FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LDC/2021/0314**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Lloyd Court, London SE27 0BX**
Applicant	**:**	**The Mayor & Burgesses of the London Borough of Lambeth**
Representative	**:**	**Mr Rabby Fozlay, Litigation Officer**
Respondents	**:**	**The leaseholders of the Property**
Present at hearing	**:**	**Mr Fozlay, Mr Eugene McAlonan (leaseholder of Flat 4) and Mr Damian McAlonan (son of Eugene McAlonan)**
Type of application	**:**	**Dispensation from compliance with statutory consultation requirements**
Tribunal members	**:**	**Judge P Korn** **Judge S McKeown** **Mr S Mason FRICS**
Date of hearing	**:**	**14 June 2022**
Date of decision	**:**	**30 June 2022**

DECISION

Description of hearing

This has been a remote video hearing which has been requested by one of the Respondents and not objected to (as a type of hearing) by the Applicant or by the other Respondents. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was considered that all issues could be determined in a remote hearing and that it would be disproportionate in the circumstances to require the parties to attend a face-to-face hearing. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The tribunal dispenses unconditionally with those of the consultation requirements which were not complied with in respect of the qualifying works which are the subject of this application.

The application

1. The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("**the 1985 Act**") from those of the consultation requirements imposed on the landlord by section 20 of the 1985 Act with which it failed to comply in relation to certain qualifying works.

2. The qualifying works which are the subject of this application comprise capital works under a qualifying long-term agreement ("**QLTA**") to the lateral mains and lighting at the Property.

3. The Property is a 4-storey purpose-built block of 14 flats. 7 flats are let out to long leaseholders, and 7 are let on secure tenancies.

Applicant's written submissions

4. On or around 6 January 2017, the Applicant gave notice under section 20 of the 1985 Act to the long leaseholders of its intention to carry out capital works under a QLTA to the lateral mains and lighting at the Property. The estimated cost of the works was £114,268.00. On or around 13 January 2017, the Applicant then sent a further letter to the long leaseholders setting out a more detailed description of the works and cost estimates.

5. The Applicant accepts that it did not fully comply with the statutory consultation requirements in that it failed to send a copy of the section 20 notice to the correspondence address for the Flat 4 leaseholder, Mr McAlonan. Instead, it sent the section 20 notice to Flat 4 itself. It did, though, send the subsequent letter dated 13 January 2017 (referred to above) to the correspondence address.

6. The reason for the error was that, at that time, the Applicant was in the early stages of designing and implementing new working processes. One of the processes that was reworked was the creation of section 20 notices. The process was reworked so that notices could be generated automatically using the Applicant's existing data/housing stock management system rather than being produced manually. One of the early problems with this new process was that it only generated notices which were addressed to the relevant property address for each leaseholder and it was not able, at that time, to generate notices for any contact/correspondence address recorded against the relevant account. The reason why the letter of 13 January 2017 was addressed and sent correctly is that that letter was produced manually.

7. The Applicant's delay in making this application was because until the recent First-tier Tribunal decision in the case of LON/00AY/LSC/2021/0165 the Applicant believed that giving notice at the property address constituted valid notice under the terms of the lease and/or pursuant to section 196 of the Law of Property Act 1925. The Applicant was also engaged in pre-action correspondence with Mr McAlonan since 10 December 2020, attempting to resolve this matter in order to save cost, time and tribunal resources, but those discussion have now broken down.

8. The Applicant seeks unconditional dispensation from compliance with those of the consultation requirements not complied with. This is on the basis that (i) any failure to comply with the consultation requirements was caused by an administrative error, technical difficulties and/or the introduction of a new working process, (ii) notice was served at the property address and then the follow-up letter dated 13 January 2017 was served at the correspondence address and (iii) despite Mr McAlonan being on notice of the works since at least 13 January 2017 he has not at any time identified any relevant prejudice or identified anything that he would have said if he had been given the opportunity to do so.

9. The Applicant states that the proper approach to an application for dispensation under section 20ZA of the 1985 Act is set out in the decision of the Supreme Court in *Daejan Investments Limited v Benson and others [2013] UKSC 14*. The consultation requirements are directed towards ensuring that leaseholders are not required to (i) pay for unnecessary services or services provided to a defective standard or (ii) pay more than they should for services which are necessary and provided to an acceptable standard (see paragraph 44 of *Daejan*). The right to be consulted is not a freestanding right and the statutory consultation requirements are a means to an end, not an end in themselves (see paragraphs 46 and 78 of *Daejan*).

