FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LDC/2021/0124**
HMCTS code	**:**	**P: PAPER REMOTE**
Property	**:**	**Vantage Point, 174 Sanderstead Road, South Croydon, Surrey, CR2 0LY**
Applicant	**:**	**Selsdon Property Management Limited**
Representative	**:**	**Martin and Co (Stahl Fernandes)**
Respondents	**:**	**See attached schedule of 30 lessees**
Type of application	**:**	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	**:**	**Judge Robert Latham**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**16 December 2021**

DECISION

The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 on the following conditions:

(i) The Applicant shall not pass on any costs relating to this application through the service charge.

(ii) The fee of £3,555 which the Applicant is seeking charge to the service charge account for its costs in project management and administration

fees should be reduced by 20% (£711) to reflect its failure to comply with its statutory duty to consult.

Covid-19 pandemic: description of hearing

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was P:PAPER REMOTE. The Directions provided for the application to be determined on the papers unless any party requested a hearing. No party has requested a hearing. The Applicant has provided a Bundle of Documents which totals 208 pages.

The Application

1. On 1 April 2021, the Tribunal has received an application seeking retrospective dispensation from the consultation requirements of section 20 of the Landlord and Tenant Act 1985 ("the Act"). The application was issued by Sandra Vieira, the Applicant's Property Manager. On 9 August, the Applicant appointed Stahl Fernandes of Martin & Co, to represent it in these proceedings.

2. The qualifying works are to rebuild the ramp and steps which provide the only means of access to the building. The works started on 22 March and were expected to take between 10 to 12 weeks. Structural engineers recommended that the works be carried out urgently to prevent the imminent collapsed of the retaining wall supporting the entrance ramp and steps to the only entrance to the building.

3. The application relates Vantage Point, 174 Sanderstead Road, South Croydon, Surrey, CR2 0LY ("the Building"). This is a purpose built block of 30 leasehold flats which was constructed in 2006. All the flats are held on long leases which include a covenant to contribute to the service charge. At the background to this application are two possible issues (i) a claim in negligence in respect of the design, construction and/or supervision of the Building in 2006; (ii) whether the cost of the works are covered by insurance. The Applicant states that the engineers engaged in the construction of the Building have ceased trading. The architects no longer retain any of the original documents. Until 7 January 2021, the Applicant states that it had a reasonable expectation the qualifying works would be paid by the building insurer.

4. All the relevant leases were granted by the Applicant which was then operating under the name of "Monopoly Trading Sanderstead Road Limited". Gerald John Gallen and Karen Gail McTiernan are the two directors of the Company. The Applicant was also the developer. The Building was constructed by Oakwood Building Contractors Limited. At the time, Mr Gallen and Tony McTiernan (now deceased) were directors of this company (see p.89). Mr Gallen no longer has any interest in it and

states that the company no longer retains any papers relating to the development.

5. The Leases of the 30 flats are held as follows:

(i) Flats 1-12: On 31 March 2006 (at p.124), the Applicant granted Alease of 125 years to Tower Homes Limited (whose name is now "London & Quadrant Housing Trust" ("L&Q") for a premium of £646,800. London and Quadrant contribute 40% of the service charge for the Building. L&Q have granted shared ownership underleases in respect of these flats. A sample lease, dated 19 December 2007, is at p.153. Seven of these lessees oppose this application. Brian Joseph Gallen who is the son of Gerald John Gallen, is the sub-lessee of Flat 2, and supports the application.

(ii) Flats 13, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29 and 30: The Applicant has granted leases of these 15 flats to Gerard John Gallen, Heather Margaret Gallen and Karen Gail McTiernan. Heather Margaret Gallen is the wife of Gerald John Gallen. A sample lease, dated 15 June 2007, is at p.184. Unsurprisingly, they support the application.

(iii) Flat 14: The lessees are Jonathan Kenneth Davis and Julie Ann Harper. They do not occupy their flat. They oppose the application. Seven of the lessees who oppose the application have appointed Mr Davis to represent them.

