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

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| **Case Reference** | : | BIR/17UG/LDC/2021/0013<br>BIR/17UG/LLC/2021/0010 |
| **HMCTS** | : | CVP Video Hearing |
| **Property** | : | New Central Building, 2a Station Street, Long Eaton, Nottingham NG10 1GL |
| **Applicant** | : | E & J Ground Rents No.15 Ltd |
| **Representative** | : | Principle Estate Management LLP |
| **Respondents** | : | Various Leaseholders – Flats 1 to 32 and Units A, B, C and Storage Unit A, Unit B and Unit C |
| **Representative** | : | Richard Ball |
| **Type of Application** | : | An Application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of specified Section 20 consultation requirements and an application under section 20C of the Landlord and Tenant Act 1985 |
| **Tribunal Members** | : | N Wint FRICS (Chair)<br>Judge P Ellis<br>V Ward BSc Hons FRICS |
| **Date of Decision** | : | 7 October 2021 |

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**DECISION**

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## Introduction

1. This is an application dated 4 June 2021 made by the Landlord, E & J Ground Rents No.15 Limited ('the Applicant') to the First-tier Tribunal (Property Chamber) (FTT) for an order to dispense with all or any of the consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985 ("the Act"), as amended by the Commonhold and Leasehold Reform Act 2002 and an application under section 20c of the Landlord & Tenant Act 1985 for an Order for Limitation of service charges: costs of proceeding by the limiting the right of the Applicant to recover all or any of the relevant costs incurred in connection with the proceedings in determining the amount of any service charge payable by a tenant.

2. Section 20 of the Act together with the Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations') requires a landlord to consult with lessees before placing a contract to undertake any 'qualifying works' that would cost each tenant more than £250.00. The Regulations set out a timetable for the consultation and identify the procedures to be followed in the course of the consultation.

3. The Act envisages that there may be occasions where for various reasons a landlord may be unable to consult, for example in cases of emergency, and there is provision in section 20ZA of the Act for a landlord to apply to the Tribunal for 'dispensation' to override all or some of the consultation requirements. An application may be made before or after works are carried out.

4. This application does not concern the issue of whether any service charge costs are reasonable or payable. In this case, the Applicant applied for dispensation from 'the full consultation process' in respect of acknowledged 'qualifying works' that have been carried out on the grounds that the works were urgently required to remove the hazard, protect the neighbouring properties and residents and prevent the escalation of costs, specifically:

   'Properties 26 & 28 are uninhabitable due to damage…caused by pigeon infestation, guano and corpses as a result of unsealed roof allowing access…requiring removal of infestation and carry out deep clean, Scrape away guano and nesting materials. Disinfection with pathogen killer and wash down, Redecoration and reinstatement flooring. Includes repairs sealing access point through the roof'.

5. The Applicant notified the Respondents by letter dated 4 June 2021 advising of the need to undertake the required works and that these were unfortunately not covered by the Applicants insurance policy. The letter also notified the Respondents that the cost of the works undertaken to flat 26 and flat 28 amounted to £16,992 inclusive of VAT which the Applicant advised would be recovered through the service charge provisions in the lease. The Tribunal is advised that the Landlord's costs amount to £804 and that any attendance

would be at the cost of £216 per hour but does not seek to recover their project management and administration fees.

6. The Tribunal issued its Directions to the parties dated 7 June 2021 requesting each submit a bundle of documents which shall include a statement in respect of the application and any representations as to whether the Tribunal should grant dispensation.

7. Under normal circumstances the Tribunal would carry out an inspection of the subject Property before making its determination. However, in view of the Covid-19 Public Health Emergency, the Tribunal considered it unnecessary to do so and had regard to the fact that neither party specifically requested an inspection be carried out.

8. The parties requested the matter be heard by way of a hearing which was held by CVP video conference on 2 September 2021. The Tribunal has therefore based its decision on the written submissions of the parties and their statements made during the course of the hearing.

