FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HN/LBC/2021/0003
Property	**:**	84 Above Bar Street, Southampton, SO14 7DT
Applicant	**:**	Lyndendown Ltd
Representative	**:**	
Respondent	**:**	Lyttleton Properties Limited
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(s)	**:**	D Banfield FRICS Regional Surveyor
Date of Decision	**:**	3 March 2021

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the repairs to the flat roof as referred to as Option 2 in the JLL report dated January 2019.

Dispensation is conditional upon none of the costs of this application being recovered from the Respondent by way of service charge.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

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 in respect of works carried out to the flat roof flat as described on pages 7 & 8 of the application form.

2. This application does not concern the commercial lessees on the ground floor of the building.

3. The Applicant explains that following reports of leaks by the ground floor commercial tenant investigations were carried out by a Chartered Building Surveyor who identified that works were required.

4. The lessees were consulted throughout the process but the Applicant accepts that it did not comply with all of the requirements of S.20. for which dispensation is now sought.

5. The Tribunal made Directions on 28 January 2021 indicating that the application was to be determined on the papers **without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013** unless a party objected in writing to the Tribunal within 14 days of the date of receipt of these directions.

6. The Tribunal sent to the Respondent a copy of the application, the directions and a form indicating whether the application was agreed.

7. It was indicated that if the application was agreed to or no response was received the lessees would be removed as Respondents.

8. Lyttleton Properties Limited objected to the application and therefore remain as respondents. There has been no objection to the application being determined on the papers without an oral hearing.

9. A bundle extending to 309 pages has been received and it is upon this document that the determination is made. Reference to page numbers will be indicated as [*]

10. The only issue for the Tribunal is whether 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

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

S.20 ZA Consultation requirements:

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.

12. 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

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

ii. 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.

iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

v. 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).

vi. 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.

vii. 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.

viii. 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.

ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

Applicant

13. The Applicant explained that "*The works were reactive works as the result of water ingress and were not part of a planned maintenance programme, but cost more than £250 per tenant to rectify. Lyndendown were alerted by the commercial ground floor tenant, Nero Holdings Ltd, that water was leaking into their demise from the flat roof above and causing damage to the interior of the commercial unit.* [51] *The property was inspected on behalf of Lyndendown Ltd by a Chartered Building Surveyor from JLL Southampton.* [59] *Leaks were identified as occurring in the staff communal areas, WC and around the raised rooflight and the roof covering was found to be unreliable and in an aged condition. The Building surveyor reported that the works required comprised: local repairs to the asphalt roof as required and overcoating with a liquid applied coating system. The works undertaken provide a seamless and hard wearing, 20-year insurance backed guaranteed finish. The solution will provide longevity and an efficient finish, and will eliminate the need for ongoing maintenance and repairs. The timber decked walkway which provides access to the flats was removed as it was damaging the roof surface. New paving slabs were correctly laid on the roof to form a dedicated walkway to the residential entrance door and a small seating area formed on the roof. The paving provided a heavy duty and hard-wearing arrangement which will withstand the pedestrian traffic and the provision to extend out from the residential wall 2 meters was to provide an area for sitting which should keep the residential tenants off the main roof. It has been reported that the residential tenants had been using the roof as amenity space. The redundant rooflights were encapsulated and repairs undertaken to the brick parapet walls and repointing undertaken to the open coping stones. A new channel was formed in the roof surface to assist with the drainage of the surface water to the rear outlet, with the objective of significantly improve the situation with standing water on the roof. The work was undertaken whilst the tenants were in occupation and will extend the lifespan of the original finish which was nearing the point where it would need to be stripped and replaced if left to deteriorate further and which would have caused significant disruption to both the residential and commercial tenants if deterioration had reached this point."* [6]

14. "*The whole of the subject property is let under two leases: Ground Floor - Nero Holdings Ltd 1st and 2nd floor- Lyttleton Holdings Ltd (Respondent) The Respondent, via their appointed agents Leo*

