FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UN/LDC/2020/0090
Property	:	37-39 Gordon Road, Cliftonville, Margate, Kent, CT9 2DW
Applicant	:	Southern Land Securities Limited
Representative	:	Together Property Management
Respondents	:	Flat 1 Ms Sandra Marshall Flat 2 Mr Richard McAtamney Flat 3 Mr J P Biddulph Flat 4 Mrs J Peet Flat 5 Mr & Mrs T Richardson Flat 6 Miss T Marinaro Flat7 Mr L B Thomas & Miss A C Singer
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works 20ZA of the Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge Tildesley OBE
Date and Venue of Hearing	:	Determination on Papers
Date of Decision	:	7 January 2021

DECISION

Summary of the Decision

1. An order for dispensation from consultation requirements is made in respect of the works to the parapet wall between 37 and 39 Gordon Road subject to the following conditions:

    a) The leaseholders' contribution to the works should be limited to £7,002.50. The Applicant is liable for the fees of The Council in the sum of £1,183.91 which cannot be recovered from the leaseholders through the service charge.

    b) The Applicant should bear the costs of the section 20ZA Application to the Tribunal and not recover the costs from the leaseholders through the service charge.

The Application

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

3. The Applicant explains that works were undertaken as an emergency following a notice being served on it by Thanet District Council ("The Council") for a dangerous structure. The party wall parapet wall adjoining 39 Gordon Road had slipped and was hanging over the front of the property on Sunday 13 September 2020.

4. The cost of the works comprised two elements. The reasonable expenses of The Council in carrying out emergency measures to deal with a dangerous building pursuant to section 78 of the Building Act 1984 [79]. The reasonable expenses amounted to £5,058.41 comprising £3,874.50 for works to render the property safe by erecting scaffolding and removal of loose dangerous coping stones; Land Registry search £6; Officer Time £825; and an Administration fee of £352.91 [54]. The second element involved the costs of repair which involved tying the wall back into the building, replacement of the coping stones and associated works. The Applicant instructed the contractors engaged by The Council to carry out the repairs. The costs of these works were £3,128 [51].

5. The works were completed on 5 October 2020 at a total cost of £8186.41.

6. The Application for dispensation was received on 9 November 2020. The Applicant stated that it was unable to consult the leaseholders about the works because they were required to be done urgently to prevent any collapse or danger being caused to leaseholders, residents and members of the public, in the event of the parapet falling to the ground. The Applicant said that by instructing the same contractors engaged by The Council to complete the repairs it was saving

leaseholders cost because the contractors were already on site and the scaffolding was in place.

7. The Applicant stated that it kept the leaseholders informed of the emergency works after being served with the section 78 notice by The Council.

8. The Applicant had embarked on a section 20 consultation exercise in respect of the other parapet wall adjoining 35 Gordon Road for the building. The Applicant had obtained a quotation in the sum of £1,538 (VAT inclusive) from The Council's contractor for these works [51].

9. On 18 November 2020 the Tribunal directed the Applicant to serve the application and directions on the leaseholders which was done on 19 November 2020. The Tribunal directed that the Application would be dealt with on the papers unless a party objected within 21 days. No objections were received.

10. The Tribunal required the leaseholders to return a pro-forma to the Tribunal and to the Applicant by 10 December 2020 indicating whether they agreed or disagreed with the application. The Applicant was given a right of reply by 17 December 2020.

11. One leaseholder, Miss Marinaro (Flat 6) returned the pro-forma. Two leaseholders, Mrs Peet (Flat 4) and Ms Marshall (Flat 1) made written representations direct to the Applicant.

12. The Applicant was required to supply a determination bundle which was provided by the required date. Pages in the bundle are in [ ].

Determination

13. The 1985 Act provides leaseholders with safeguards in respect of the recovery of the landlord's costs in connection with qualifying works. Section 19 of the 1985 Act ensures that the landlord can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 of the 1985 Act requires the landlord to consult with leaseholders in a prescribed manner about the qualifying works. If the landlord fails to do this, a leaseholder's contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

14. The requirement to consult applies to qualifying works to which a tenant is required to make a relevant contribution.