**The Lease**

9. A copy lease from one of the flats in the development has been provided by the Applicant as evidence of the parties repairing responsibilities. This lease is dated 29 January 2015 between HBW Investments 2 Ltd and Stephen John Turner and Marleen Groenen and is in respect of Apartment 1 New Central Building Station Street Long Eaton Nottingham NG10 1GL.

10. The Tribunal understands that this lease is identical to the other Respondents leases having been granted for a term of 125 years from and including 1 January 2015 to and including 31 December 2139 at an initial ground rent of £250 per annum and subject to fixed reviews at specific intervals.

11. Under clause 6 and 7 the Tenant covenants with the Landlord to pay the rent and service charge. More specifically under clause 7.4 the Tenant covenants to keep the Apartment and all additions in good and tenantable repair and decorative condition (but not to decorate any part of the exterior of the Apartment including the exterior of the external doors of the Apartment) and to replace all broken glass in the windows, doors and balcony panels and to replace and renew the Landlord's fixtures and fittings which materially reach the end of their useful life the replacement or renewal to be suitable quality and at least of equal and similar utility.

12. The Service Charge is defined in the lease as meaning such proportion of the Service Charge Expenditure defined in the Third Schedule as the Landlord (or its managing agent) acting reasonably shall consider to be appropriate and properly attributable to the Apartment and payable by the Tenant pursuant to the provisions of the lease.

13. Clause 9 provides the Landlord's covenants to provide services extending to keeping in good and substantial repair, reinstate and renew the Building

including but not limited to the structure, roofs, parapets, floors, foundations, load bearing walls, window frames, entrance doors and door frames giving access to the Retained Parts in addition as often as necessary to decorate the exterior and the internal communal parts of the Building and the Retained Parts and to keep all internal parts of the Building cleaned, heated, carpeted/ curtained and lighted and to maintain suitable electronic security systems on the entrances to and other appropriate parts of the Building.

14. The Building is defined as meaning the apartment block including but not limited to the Service Installations, lobbies, hallways, walkways, stairways, lift shafts, and other common areas

15. Schedule 3 of the lease sets out the Service Charge Expenditure.

16. The Tribunal finds that the lease provides that the cost of repairing, maintaining and decorating the Building falls within the Applicants repairing obligation and that each Respondent is responsible for the cost, as a relevant cost, which is to be paid through the service charge.

17. The consultation provisions in section 20 of the Act and the Regulations would, therefore, normally apply as the total cost of the repairs exceeds the £250.00 threshold per leaseholder.

**Relevant Law**

18. Section 20 of the Act, as amended, and the Regulations provide for the consultation procedures that landlords must normally follow in respect of 'qualifying works' (defined in section 20ZA(2) of the Act as 'work to a building or any other premises') where such 'qualifying works' result in a service charge contribution by an individual lessee in excess of £250.00.

19. Provision for dispensation in respect of some or all such consultation requirements is made in section 20ZA(1) of the Act which states:

    'Where an application is made to a leasehold valuation tribunal (a jurisdiction transferred to the First-tier 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.' (*emphasis added*).

20. In *Daejan Investments Ltd. v Benson et al.* [2013] UKSC 14 (*Daejan)*, the Supreme Court set out the proper approach to be taken to an application for dispensation under section 20ZA of the Act. In summary, this approach is as follows:

    The Tribunal should identify the extent to which lessees would be prejudiced in either paying for inappropriate works or paying more than would be

appropriate as a result of the failure by the landlord to comply with the consultation requirements;

That no distinction should be drawn between 'a serious failing' and 'technical error or minor or excusable oversight' on the landlord's part save in relation to the prejudice it causes;

The financial consequences to the landlord of not granting a dispensation are not relevant factors when the Tribunal is considering how to exercise its jurisdiction under section 20ZA; and

The nature of the landlord is not relevant.

21. Further, in exercise of its power to grant a dispensation under section 20ZA of the Act, the Tribunal may impose such terms and conditions as it thinks fit, provided only that these terms and conditions must be appropriate in their nature and effect.