Newman, were consulted: • at pre-tender stage; • regard was given to any observations made and a quotation was submitted and considered from the contractor that they nominated; • The contract was awarded to the lowest tender.
Pre-tender stage
14th December 2018 Nero Holdings Ltd, the tenant of the ground floor retail unit, first alerted the Applicant to numerous issues with water ingress in the area below the rear flat roof.
19th December 2018 The property was inspected on behalf of the Applicant by a Chartered Building Surveyor. The roof covering was found to be unreliable and in an aged condition and further investigations were required.
14th January 2019 A building survey was undertaken of the roof.
14th February 2019 The Applicant wrote to both tenants advising them of the general issue and the remedial works required and supplied a full copy of the Building Survey report, which set out 3 indicatively priced options. The Applicant asked for comments/observations on the proposed options. Option 1 - £3000
plus, vat, was a short-term fix to the water ingress but would not address the overall condition of the roof/surroundings and had no guarantee of success. Option 2 £19,500 plus VAT offered a long term waterproofing solution and addressed the defects found and Option 3 £25,000-£30,000 plus vat complete removal of the old flat roof which would require re-insulation of the replacement roof in compliance with current building regulations.

15. *The Applicant advised both tenants that under the terms of their leases that repairs to the structure, would be recharged between Lyttleton Properties Ltd and Nero Holdings Ltd via the service charge. Nero Holdings Ltd fully engaged in discussions and appointed and external building consultant to act on their behalf.*
28th February 2019 The Respondent, via their agent, advised that did not believe that they were liable to pay for the works.
13th March 2019 The Applicant advised the Respondent that under the terms of their lease they are jointly responsible for the cost of the works; offered to supply a copy of the lease and again sought the Respondent's views on the 3 options proposed.
18th March 2019 The Applicant forwarded a copy of the lease to the Respondent's agent setting out the clauses that detailed the service charge obligations.
The Applicant asked if the Respondent had any contractors that they wished us to include in the tender process.
19th March 2019 Respondent advised that they would be interested in their roofers Frost Roofing reporting on the job.
The Applicant arranged access for the Respondent's contractor to quote for the repairs.
3rd April 2019 A quotation was received from Frost Roofing, via the Respondent's agent, for £13,500 which followed the specification for option 2.

14th May 2019 The Respondent's agent was advised of concerns with their Contractor's quotation raised by the Applicant's Building Surveyor and the Building Surveyor for the other tenant liable for the service charge. These included: The figures proposed by the Respondent's Contractor were indicative budgeted costs not quoted fixed costs and were therefore subject to possible change. The roofing product proposed by the Respondent's Contractor did not require a manufacturer approved installer to fit it and therefore the guarantee (compared to the 20 year labour, materials and rectification guarantee of the roofing product sought by JLL) was considered interior and carried a risk of having no value.
The Respondent offered no feedback or comment to these concerns. The Respondent's contractor was not invited to formally tender based on the concerns raised.
Tender Stage
16th May 2019 The Applicant instructed the tender of the works.
15th July 2019 The refurbishment works were formally tendered to 3 contractors unrelated and unknown to the Applicant.
7th August 2019 the Tender Report was received. The Applicant appointed the Contractor who had submitted the lowest tender against the specification set.
12/9/2019 The Applicant wrote to the Respondent's agent advising that refurbishment works would commence on the 30th September 2019.
In March 2020 service charge invoices amounting to £11,090.79 each were issued to the Respondent and Nero Holdings Ltd. This amount comprises of 50% of the cost of the roof works and £286 of non-qualifying expenditure per tenant. In accordance with the terms of the leases.
The Applicant is seeking to recover the amount of £11,090.79 from the Respondent. Nero Holdings paid their service charge invoice of £11,090.79 in full, with no dispute.
October 2020 The Respondent responded to payment requests that the Landlord and Tenant Act 1985 applies to dwellings therefore section 20 of that Act applies as it required to be served in the event of major works. A section 20 notice was not served and therefore they were only prepared to pay £250."