(iv) Flat 19: Katharine Maria Stergio is the lessee. She opposes the application.

(v) Flat 21: The lessee is Robin Adam Sadler. He has taken no part in these proceedings.

6. The Applicant states that it is seeking dispensation with the following consultation requirements:

"(i) the timetable for consultation after service of the Section 20 Notice;

(ii) omitting to providing more than one estimate in respect of the work and services carried out by KLF, Croydon Council and (the Applicant);

(iii) not serving the Notice of Reasons for awarding a Contract in respect of any of the contractors."

7. The Applicant states that the following consultation has been carried out:"

"(1) A Section 20 Notice dated 5th March 2021 was sent to all tenants and subtenants of L&Q together with a covering letter explaining that

due to the urgency of works this application would be made in due course.

(2) A Statement of Estimates dated 15th March 2021 was sent to the tenants and subtenants before the end of the consultation period due to the urgency.

(3) A contractor nominated by a tenant was contacted to provide an estimate but declined to do so.

(4) A number of tenants have instructed a surveyor to advise them. The Landlord is cooperating with the surveyor and other tenants in the provision of information.

(5) Before the Landlord could serve a Notice of Reasons for Awarding a Contract to carry out the qualifying works (before the end of the consultation period) KLF Consulting Engineers advised the Landlord that the qualifying works were critical.

(6) On 9th March 2021 the Landlord appointed on merit Read Building Solutions Ltd as the main contractor. RBSL contract price is £131,169.60p [net cost £109,308.00 plus VAT £21,861.16). RBSL provided the lowest quote of the three estimates which had been included in the Statement of Estimates.

(7) On March 23rd KLF confirmed in writing to the Landlord "The outward movement has continued and the stability of the wall has become an increasing concern hence the work now being critical."

Directions

8. On 4 August 2021, the tribunal issued Directions. The Tribunal stated that it would determine the application on the papers, unless any party requested an oral hearing. No party has done so.

9. By 11 August, the Applicant was directed to send to each of the leaseholders (and any residential sublessees) by email, hand delivery or first-class post: (i) copies of the application form (excluding any list of respondents' names and addresses) unless also sent by the Applicant; (ii) if not already detailed in the application form, a brief explanation for the reasons for the application and (iii) a copy of the directions. The Applicant was also directed to display a copy in a prominent position in the common parts of the Property.

10. The tribunal subsequently conformed that the Applicant should also serve L&Q. On 11 August (at p.110) Martin & Co confirmed that it had complied with the Directions.

11. On 17 August, the tribunal amended the Directions in response to a request from 12 lessees that they needed more time to respond as they needed to take legal advice. By 22 October, any leaseholder who opposed the application was directed to complete a Reply Form which was attached to the Directions and email it both to the Tribunal and to the Applicant. The leaseholder was further directed to send the applicant a statement in response to the application.

12. The lessees of Flats 3, 4, 5, 8, 9, 10, 11, 14 and 19 completed the forms stating that they opposed the application. Mr Davis (Flat 14) and the lessees of Flats 3, 4, 8, 9, 10, 11 and 19 have filed a Statement setting out their grounds for opposing the application (at p.31). They make detailed criticisms of the Applicant's failure to comply with the statutory consultation procedures. They suggest that dispensation should be granted on the following terms:

(i) The Applicant should pay the costs of their experts, a surveyor and a structural engineer, in seeking to establish that the Building, when constructed, did not comply with building regulations.

(ii) The Applicant should not be permitted to pass on of the costs that it has incurred in legal expenses in relation to this matter. This should extend to its costs in dealing with the insurance and the loss adjustor. This should extend to the costs of instructing a structural engineer.

(iii) Within 7 days, the Applicant should provide access to the original structural drawings and specifications relating to the original construction of the Building.

(iv) The Applicant should provide any expert that they instruct with access to the site and to any relevant documentation.

(v) The Applicant should provide monthly updates to all lessees on the progress that is being made with the loss adjustor.

