6. The quotes came from two sources, neither of which is associated with the Applicant or Pelham Associates:

(a) The owner of the dental practice obtained a quote from his own contractor, ER Roofing, for £13,527 plus VAT. While Mr Dewey had no objection to using this contractor, he decided to obtain an alternative quote.

(b) Therefore, Mr Dewey obtained a quote from CBS, a roofer Pelham Associates had used before and which was known to Mr Dewey. CBS's quote was £13,525 plus VAT.

7. Pelham Associates did not receive any response from the Respondents following the letter of 16th March 2020 and a further email later that month. Mr Dewey instructed ER Roofing to commence the works in April and they were due to take 3-4 weeks. In the event, due to delays caused by the restrictions imposed due to the COVID-19 pandemic, they were not off site until late May. Mr Dewey himself could not supervise the end of the contract because he was furloughed for the month of May. The final bill was higher than either quote but the Applicant has decided to seek service charges only at the amount of ER Roofing's quote.

8. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

(a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42] (It is arguable that the statutory consultation requirements arising from section 20 were aimed at more than just addressing the costs referred to in sections 18 and 19 and that it is absurd to suggest that lessees' interests, particularly where their property is also their home, do not go beyond the cost to them, but the Supreme Court thought otherwise.)

(b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

(c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]

(d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a

means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

(e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]

(f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

(g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

(h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

(i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

(j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

(k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

9. The Respondents are deeply dissatisfied with the management of the property by Pelham Associates. The Tribunal has already ruled on two disputes between the parties (LON/00AG/LSC/2019/0248 and 0469) while another is pending. The Second Respondent told the Tribunal that they had failed to respond to his correspondence in relation to other matters on "many, many" occasions in the past. The witness statements submitted by the Respondents in lieu of a statement of case set out a number of complaints which arguably went to the reasonableness and payability of the service charges arising from the subject works. The Tribunal pointed to paragraph (4) of the directions which explained that reasonableness and payability were not in issue in the current application. As a result, the Second Respondent limited his submissions to the issues addressed in turn below.

10. In 2018 the same roof had been leaking water into the dental practice. Pelham Associates called in Crestel Projects, a contractor known to them. Although they recommended replacing the roof, it appears that they applied a primer and reinforced matting over the top of the existing roof at a cost of £5,967. All parties expressed disappointment and concern that the roof required work again so soon after Crestel's works but the

Second Respondent went further. He assumed that Crestel would have left the roof in a condition fit for purpose and, given that it was not in such a condition, they should have been called back to fix the problem without further cost or at least at a lower cost. He said that, if there had been proper consultation, he would have pointed this out and that the Respondents had suffered prejudice because the Applicant went ahead with the works without considering this.

11. Unfortunately for the Respondents, this line of reasoning rests on too many assumptions:

(a) There is no evidence that the work carried out by Crestel in 2018 could or should have addressed the problem identified in 2020. Mr Dewey told the Tribunal that the principal problem was an original cast-iron downpipe not addressed by Crestel but also that the roof was beyond economic repair and needed to be replaced. The Second Respondent pointed out that Crestel had made the same comment about the roof in 2018 but the fact is that they did not replace the roof at that time. It is possible that these facts may form the kernel of an objection to the payability of service charges arising from the costs incurred by Crestel but they run contrary to the argument that Crestel's work should have dealt with the issue which arose in 2020.

(b) There is no evidence that Crestel would have been willing to do the work in 2020 for anything less than the amounts quoted by ER Roofing and CBS, let alone that they would do it for free.

(c) The evidence suggests that, if the Respondents had been able to put forward the return of Crestel as a possible solution, Pelham Associates would not have accepted it and the outcome would have been unchanged. If Crestel had been obliged to return and do the remedial work for free, that would effectively have compelled Pelham Associates too use them but, instead, Mr Dewey said that Crestel were not roofing specialists and, given that the dental practice had suggested a specialist roofing contractor, he went with that option – CBS also have specialist roofing expertise. As stated by the Supreme Court, it is the Applicant who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them, subject only to the boundaries of reasonableness. In the circumstances, Mr Dewey's approach was within such boundaries.

12. The Second Respondent complained that the dental practice was "in control" of the works and queried why the Respondents should contribute to the costs in such circumstances. Mr Dewey asserted that, although the chosen contractor had been proposed by the owner of the dental practice, he had been the one to decide to go with ER Roofing and to enter into a contract with them – this is supported by the fact that their invoice was addressed to the Applicant. However, even if the Second Respondent's assertion were correct, it may only go to the reasonableness or payability of the resulting charges, not whether consultation should be dispensed with. In particular, the Second Respondent could not point to any financial prejudice which could have arisen from this issue.