21. For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

22. As regard the application for a section 20c order: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or First Tier Tribunal, or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application…

(2) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

23. The relevant case law in relation to section 20C was reviewed by the Deputy President in the Upper Tribunal in *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0519 (LC) at paragraphs 51 to 59. His review began necessarily with reference to the Court of Appeal decision in *Iperion Investments Corporation v Broadwalk House Residents Limited* [1995] 2 EGLR 47 and the well-known passages from the judgment of Peter Gibson LJ, before continuing with detailed reference to the decision of the Lands Tribunal (HH Judge Rich QC) in Tenants of *Langford Court (Sherbani) v Doren Limited (2001) LRX/37/2000*.

24. The Deputy President in *Conway* quoted with apparent approval the following passages from the judgment of HHJ Rich QC in *Doren* relating to the exercise of the 20C discretion:

"28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.

29. I think that it can be derived from [*Iperion*] that where a court has power to award costs, and exercises such power, it should also exercise its power under s20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.

30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

31. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them."

25. The review in *Conway* continued with reference to *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 where HHJ Judge Rich QC reiterated that the only guidance as to the exercise of the statutory discretion which can be given is to apply the statutory test of what is just and equitable in the circumstances. Noting that the observations he had made in his earlier decision were intended to be "illustrative, rather than exhaustive" of the matters which needed to be considered, and adding significantly (at paragraph 13) that:

"The ratio of the decision [in *Doren*] is "there is no automatic expectation of an Order under s.20C in favour of a successful tenant." So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s20C in his favour."

26. More recently in *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 (LC) His Honour Judge Behrens referred to the decision in The Jam Factory [2013] UKUT 0592, which he took to contain a full review of the authorities, and summarised the applicable principles as follows:

"1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.

2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.

3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.

4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.

5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income."

27. The Tribunal duly relies upon this guidance in its consideration of the Respondents application for a direction under section 20C.

**Submissions of the Parties**

**Applicant**

23. The Applicant submitted a Statement of Case prepared by Stephen Downham of Principle Estate Management LLP (PEM).

24. In the statement, Mr Downham advises that the purpose of the application to dispense with all the requirements to consult was to save costs, prevent further disrepair to other properties, the safety of residents in the building and that all other avenues had been exhausted.

25. Mr Downham advises that the building had some long-standing major defects (roof requiring replacement, issues to the stonemasonry façade and redecoration throughout – as identified in the report dated 8 January 2020 prepared by Impact Roofing and Building Ltd and commissioned by the previous managing agents). In essence, the major issue was the need to attend to the replacement of the roof which had allowed pigeons to gain access to the loft spaces and other void areas in the building. Some works had been carried out by Premier Pest Control under the previous managing agents to remove pigeons from the roof including carrying out insecticidal cleaning unfortunately these did not alleviate the issues. However, it appears that according to the previous managing agents damage was caused to the roof which created a new hole following a storm in early 2020.

26. The major roof works were identified in May 2020 (following receipt of quotes from contractors Busters Group and Dovetail Group to remove the pigeon

infestation) extending to the replacement of the roof and as part of this it was decided to include the removal of any guano and pigeon infestation and the sealing of any access points in the roof space to prevent further problems arising.

27. In July 2020, PEM became aware via their letting agent, Intus Lettings, that having gained access to flat 28 there was a pigeon infestation problem but were unable to gain access to flat 26 check the extent of any damage until 20 October 2020 due to an issue with the key. At the time PEM intended to have all the works paid for by the Applicants insurance policy having notified their insurers in August 2020 however, on 22 January 2021, the Applicants were notified that the insurance policy would not, unfortunately, cover these specific (pest control) related works; an insurance claim had been previously submitted and approved to remove pigeon nests under the previous policy.

28. In August 2020, PEM provided an update to all the leaseholders of their plans to carry out the various works they had identified including the issues concerning pigeon infestation, the roof defects and the damage to flats 26 and 28 caused by the issues to the roof.