13. The Applicant has sent the lessees a response, dated 10 November (at p.38). It states that it relied on independent professional advice. The lessees were notified promptly as soon as relevant information became available. Until 7 January, the Applicant had a reasonable expectation that the qualifying works would be paid through the building insurance. The contractor nominated by the lessees did not have the relevant experience. Any costs relating to a possible legal claim relating to the construction of the Building fall outside the scope of this application. The Applicants note that they may be making a separate Section 20 application in respect of the costs that it has incurred in respect of the insurance claim. The Applicant has shared with the lessees the relevant documentation that is in their possession. The lessees' surveyor has been supplied with copies of the estimates for the qualifying works and the

specification, drawings and calculations on which the estimates were based. The Applicant is not willing to provide updates on its insurance claim as this is protected by legal professional privilege. Disclosing this information could cause substantial prejudice to both the Applicant and the lessees.

The Law

14. The consultation requirements applicable in the present case are contained in Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. A summary of those requirements is set out in *Daejan Investments Ltd v Benson* ("*Daejan*") [2013] UKSC 14; [2013] 1 WLR 854, the leading authority on dispensation:

> Stage 1: Notice of Intention to do the Works: Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.
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> Stage 2: Estimates: The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
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> Stage 3: Notice about Estimates: The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
>
> 4: Notification of reasons: Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

15. Section 20ZA (1) of the Act provides:

> "Where an application is made to the appropriate 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."

16. The Tribunal highlights the following passages from the speech of Lord Neuberger in *Daejan*:

> (i) Sections 19 to 20ZA of the Act are directed towards ensuring that tenants are not required to (a) pay for unnecessary services or services which are provided to a defective standard (section 19(1)(b)) and (b) pay more than they should for services which are necessary and are provided to an acceptable standard (section 19(1)(b). Sections 20 and 20ZA are intended to reinforce and give practical effect to these two purposes.
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> (ii) A tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
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> (iii) A tribunal can impose conditions on the grant of dispensation under section 20(1)(b). It is permissible to make a condition that the landlord pays the costs incurred by the tenant in resisting the application including the costs of investigating or seeking to establish prejudice. Save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

17. The current application is somewhat different from the facts in *Daejan* in that the stated reason for the landlord's failure to comply with the statutory consultation requirements was the urgency of the works. However, an additional factor sems to have been the Applicant's hope that the cost of the works would be met by insurance. Whilst the urgency of works may make the statutory consultation timetable impractical, a landlord should still seek to follow the spirit behind the statutory provisions. The landlord should consult any relevant tenants about the scope of the urgent works that are required. The landlord should also seek to test the market to ensure that best value is secured. A tenant may be able to identify a contractor from whom an estimate might be obtained.

The Background

18. The Applicant has provided the Tribunal with a letter, dated 18 August 2021 (at p.69) from Mr Trevor Mullineaux, a structural engineer from KLF Structural Design Limited ("KLF"). He does not provide copies of the reports which is has provided to the Applicant as the Applicant has been advised that legal professional privilege should be claimed in respect of these. In May 2019, KLF carried out their first inspection. Shortly after this date, makeshift barriers were constructed around the wall.

19. Mr Mullineaux describes how between October 2020 and February 2021, KLF oversaw the tender of the remedial works/reconstruction of the retaining wall and pedestrian ramp. The Applicant does not explain why a Stage 1 Notice of Intention was not served once the scope of the required works had been identified and before KLF went out to tender. This would have afforded the lessees the opportunity to comment on the scope of the proposed works and to nominate a contractor from whom an estimate should be sought.

20. The Applicant's hope that insurance might cover the cost of the works is not a sufficient excuse. If the insurance claim was being pursued for the benefit of the service charge payers, as opposed to the Applicant's interests as developer or landlord, there should have been greater transparency. Insurance cover would not have been relevant to the scope of the works that were proposed, but rather to how the works would be funded.