10. The Applicant states that, despite the length of time that has passed since Mr McAlonan became aware of the works, no evidence has been

adduced to suggest that the relevant works were: (a) unnecessary; (b) provided to a defective standard; and/or (c) unreasonable in amount. Any challenge by him is simply technical in nature and should not bar the Applicant from recovering the costs of works that were necessary, provided to a reasonable standard and reasonable in amount. The Applicant also notes that the relevant works were carried out under a QLTA, which provides for further costs savings. The extent, quality and cost of the works were in no way affected by the Applicant's failure to comply with the consultation requirements and, therefore, in the absence of very good reasons, dispensation should be granted.

Responses from the Respondents

11. Mr McAlonan, the leaseholder of Flat 4, has made written submissions and also made oral submissions at the hearing. These submissions are summarised below.

12. The hearing bundle also contains a completed form from the leaseholders of Flat 8 stating that they had sent a written statement to the Applicant. However, at the hearing Mr Fozlay said that the Applicant had no record of having received any written statement from them, and they were neither present nor represented at the hearing. No other leaseholders have made any submissions.

Mr McAlonan's written submissions

13. Mr McAlonan disputes liability for more than £250 towards the cost of the works on the basis that the Applicant has not consulted with him as required by section 20 of the 1985 Act (and relevant regulations thereunder). He also states that the Applicant's description of the works is not identifiable to the features or design of the building described by the Applicant, that some of the works constitute improvements rather than repairs, that some of the works appear to be unnecessary, and that the cost of the works carried out does not appear reasonable and was not reasonably incurred. He also asks the tribunal to consider the length of time that it has taken the Applicant to apply for retrospective dispensation.

14. Mr McAlonan notes the Applicant's assertion that he has not suffered any relevant prejudice, but he submits that relevant and actual prejudice has been suffered. As a result of the Applicant's failure, he was given no voice in relation to any decisions or subsequent actions carried out by the Applicant.

15. The Applicant made no attempt to provide information, support, or relevant documentation throughout its exchanges with Mr McAlonan. The delay in the making of the application was in part caused by the Applicant's unwillingness to co-operate with reasonable requests for

information by Mr McAlonan. Throughout the correspondence between them for more than 24 months the Applicant threatened legal action and continued to assert that Mr McAlonan had received the section 20 notice. The Applicant only accepted at a late stage that a failure to comply with the relevant consultation requirements had occurred.

16. Mr McAlonan goes on to state that he did not in fact receive the section 20 notice and that he consequently suffered prejudice as he was unable to make the representations that he wanted to make as to the need for works or the cost of the works. He was also unable to put forward any alternative contractors, seek expert advice or review the work once complete. The knock-on effect was that the entire procedure was flawed.

17. In Mr McAlonan's submission, since March 2019 he has requested the early disclosure of documents and relevant information associated with these works due to the Applicant failing to provide a section 20 notice, but the Applicant has *"failed to co-operate in providing specific and reasonable requests to assist him"*. Requests made by him included *"relevant and meaningful information … such as inspection reports, feasibility studies, surveys, accounts, receipts, and documents"*. By not providing the notice and withholding the other information requested the Applicant has caused him to be *"prejudiced from reviewing the complete works"*. This meant that he was unable to determine fully the necessity of the works or costs attributed, nor raise questions at consultation. In addition, he was unable to check the condition of the works as the Applicant refused to provide the final inspection of works.

18. On 31 May 2021 Mr McAlonan requested more information about works described as being works to a "bin store". In an email dated 7 June 2021 the Applicant stated that the "bin store" was a "bin area in the car park adjacent to the building". Mr McAlonan replied by stating that the "bin store" does not exist and requesting either drawings or photographic information of this area and evidence of works. He states that the Applicant has chosen not to provide this information.

19. Mr McAlonan has also asserted that some of the works constitute improvements rather than repairs and therefore that the cost of those works is not recoverable under his lease.