Respondent

16. In their statement of case dated 8 February 2021 [286] the Respondent refers to the Applicant's error in believing that as they were commercial lessees S.20 consultation was not required. The cause of the damage to the roof is also challenged and it is suggested that when this is attributable to the commercial tenant they should bear the cost. With regard to the tendering process it is said that; *"I would like to focus on the tendering process seeing as this has not been carried out in accordance with the section 20 process. You will note that the applicant instructed JLL to carry*

out a report and the report also gave 3 different options of the type of works to be carried out, with this came an indication of 3 different prices. I can only assume the applicant is using the reports indication of prices as "quotations" as we have not received any quotations from the applicant to date. We were not made aware of the tendering process and were not advised on any quotations received besides from the report which was not a quotation. On the same point the quotation that was given by our suggested contactor was in line with option 2 of the report provided, and was declined for various reasons. The applicant mentions that I did not respond to their email in declining my contractors quotation, however if you read the email dater 14 May 2019 you will clearly see that they advised that they are going ahead with their option 2 (which no quotation has been provided to date) and did not give any option to question their reasoning for declining this quotation. Again option 2 of their report has yet to be quoted by another contractor at the tendering stage and they are clearly referring to the report which is a clear indication how the process has not been carried out. I would also like to refer to bullet point 4 & 5 of this email that makes very clear the lack of a tendering process being carried out. I refer back to the tendering process that we are not aware of and is not in line with the required stipulations of the section 20. The Section 20 consultation procedures may seem onerous and time consuming. But the legislation is there to protect leaseholders like us from paying unnecessarily high sums. If you're an RMC/RTM director you still need to follow the rules, even if everyone in your block agrees to the work. The consultation process outlined in Section 20 of the Landlord and Tenant Act 1985 is a way to give leaseholders a bit of control over major expenditure connected to their property. The landlord has to give the leaseholders notice that work is going to be carried out, and a fair tender process needs to be adhered to, in which impartial quotes are sourced and tenants get the opportunity to nominate contractors. Had the tendering process been adhered to and other contractors sent to quote I have no doubt the cost for the job would have been substantially lower. As things stand only 1 quotation has been supplied by ourselves and I assume the applicant is using JLL report as the second quotation. The applicant went ahead and did the works without consent and is using the fact that they kept us informed through the process as reason that even all though they did not serve a section 20 they complied with all the elements a sections 20 would take care of. It is clear they have not complied with the Section 20 process and did not keep me informed through the process and I contest the full charge being levied on me."

17. The Respondent states that: -

- *At least 2 quotes would have been provided for our consideration and none were received/circulated to this date by the applicant.*

- *My nominated contractor/quotation would have been considered properly had the tendering process been carried out.*
- *In our opinion a 10 year guarantee system would be reasonable.*
- *The seating area referred to in point 5.2 of JLL report (option 2) is considered an "improvement" rather than "maintenance" and therefore this is not a service charge liability.*
- *I would have queried the scope of work as it is evident that the commercial tenants have caused damage to the parapet wall and had we been consulted properly we would have asked the freeholders to recharge the commercial tenant 100%.*
- *In conclusion we consider our liability to be no more than £250 based on the failure to consult.*

Applicant's Response

18. It is not disputed that consultation should have taken place. The Respondent was consulted throughout the process and was advised of the anticipated level of the costs. The Respondent has suffered no loss and has not suffered any substantive prejudice.

19. The Applicant confirms that "*it served a Section 20 Notice dated 30th September 2020, which detailed planned works to the second- floor flat roof of 84 Above Bar Street Southampton. In response to the S.20 Notice relating to the second-floor roof, the Applicant received an email from Kelly Tottle of Leo Newman, as agent for the Respondent, on 13th October 2020 asking that we include Frost Roofing in the tender process for this roof. On this occasion Frost Roofing declined to tender. Their response was "Due to the current climate we are unable to offer you a quotation at this time. We have experienced working in Southampton in the past and during the winter months it is nigh on impossible to judge if we can arrive and get on due to the very damp conditions there. Also as we are in Essex the travelling factor also adds to this; having said that during the summer months it would be something we possibly would consider." The tender process was completed. The tender and winning tender documents were sent to Mark Emmanuel on 13th January 2021 requesting comments and confirmation that the Respondent will pay their share of the costs. The Applicant did not receive a response within the 30 days from the 13th January 2021. The Respondent has demonstrated that it has acted no differently when the Applicant has fully complied with the statutory consultation process; compared to the process for which dispensation is now sought."*

