FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HG/LDC/2021/0033
Property	**:**	Palace Vaults, 33 New Street, Plymouth PL1 2NA
Applicant	**:**	Aquacross Limited
Representative	**:**	Soma Mitra-Chubb
Respondent	**:**	The Lessees of the Flats The freeholder- Palace Vaults (Freehold) 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)	**:**	Judge J Dobson
Date of Directions	**:**	23rd June 2021

DECISION

Summary of the Decision

1. **The Applicant is granted 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 major works, being works to guttering and related. The Tribunal has made no determination on whether the costs of the works are reasonable or payable**.

The application and the history of the case

2. The Applicant applied for 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. The Applicant explains that the Applicant is a property management company established by the residents of the Property.

3. The Tribunal gave Directions on 22nd April 2021, explaining that the only issue for the Tribunal is whether, or not, it is reasonable to dispense with the statutory consultation requirements and is not the question of whether any service charge costs are reasonable or payable. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, if any.

4. The Directions also stated the Applicant shall request that the Tribunal determines the application and went to say that the Applicants may so request after 7th May 2021 and prior to 12th May 2021 if no objection has been sent by Respondents and the Applicant is able to do so, provided strictly that service of the application was effected in time for the Respondent's response to be due by that 7th May 2021 date.

5. The Directions further stated that Tribunal would determine the application on the papers received and that having considered the application the Tribunal was satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11.

6. In the event, the Applicant did not make a request for determination of the application, despite reminders from the Tribunal case officer. The Tribunal subsequently issued a Notice that it was minded to strike out the application in consequence of that. Only thereafter was a request for the Tribunal to determination the application made. There has consequently been a delay of a number of weeks beyond the point at which the Tribunal would otherwise have determined the application.

7. This the Decision made on that basis and following a paper determination.

The Law

8. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

9. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

10. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.

11. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

12. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

13. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

14. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

15. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

16. If dispensation is granted, that may be on terms.

17. The effect of Daejan has very recently been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Consideration

18. The Applicant explained in the application that Palace Vaults is a building comprising 13 flats- 1 to 12 and 14- and a ground floor shop. The Applicant states in the application as follows:

> "The works are urgent. A heavy gutter on the west side of the building has fallen from height into the garden of the neighbouring property - fortunately without injury or damage. That gutter needs to be urgently replaced and the remaining guttering on that side checked and secured to avoid risk of further falls and potential injury or damage." The immediate qualifying works are: "the erection of scaffolding on the west side of the building in the gardens of the adjoining properties, replacement of the missing gutter section, checking and securing remaining guttering, and repairs to the fascia boards and/or brackets which bear the guttering". However, in addition, the Applicant states: "At the same time the opportunity will be taken to effect repairs to rendering, and painting of window frames only accessible from a scaffold in that location".

19. The application adds that Aquacross Limited, the Applicant, is the Residents' Property Management company established at the time of the building's conversion to collect service charges and manage the maintenance of the building and that all residential leaseholders (but not the shop unit leaseholder) are obliged to take up shares in Applicant and have done so. All residential leaseholders and the shop leaseholder are also, it is said, required to pay service charges to Applicant for maintenance of the building. The application adds that all but one of the flat owners, and the owner of the shop lease, participated in purchase of the freehold in 2014, when the freehold was acquired by a company created for that purpose - Palace Vaults (Freehold) Ltd. The freeholder is said to have no right to collect service charges.

20. The Applicant seeks dispensation from consultation because of the stated urgency of the works.

21. The application adds that all leaseholders have been notified of the need for these works, the company selected by the Applicant to perform the works, and the estimated costs of the works and associated fees, including the fees for putting in place the scaffold licence for the adjoining properties. They have also said to have been provided with an estimate of the proportion of costs which will fall to be funded from

service charges, since some of the costs can be funded by the freehold company from ground rent or licence income. The Tribunal does not seek to comment on whether it is appropriate for any of the costs to be funded by the freeholder, having insufficient information on which to do so, or similarly as to any right of the freeholder to be refunded such funds.

22. A sample lease, of Flat 10, was provided with the application ("the Lease"). The Tribunal understands that the leases of the other properties are in the same or substantively the same terms.

23. The Applicant is responsible for repairs and other services. The relevant provisions are particularly contained in clauses 7.1 and 8.2 of the Lease.

24. The Lease was varied in 2013 pursuant to a Deed of Variation, the term being extended. The Lease was varied again in 2015 with regard to the rent payable. The relevant clauses with regard to services and service charges are unaffected.

25. There has been no response from any of the leaseholders opposing the application. Indeed, each of the eight lessees who have responded have agreed to the application.

26. None of the leaseholders have therefore asserted that any prejudice has been caused to them. The Tribunal finds that nothing different would be done or achieved in the event of a full consultation, except for the potential delay and potential problems.

27. Accordingly, the Tribunal finds that the Respondents have not suffered any prejudice by the failure of the Applicant to follow the full consultation process.

28. The Tribunal consequently finds that it is reasonable to dispense with all of the formal consultation requirements in respect of the major works to the lift of the building.

29. This decision is confined to determination of the issue of dispensation from the consultation requirements in respect of the qualifying long-term agreement. The Tribunal has made no determination on whether the costs 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 1968 would have to be made.

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.