21. The Applicant refers to the Stage 1 Notice of Intention dated 5 March 2021 (at p.71). By this date, the Applicant had already obtained three quotes for the works. The total cost of the works, including associated fees and charges, was stated to be £169,163, excluding VAT. Whilst the lessees were invited to comment on the scope of the works and to nominate a contractor by 14 April, it is apparent that the scope of the works had already been specified in the tender documentation. There was little point in inviting the nomination of a contractor at this stage as three tenders had already been returned.

22. On 9 March, the Applicant, on the advice of KLF, had appointed Read Building Solutions ("RBS") to carry out the works at a price of £109,308 (excluding VAT). RBS had returned their tender on 2 February (at p.81). On 22 March, the works commenced. On 11 August (at p.84), Stroma Building Control issued a final Building Control Certificate.

23. The papers make reference to letters dated 5 and 10 February. However, no copies are provided in the bundle. In an undated letter (at p.85), Mr Davis responded to these letters. On 15 March, Mr Davis, supported by 10 other lessees, responded to the Notice, dated 5 March. Their concerns were why the wall had failed after only 14 years, whether there had been any negligence in designing and constructing the Building, whether the proposed works would prevent the problem from reoccurring, and how the works would be funded. Clarification was sought on the status of the building insurance. Clarification was also sought as to whether there was any relationship between the Applicant and its directors with KLF and any of the contractors. Mr Davis asked the Applicant to obtain a quote from Candor Construction Limited ("Candor").

24. On 15 March 2021, the Applicant sent the lessees a "Statement of Estimates". Three estimates had been obtained ranging from £109,308 to £172,540 (all excluding VAT). The Applicants were invited to inspect

and comment on the estimates by 20 April. However, this was largely academic as RBS, who had submitted the lowest tender, had already been appointed. The Applicant stated that Candor had been approached but had declined to quote as this was not their type of work. Mr Davis states that Candor had rather declined to submit a tender because of the timescale within which it was required. This is probably correct.

25. The total cost of the works was stated to be:

(i) RBS: £109,308 + VAT: £131,170;
(ii) KLF: £14,300 + VAT: £17,160
(iii) Croydon Council (suspension of 4 car parking bays for 10 weeks): £12,000;
(iv) Applicant's project management and administration fees: £3,555;
(v) Contingency fee: £10,000.

Total: £173,885

26. The Applicant responded to the points raised by the lessees. The cause of the problem was unknown. The installation of a steel frame should reduce the risk of reoccurrence. There Applicant has no link with any of the contractors. A response was not provided on the state of the building insurance.

27. On 1 April, the Applicant issued this application to the Tribunal. On 4 August (at p.94), the Applicant notified the lessees that the works had been completed and signed off by KLF. The total cost of the works to date were £185,284. It was noted that there were continuing legal costs relating to the application to this tribunal. Details were provided of the sums that would be payable by the lessees. L&Q are required to pay £74,514 (40%) in respect of their 12 flats. The fees will not be collected until this Tribunal has determined this application.

The Tribunal's Determination

28. The only issue which this Tribunal is required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements, and if so, whether to impose any conditions. **This application does not concern the issue of whether any service charge costs will be reasonable or payable**. However, as noted above, the statutory consultation procedures are part of the statutory armoury to protect lessees from paying excessive service charges or for works which were not reasonably required.

29. The Tribunal is satisfied that the Applicant could and should have instituted the statutory consultation between October 2020 and February 2021. KLF advised on the scope of the works and drew up a specification. The Applicant should have served the Stage 1 Notice of Intention at this stage. Had they done so, it is probable that Mr Davis would have nominated Candor. KLF could then have sought a quote from

Candor when it went out to tender. The Tribunal is further satisfied that the Stage 3 Notice of Estimates was inadequate. The lessees were afforded no opportunity to influence the choice of contractor, given that RBS had already been appointed. Whilst the works may have become more urgent in February 2021, the statutory consultation should have been completed by this date.