20. With regard to which lessee had caused damage the Applicant states "*The Lease specifically sets out the Respondent's proportion of the External Service Charge Costs, the Applicant is not seeking to apportion blame for the need for the works, the roof was "unreliable and in an aged condition"."*

"*The works were formally tendered by JLL to 3 contractors unrelated and unknown to the Applicant. The tender document was issued by JLL directly in July 2019. There was an omission, and the Tender Report was only sent to the commercial tenant by JLL. The Applicant has never requested the tender documents or queried who was instructed to do the works, even though they were advised that the works were going ahead and when. A copy of the tender document* [245] *is supplied.*"

21. *"Following consultation with the ground floor commercial tenant, the consultant building surveyor and taking into consideration the fact that the Respondents contractors estimate. It was decided to procced with Option 2 – upon which it appeared all parties agreed. The Respondent's contractor had quoted on this basis but had been considered unsuitable to tender for the contract, by the Applicant's consultant Building Surveyor, the commercial tenant and the Applicant, for the reasons outlined in the email of the 14th May 2019. The proposed works were put out to tender 15th July 2019. The contract was awarded to the lowest tender."*

22. "*Although the Applicant sought to engage with the Respondent, the Respondent largely failed to respond or engage, except for proposing a possible contractor. The Respondent was aware of what was proposed, was advised of indicative costs and given the chance to make comments/observations. The Respondent was not provided with a copy of the Tender document and winning tender, due to an omission, but the works were fully tendered to 3 independent contractors and the contract was awarded to the lowest tender. The Respondent was advised of the works prior to them being undertaken and letters were supplied for onwards transmission to their tenants advising the of the possible disruption and contact details for the contract administrator and contractor. The Respondent appears to be a well informed and professionally advised Limited Company. It seems to be aware of the S.20 process. However, the Respondent did not raise any issues with the process that had been undertaken until they were asked to pay for their share of the cost. Throughout the process the Respondent did not request any information, challenge any proposals or raise any queries. The Applicant does not believe that the Respondent has suffered any loss or substantive prejudice. The works were reported on, tendered and overseen by an impartial RICS regulated firm and the outcome and the costs would have been the same had any alternative S.20 consultation taken place.*"

DECISION

23. 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.

24. The only issue for the Tribunal is whether the lack of consultation has prejudiced the Respondent in that if it had taken place the landlord may have done something different when arranging for the works to be carried out.

25. The Applicant accepts that consultation should have taken place and it is for this reason that dispensation is now sought.

26. It is clear that the Respondent was kept informed of the progress of the works albeit not by a formal S.20 process. A contractor was nominated and a different specification of works proposed neither of which was accepted by the Applicant.

27. A competitive tender on the selected specification was carried out and the lowest tender accepted. It was unfortunate that a copy of the tender report had not been supplied to the Respondent at an earlier stage which may have allayed some of its concerns over the competitive process.

28. Whether or not the works include "improvements" is not a matter for this application which is solely concerned with dispensation from consultation. Challenges to whether the sum demanded is reasonable or payable is a matter for a S.27A application.

29. I am not satisfied on the evidence before me that the Respondent has suffered prejudice as considered in the Daejan case referred to above and as such dispensation may be granted.

30. In view of the above **the Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the repairs to the flat roof as referred to as Option 2 in the JLL report dated January 2019.**

31. **Dispensation is conditional upon none of the costs of this application being recovered from the Respondent by way of service charge.**

32. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
3 March 2021

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 the Regional office which has been dealing with the case. The application must be sent by email to rpsouthern@justice.gov.uk

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.