20. He states that the works involved the entire relocation of all residents' electric meters and that it is unclear why these works were carried out, who provided this instruction and what the cost was of completing the works. In addition, despite requests, the Applicant has not provided a fire risk assessment or health and safety report to demonstrate that works undertaken were due to a risk to life. In addition, the Applicant has suggested that the wiring did not comply with the relevant regulations at the time, but in lieu of any electrical inspection or

condition report prior to installation Mr McAlonan believes that it not necessary to re-wire an entire building to current wiring standards. The Applicant has also failed to specify what specific regulations the wiring breached. This would have been requested and investigated if the section 20 notice had been received.

Applicant's response to Mr McAlonan's written submissions

21. In response, the Applicant states that Mr McAlonan has had ample opportunity to investigate any prejudice and/or the works. Substantial documentation has been provided to him and yet he has failed to identify or adduce evidence of any relevant prejudice that he claims to have suffered and/or will suffer if an unconditional dispensation were to be granted.

22. On or around 13 January 2017 (being 7 days after the date of the section 20 notice) the Applicant sent an appendix containing a detailed breakdown of the proposed works to Mr McAlonan's correspondence address. Then on 28 March 2017 the Applicant sent an invoice to Mr McAlonan's correspondence address for the estimated costs of the works. Neither of these documents was returned as undelivered or undeliverable. Nor has Mr McAlonan at any time raised any issues and/or adduced any evidence of any difficulties with receiving post at the correspondence address. It is therefore clear that he knew or ought to have known of the works from as early as 13 January 2017. Despite this, he has adduced no evidence at all of any attempt to investigate the works, to make any enquires with the Applicant, to seek any additional opinions or submit any observations. Any suggestion that he would have investigated the works or sought an additional opinion is, in the Applicant's submission, disingenuous.

23. Since its letter before action on 10 December 2020 and until issuing the present application, the Applicant states that it has attempted to resolve this dispute with Mr McAlonan. Copies of some of the relevant correspondence passing between the parties are included in the hearing bundle. The Applicant states that Mr McAlonan has been provided with substantial documentation in respect of the works but, despite this, the Applicant has not received any information and/or evidence from him to suggest that he has suffered any relevant prejudice. Neither has he investigated the works nor provided the Applicant with any additional opinions. He has not identified, at any material time, what he would have said if he had received the section 20 notice at the correct address. Nor has he explained why he needs any further information/documentation nor how not having such documentation has prevented or is preventing him from identifying/investigating any relevant prejudice.

24. The Applicant states that Mr McAlonan has not identified any relevant prejudice beyond not being able to participate in the consultation

process. He has not, for example, identified any way in which he could have suggested a way to get the work done more efficiently or more quickly or more economically, and on this point the Applicant has referred the tribunal to the decision of the Upper Tribunal in *Wynne v Yates & Anor [2021] UKUT 278 (LC)* as well as again referring to the decision of the Supreme Court in *Daejan v Benson*.

The hearing

25. At the hearing Mr Fozlay for the Applicant submitted that Mr McAlonan had raised no evidence of relevant prejudice, nor any evidence of what he would have done if the Applicant had fully complied with the consultation requirements.

26. Mr McAlonan said in reply that he would have consulted an expert. He also said that he had made reasonable requests for documentation which were ignored.

27. There was some discussion regarding the bin store, with Mr McAlonan being adamant that it did not exist and Mr Fozlay disagreeing.

28. As regards receipt of correspondence and documentation relating to these works, Mr McAlonan said that he did not receive anything until February 2019. Mr Fozlay vigorously disputed the plausibility of this claim. As stated by the Applicant in written submissions, a letter with detailed information about the works was sent to the correct correspondence address on 13 January 2017 and a demand for payment was sent in March 2017. In addition, in Mr McAlonan's own written submissions he refers to information being available to residents on 18 September 2017, January 2018 and 13 February 2018 and there is no indication in his written submissions that he did not see this information at the time, and therefore it could not be the case that Mr McAlonan had no information about the works until February 2019.

29. Mr Fozlay submitted that the Applicant had provided Mr McAlonan with copious information, and he referred the tribunal to the relevant sections of the hearing bundle. Despite this, Mr McAlonan could not explain why he was unable to articulate any specific prejudice suffered, nor was there evidence that he had tried to obtain expert support or alternative quotes. In response, Mr McAlonan said that the Applicant had not provided him with sufficient information to enable him to obtain quotes.