30. However, as the lessees recognise, it is more difficult to identify the extent of any prejudice. The statutory duty to consult relates to the scope of any remedial works and the contracting process required to secure best value. It did not relate to any claim that the lessees might have in respect of the negligent design or construction of the Building or any possible insurance claim. These are separate issues that need to be resolved. The lessees would have wanted to instruct their own expert to advise on these matters, even if the Applicant had followed the statutory consultation procedures.

31. If the Applicant intends to recover any additional costs of investigating these claims, it will need to establish that these costs were incurred for the benefit of the service charge payers, rather than for the benefit of the landlord/developer. If it was for the benefit of the service charge payers, it will need to justify the apparent lack of transparency.

32. The Tribunal is not satisfied that the lessees have been prejudiced in being unable to comment on the scope of the remedial works. The Tribunal understands that there have been ongoing discussions about the scope of the works. The lessees instructed their own surveyor. The surveyor met the Applicant on site on 22 March and was provided with particulars of the specification and drawings (see p.39). On 24 March, there was a 1.5 hour meeting at which the proposed works were discussed. This is the type of engagement that would have occurred had the statutory procedure been followed. The lessees do not suggest that the works were not required or that a more limited scheme was appropriate. Their main concern was that the problem should not reoccur.

33. Secondly, the Tribunal is not satisfied that the lessees have been prejudiced by their failure to be able to nominate a contractor from whom an estimate should be sought. The Applicant tested the market by seeking tenders from three independent contractors. There was a significant range in the three estimates. The Applicant accepted the lowest tender.

34. It is not necessary for the Tribunal to determine whether Candor would have submitted a lower tender had it had the opportunity, and been minded, to do so. If the lessees are able to establish that the contract price was unreasonably high, they still have the opportunity to so through an application under section 27A of the Act.

35. The Tribunal notes that L&Q have not made any representations in respect of the proposed works. L&Q will bear 40% of the cost of the works. Whilst they will be able to pass this on to their sub-lessees, this Tribunal would have expected L&Q to take a more proactive role in protecting its interest in the Building and also the interests of its sub-lessees.

36. The Tribunal is satisfied that the lessees have been prejudiced in two ways:

(i) This application would not have been necessary, had the Applicant carried out the statutory consultation between October 2020 and February 2021. It is therefore a condition of dispensation that the Applicant should not seek to pass on any of its costs in respect of this application through the service charge.

(ii) Secondly, the Applicant is charging £3,555 for its costs in project management and administration fees. The Tribunal reduces this by 20% (£711) to reflect its failure to comply with its statutory duty to consult.

Service of this Decision

37. The Tribunal will email a copy of this decision to the Applicant, Mr Davis (who is representing Flats 3, 4, 8, 9, 10, 11 19) and Natasha Lawrence (Flat 5). The Applicant is responsible for emailing or sending a copy of the decision to all the lessees, including L&Q.

Judge Robert Latham
16 December 2021

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 **by e-mail** 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).

Schedule of Lessees

Flats 1-12 in respect of which London and Quadrant have an Intermediary Interest

Flat 1: Ousma Tarik and Sara Aboussaad
Flat 2: Brian Joseph Gallen +
Flat 3: Daniel Alderman *
Flat 4: Laura McIntyre Smith and Conor Ryan Mills *
Flat 5: Natasha Allana Lawrence and Harley Drew Williams **
Flat 6: Blake Anthony Springer and Samantha Jupp
Flat 7: Laura Floyd
Flat 8: Jennifer Feist *
Flat 9: Charlotte Emily Smale and Laura Elizabeth Smale *
Flat 10: Christie Jade Wyatt and Dominic George Hayward *
Flat 11: Kyle Derek Parsons *
Flat 12: Paul Simon Brown and Caroline Jane Brown

Flats with No Intermediary Landlord

Flats 13, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29 and 30 (15): Gerard John Gallen, Heather Margaret Gallen and Karen Gail McTiernan +
Flat 14: Jonathan Kenneth Davis and Julie Ann Harper *
Flat 19: Katharine Maria Stergio *

Flat 21: Robin Adam Sadler

* Oppose application and are represented by Mr Davis
** Oppose application
\+ Support application