15. "Qualifying works" mean works on a building or any other premises (section 20ZA(2) of the 1985 Act). "Relevant contribution" in relation to a tenant and any works or agreement is the amount which s/he may be required under the terms of the lease to contribute (by payment of service charges) to relevant costs incurred on carrying out the works (section 20(2) of the 1985 Act).

16. In this case the Tribunal's decision is confined to the dispensation from the consultation requirements in respect of the works under section 20ZA of the 1985 Act. The Tribunal is not making a determination on whether the costs of those works are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

17. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, the Tribunal is given a broad discretion on whether to grant or refuse dispensation. The discretion, however, must be exercised in the context of the legal safeguards given to the Applicant under sections 19 and 20 of the 1985 Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54 which decided that the Tribunal should focus on the issue of prejudice to the tenant in respect of the statutory safeguards.

18. Lord Neuberger in *Daejan* said at paragraph 44

> "Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements".

19. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the leaseholders would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the leaseholders to identify any relevant prejudice which they claim they might have suffered. If the leaseholders show a creditable case for prejudice, the Tribunal should look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the leaseholders fully for that prejudice.

20. The representations from the leaseholders focussed on three issues:

    a) When the incident happened on Sunday 13 September 2020 a leaseholder reported it to the out of hours service provided by the Applicant which did not send a contractor out to investigate whether the slip of the parapet wall constituted a danger. Another leaseholder reported the matter to The Council who responded straightaway to the incident and arranged for a contractor to make it safe on the Monday. The leaseholders made the point that if the Managing Agent had responded the costs incurred by The Council may have been avoided.

b) The leaseholders had paid for major works to the property in 2015 and 2017, and that the defect in the parapet wall was a result of the Applicant's negligence in not carrying out the works to the required standard.

c) There was an obligation upon the Applicant to identify the causes of the building failure, and if necessary obtain a report from The Council and the contractors.

21. The Tribunal starts its analysis by considering whether the Applicant is required to consult on the costs that it has incurred in relation to the incident of the slippage of the parapet wall.

22. The Tribunal is satisfied that the costs incurred fall within two distinct categories. The sum of £5,058.41 related to the payment of reasonable expenses of The Council in connection with the issue of the Notice of Intention to Carry Out Emergency Measures to deal with Dangerous Building/Structure under section 78 of the Building Act 1984. The sum of £3,128 was the costs incurred by the Applicant on the repair of the parapet wall by the contractors initially engaged by The Council to render the property safe.

23. The Tribunal finds that the Applicant as owner of the building was obliged to pay the sum of £5,058.41 to The Council in respect of the exercise of its statutory responsibilities in connection with dangerous buildings. Although the costs of £5,058.41 could be characterised as a charge on the landlord by a local authority the Tribunal holds that they also amounted to relevant costs incurred on works to a building. The costs were primarily for works to render the building safe in order to carry out an effective repair to the building. The second element of £3,128 was incurred by the Applicant to put right the defect to the parapet wall. The Tribunal, therefore, decides that the total sum of £8186.41 represented costs of qualifying works upon which the Applicant was obliged to consult the leaseholders.

24. The Tribunal accepts that the Applicant did not have time to carry out the form of consultation envisaged by section 20 of the 1985 because of the imminent risk to the health and safety of the residents and members of the public posed by the dangerous state of the building caused by the slipped parapet wall. The Tribunal also accepts that it made sense for the Applicant to engage the same contractors who rendered the building safe to carry out the necessary works to the parapet wall between 37 and 39 Gordon Road.

25. The question then is whether the leaseholders suffered relevant prejudice by the Applicant's failure to consult. Although only Miss Marinaro of Flat 6 completed the pro-forma in accordance with the directions, two other leaseholders Ms Marshall of Flat 1 and Mrs Peet of Flat 4 supplied the Applicant with representations on the costs of the emergency works.

26. The leaseholders identified two areas of potential prejudice. They argued that extensive external works had recently been carried out on the building and that the problem of the slipped parapet wall had been caused by the previous works not being done to the required standard.