29. As a consequence, PEM sought quotes for the damage caused to flat 26 and flat 28 from two companies with Entire FM being the lowest at £16,992. The works included removal of guano and pigeons, deep clean, redecoration throughout including repairs to walls and ceilings, replacement flooring where required, external elevation inspection, checking louvre vent and renew roof coverings.

30. In the Applicant's opinion these works were necessary due to the health and safety issues for the residents, the effects of damage to the building's fabric, loss of rental income for some leaseholders and that the costs were expected to increase if any further delay occurred arising from the need to carry out a consultation exercise with the residents.

31. This, in the view of the Applicant, necessitated the need to carry out the works as soon as possible without consulting the residents thereby ultimately benefitting the parties concerned without prejudicing their position. Further, the Applicant advised that they have waived their project management and administration fee although the cost of preparing for the hearing in the matter amounted to £804 and that any attendance would be at the cost of £216 per hour.

**Respondents**

32. The Respondents submitted a Statement of Case prepared by Richard Ball.

33. In the statement, Mr Ball advises that 29 Leaseholders (out of a total 32) object to the Landlord's application and consider the cost of £16,992 and the Landlords legal fees have only been incurred due to the poor management of the Building and arose from poor communication which could have been avoided

had the previous and current management companies acted in a more timely manner and engaged earlier with the Leaseholders.

34. In the opinion of the Leaseholders, the original repairs should have been carried out properly at the time thereby preventing any further occurrence and damage. The fact that there were subsequent issues that arose regarding the roof and pigeon infestation is evidence that this did not occur and that the Landlord had also been dilatory in attending to the matters of which they must have been aware.

35. The Leaseholders advise that the issues concerning the roof and pigeons were known to the Landlord in 2018 and therefore should have dealt with much earlier. It is also accepted that although Premier Pest were commissioned in 2019 to remove the pigeons the works did not deal with sealing the roof to prevent further pigeon infestation in the roof area.

36. PEM took over from the previous agents in April 2020 and the Leaseholders advise that nothing was done until a month later and although they did authorize two tenders/ reports into the matters the works were effectively 'parked' until they were rolled into the wider roof repair works contrary to the apparent urgency of the works and repairs identified.

37. The Leaseholders also object to PEM having commissioned a 10-year plan report into the Buildings defects which they would/ should have already been aware given that repairs to the roof were identified in the original planning application in 2012.

38. Having been made aware of the Improvements Notice which was served on the Applicant on 18 May 2021 in respect of hazards identified in the common parts of the Building, the Leaseholders consider this is further evidence of the Landlords managing agent's failure to manage the Building to an acceptable standard. Further the fact that PEM have taken out an insurance policy that does not cover pigeon infestation is again evidence of their poor management which they were not made aware of until some 10 months later and after £16,992 had been spent to refurbish flat 26 and flat 28. It also appears that communication between PEM and the Leaseholders throughout (including notification of the dispensation application) has been problematical which has fostered mistrust and antagonism between the parties.

39. However, perhaps more importantly is the Leaseholders claim that the costs incurred are not in fact permitted under the terms of the lease and service charge provisions and that as the management company has failed to perform their responsibility properly the Leaseholders should not have to bear the cost of their failure.

**The Tribunal's Determination**

40. The Tribunal has had regard to the evidence adduced by the Applicant and Respondents, the relevant law and its knowledge and experience as an expert Tribunal.

41. It is also noted that the Leaseholder of Flat No. 1 did not object and supports the Landlord's application for dispensation whereas the leaseholders of the following flats; 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 31, 32 have objected to the application.

42. It is clear to the Tribunal from the information and evidence supplied by the Applicant that the works were urgently required to the roof and flats. The Tribunal has also had regard to the fact that the Applicant notified the leaseholders by letter on 11 June 2021 following a visit from Erewash Borough Council on 27 April 2021 that they had received two Improvement Notices under Section 8 and 12 of the Housing Act 2004 detailing a Category 2 hazard requiring remedial action (including dealing with the pigeon infestation and roof renewal) to start on 17 June 2021 and be completed before 17 September 2021. This followed an earlier letter to the leaseholders advising of the Landlord's intention to undertake a consultation process which had now been put in jeopardy given the deadline.