13. The Second Respondent complained bitterly about the Applicant's failure to provide either of the quotes from CBS and ER Roofing. The Respondents eventually saw the breakdown of ER Roofing's works because they were in the final receipted invoice but they were deprived of the opportunity to compare, contrast or analyse the original quotes. In the Tribunal's opinion, this criticism is justified. The Respondents did not ask for copies of the quotes in clear terms but it should have been obvious to Pelham Associates that they were relevant documents which would have been part of a full consultation process and should have been disclosed as part of these proceedings, if not before. Mr Dewey was unable to provide a satisfactory explanation as to why they were not at least in his bundle before the Tribunal. Having said that, the Tribunal cannot see, nor was the Second Respondent able to point to, any financial prejudice which arose from this omission.

14. If he had been given the chance to respond to consultation, the Second Respondent also said he would have pointed to the rate of £250 for the EDPM roofing material quoted in ER Roofing's invoice compared to the price of £31.55 advertised online. Mr Dewey could not explain the apparent price discrepancy but pointed out that both contractors, CBS and ER Roofing, had come up with similar total prices despite their independence from each other so he had no reason to think they had been inflated.

15. The Tribunal does not understand the difference either but that does not necessarily mean anything is wrong. The Respondents have had ER Roofing's invoice since 22nd June 2020. They could have asked the question of ER Roofing themselves, just as they could have asked Crestel about whether they would have returned to do the work for free if that had been requested. There needs to be at least some evidence on the basis of which the Tribunal can find there to have been financial prejudice to the Respondents arising from the lack of consultation. Assumptions and guesswork are insufficient. The Respondents' question about the difference in price for the roofing material is a good one but it is not rhetorical. Whether it supports the Respondents' case requires an answer. The Respondents cannot expect a Tribunal to find in their favour if they do not seek answers to their questions when they have an opportunity to do so. They might expect not to receive an answer but they at least have to try.

16. The Respondents' failure to seek answers to their questions from the contractors is consistent with their approach in this case. At the end of his supplementary witness statement, the Second Respondent stated that he and his wife decided not to respond to Pelham Associates's letter of 16th March 2020 to protect their family from unnecessary stress (his wife was 5 months pregnant, they had a small child and COVID-19 had put further pressures on them) and to leave this matter in the hands of the Tribunal, particularly as on previous occasions he had not received answers to his queries. However, this is not a permissible approach.

17. Even though the Respondents may have good reason, as they allege, to suspect the bona fides and responsiveness of Pelham Associates, they still have to play their part. While Pelham Associates may not have responded previously, that is no guarantee that they would not have responded to, or at least taken into account, anything the Respondents put forward this time. It hardly lies with the Respondents to complain about the consequences of not having a full consultation process when they refuse to take part in the limited consultation available to them.

18. In the circumstances, the Tribunal cannot see that the Respondents have been caused any form of prejudice by the Applicant's failure to go through the full consultation process. The Tribunal accepts that the situation was urgent and needed to be address on a shorter timescale than the full statutory process would have allowed. Therefore, the Tribunal decided to grant dispensation from the statutory consultation requirements.

19. As was reiterated during the hearing and earlier in this decision, this is not a finding as to the reasonableness or payability of the charges arising from these works and the Respondents still have their remedies in relation to that.

20. The Respondents also complained that the Applicant company had been dissolved in the jurisdiction in which it originally had been registered, the Isle of Man. It is possible that the registration has been transferred to the Seychelles. In any event, the consequences of such matters are best left to the relevant specialist court and the Tribunal makes no further comment on this issue.

21. The Respondents sought orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that they should not have to pay the Applicant's costs of the proceedings through service or administration charges. One of the previous Tribunal decisions concerned the Applicant's attempt to impose such charges in relation to previous proceedings. Mr Dewey indicated that the Applicant did not intend to pursue their costs of these proceedings other than seeking the reimbursement of the hearing fee of £200 because it had been the Respondents who insisted on a hearing instead of the paper determination requested by the Applicant.

22. The Tribunal is concerned that the Applicant failed to disclose all relevant documents and then to provide a proper bundle. If the Respondents had not already exercised their right to request a hearing, the Tribunal would have almost certainly listed one to ensure that there was proper consideration of the application based on sufficient documentation. Further, by their failure to produce relevant documents, such as the original quotes, the Applicant limited the Respondents' opportunities to understand the merits of the application, helping to prolong the litigation. In the circumstances, the Tribunal has decided not

to make an order for reimbursement of the Tribunal fees but to make the requested orders under section 20C and paragraph 5A.

Name: Judge Nicol **Date:** 6th October 2020

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 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).