27. The Applicant's managing agent investigated the leaseholders' concerns with the standard of the previous works. The Agent stated that the works in 2015 were to replace the coping stones following reports of water ingress into a top floor fiat. According to the Agent, the works remedied the leaks to the property and the Agent had no indication on file of defects to the parapet wall. The Agent reported that the 2017 works involved the whole fabric of the building except for the parapet wall to 37 and 39 Gordon Road because of the repairs done in 2015. The Agent pointed out that the surveyors supervising the 2017 works had identified repointing to the parapet wall between 35 and 37 Gordon Road but had not recorded any structural defects with the other parapet wall.

28. The Agent had originally submitted a claim for the costs of the works under the buildings insurance policy. The insurers had rejected the claim on the ground that there was no evidence of an insured peril. The Agent relied on the observation of the loss adjuster who stated that the failure was associated with the structure not being tied to the building.

29. The Tribunal is satisfied with the Applicant's explanation that the works to the parapet wall were necessary and appropriate and that leaseholders have suffered no relevant prejudice by the carrying out of these works.

30. The leaseholders' second area of potential prejudice concerned the failure of the Applicant's Agent's out of hours service to respond to the incident. The Agent accepted that a leaseholder made a call at 1.38pm on Sunday 13 September 2020 to Veritas which provided the out of hours service. The Agent also accepted that Veritas did not treat the matter as an emergency, and no contractor was instructed to investigate the matter on the Sunday.

31. The Agent, however, relied on the outcomes of the internal investigation of Veritas, which put the blame on the leaseholder who made the call and alleged that the leaseholder was not clear about the damage and did not explain the urgency of the situation.

32. The Tribunal is not convinced by the account given by Veritas. The Tribunal notes that a member of the in hours security team of Veritas took the initial call and that the maintenance team did not return the call to the leaseholder until four hours had elapsed. Although Veritas, stated that the leaseholder was not clear about the damage, the internal investigation reported that the leaseholder had said that "a join in the roof had slipped down", which in the Tribunal's view should have raised questions about the severity of the incident. The Tribunal

observes that Veritas said it would report the incident to the Agent but it would appear that the Agent first learnt about the incident from The Council which contacted the Agent on Monday 14 September 2020. Finally the Tribunal is not impressed with Veritas' reluctance not to release the recordings of the phone calls to the Agent.

33. The Agent states that even if Vertitas had not provided the required level of service the leaseholders suffered no financial prejudice from Veritas' alleged failure. The Agent pointed out that its office was closed at a weekend, and the earliest it would have been able to expedite contractors on site would have been Monday 14 September 2020, the same day as The Council.

34. The Tribunal disagrees with the Agent's assessment. The Tribunal is satisfied that Veritas did not provide the required level of service which meant that additional costs were incurred by the intervention of The Council. The additional costs were £825 for officer's attendance £351.91 administration fee, and £6 Land Registry fee which totalled £1,183.91. The Tribunal finds that the leaseholders suffered relevant prejudice from the out of hours service not operating as it should.

35. Where the Tribunal finds relevant prejudice in favour of the leaseholders, it is not appropriate for the Tribunal to make an unfettered order for dispensation. The Tribunal can either impose conditions on the grant of dispensation or refuse it altogether. In this case Tribunal considers that an order for dispensation from consultation requirements should be granted in respect of the works to the parapet wall between 37 and 39 Gordon Road but subject to the following conditions:

    a) The leaseholders' contribution to the works should be limited to £7,002.50. The Applicant is liable for the fees of The Council in the sum of £1,183.91 which cannot be recovered from the leaseholders through the service charge.

    b) An order for dispensation is an indulgence from the Tribunal to the landlord at the expense of the leaseholders[1]. The Applicant should bear the costs of the application to the Tribunal and not recover the costs from the leaseholders through the service charge.

36. The Tribunal will advise Miss Marinaro of Flat 6, Ms Marshall of Flat 1 and Mrs Peet of Flat 4. The Tribunal directs the Applicant to inform the remaining leaseholders and to display the written decision on a noticeboard in the common areas.

[1] See [64] & [73] *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54

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 by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at 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.

Due to the Covid 19 pandemic, communications to the Tribunal MUST be made by email to rpsouthern@iustice.gov.uk. All communications must clearly state the Case Number and address of the premises.