43. Section 20ZA does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with the consultation requirements. However, the Supreme Court in *Daejan* found that the Tribunal in considering whether dispensation should be granted must take into account the extent to which lessees would be prejudiced by a landlord's failure to consult.

44. There are essentially three stages in the consultation procedure, Stage 1; the pre tender stage; Notice of Intention, Stage 2 the tender stage; Notification of Proposals including estimates and, in some cases, a third stage advising the leaseholders that the contract has been placed and the reasons behind the same. The dispensation sought in this matter is, in effect, a means for expediting the carrying out of this work in order to curtail damage or further damage to the subject Property as well as possible harm and injury to the Leaseholders.

45. The Tribunal is satisfied that the Applicant needed to attend to the works immediately and were of sufficient urgency that it was necessary to dispense with the normal consultation requirements.

46. In the circumstances and applying the tests set out in section 20ZA and the approach specified in *Daejan*, the Tribunal finds that the lessees would not be prejudiced by granting the dispensation of the section 20 consultation requirements in the Act and in the Regulations to the extent sought in the application and that it would be reasonable to grant such dispensation. Therefore, dispensation is granted.

47. The Tribunal has also considered the Respondents request to limit the Applicants costs incurred in connection with these proceedings. The Respondents grounds are that the Applicant failed to properly communicate their intentions regarding the works and the dispensation application and PEM failed to respond to repeated requests made by the Leaseholders for further information leaving no other option but to dispute the application.

48. Section 20C allows the Tribunal to may make an Order as "it considers just and equitable in the circumstances". This means that a court or tribunal will make its decision on the merit of each case. Whilst each application is left to the discretion of the Tribunal, case law suggests that they are likely to consider one or more of the following factors in deciding whether to make a Section 20C Order.

(i) Whether the lease allows a Landlord to recharge legal costs as a Service Charge;
(ii) Whether the Leaseholder has made adequate attempts to resolve the issue with their Landlord before commencing legal proceedings;
(iii) Whether the Landlord has responded 'unreasonably' to earlier attempts by a Leaseholder to resolve a dispute;
(iv) Having regard to the financial circumstances of each party; and
(v) Has the Landlord acting in such a way as to have caused legal proceedings to have occurred.

49. The Tribunal also notes the comments of His Honour Judge Rich, in *Langford Court* v *Doren* LRX/37/ 2000 Lands Tr. (unreported), at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

50. Moreover, in *Aster Communities v Kerry Chapman* [2020] UKUT 177 (LC) HHJ Stuart Bridge said:

"An application to dispense with consultation requirements does not take place in a vacuum. If the FTT takes a view of the application without regard to what has happened previously as between the landlord and the tenants, and what is likely to happen in the foreseeable future, it is difficult to see how it can properly consider what if any prejudice has been suffered."

51. The Tribunal is satisfied the Landlord is entitled to dispensation from consultation requirements, but the Applicant should have commenced its consultation process shortly after its appointment.

52. The Tribunal considers the cost amounting to £804 incurred by the Applicant should have been avoided and that the Applicant's reasonable costs are not to be regarded as relevant costs for the purpose of the service charge and shall not

therefore be able to recover these under the service charge provisions in the lease.

53. Parties should note that this determination relates only to the dispensation sought in the application and does not prevent any later challenge by any of the lessees under sections 19 and 27A of the Act on the grounds that the costs of the works incurred had not been reasonably incurred within the lease or that the works had not been carried to a reasonable standard which maybe a matter for a subsequent application by the Respondents to the Tribunal.

**Appeal to the Upper Tribunal**

54. If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

55. If the party wishing to appeal does not comply with the 28-day time limit, the party 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.

56. The application for permission to appeal must identify the decision to which it relates, state the grounds of appeal and state the result the party making the application is seeking.

**Nicholas Wint FRICS**