30. In response to a specific question from the tribunal, Mr McAlonan confirmed that he would not be happy with a conditional dispensation but was seeking a refusal to give dispensation so that his contribution to the cost of the works would be limited to a maximum of £250.00.

The relevant legal provisions

31. Under Section 20(1) of the 1985 Act, in relation to any qualifying works *"the relevant contributions of tenants are limited … unless the consultation requirements have been either (a) complied with … or (b) dispensed with … by … the appropriate tribunal"*.

32. Under Section 20ZA(1) of the 1985 Act *"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…, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements"*.

Tribunal's analysis

33. The only failure to comply with the statutory consultation requirements in respect of the major works of which we have any evidence is the Applicant's failure to serve notice properly on Mr McAlonan, the leaseholder of Flat 4. There is no evidence before us of any failure to comply with the consultation requirements vis-à-vis any of the other leaseholders.

34. Mr McAlonan has made submissions about the day-to-day service charges but we have not summarised these submissions as they are not relevant to this application. He has also submitted that certain of the works constitute 'improvements' and therefore that the cost is not recoverable under the terms of his lease. However, even if there is a basis for challenging the payability of certain charges on the basis that such cost is not recoverable under the terms of the lease, the correct way to make such a challenge to payability is to make a separate application to the tribunal under section 27A of the 1985 Act for a determination as to the reasonableness of the service charge items in question. The tribunal does not have jurisdiction to deal with this issue as part of an application for dispensation.

35. Turning to the issues which are relevant to the dispensation application, it should be noted that these works were being carried out under a QLTA on which the Applicant had already consulted, and there is no suggestion that there were any flaws in the consultation process in respect of that QLTA. The relevance of this point is that with the contractor already chosen under a QLTA the requirements of the statutory consultation in respect of the works are less onerous, in that there is no obligation to obtain competitive quotations.

36. In relation to the Applicant's acknowledged failure fully to consult with Mr McAlonan, there is a factual/legal dispute between the Applicant and Mr McAlonan as to the extent of that failure. The Applicant accepts that on or around 6 January 2017 it purported to serve a section

20 notice on Mr McAlonan but sent it to the Property and not to his address for correspondence. However, Mr McAlonan maintains that he did not receive any correspondence from the Applicant in relation to the major works until February 2019. The Applicant disputes this and states that other correspondence in relation to the major works was validly served between January 2017 and February 2019.

37. The Respondent's position as to how much (if anything) he knew about the works prior to February 2019 is unclear. In written submissions he does not make a clear statement as to what he did or did not receive. There are references to information dated 18 September 2017, January 2018 and 13 February 2018 which appear to indicate some knowledge of what was proposed in relation to the major works, but again the submissions are unclear.

38. The Applicant's position is that apart from the initial section 20 notice all other correspondence in relation to the major works was sent to the correspondence address, including a letter sent just one week later on 13 January 2017. There is no evidence before us that to indicate that the Applicant is being untruthful in this regard. Having considered all of the written and oral submissions, including the Applicant's explanation as to why the section 20 notice was not sent to the correct correspondence address, we are satisfied on the balance of probabilities that subsequent letters and invoices were sent to the correct correspondence address and therefore that the Respondent knew or ought to have known about the major works proposals – or at least that he was validly served with relevant information on the major works – a week after the sending of the section 20 notice and then at various points thereafter. Therefore, the focus needs to be on the consequences of the failure to send the section 20 notice itself to the correct correspondence address.

39. It is clear from the decision of the Supreme Court in *Daejan v Benson* that the key issue when considering an application for dispensation is whether the leaseholders have suffered any prejudice as a result of the failure to comply with the consultation requirements. In giving the majority decision, Lord Neuberger stated as follows in paragraphs 44 and 46: *"Given that the purpose of the [consultation] 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 [tribunal] should focus when entertaining an application by a landlord under section 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. I do not accept the view that a dispensation should be refused … solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The Requirements are a means to an end, not an end in themselves, and*

the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above".

40. In addition to making it clear that the key issue is whether the leaseholder or leaseholders in question have suffered any prejudice, Lord Neuberger stated as follows in paragraph 67 of *Daejan v Benson*: *"while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants".* In other words, it is not enough for a tenant/leaseholder simply to assert the existence of prejudice; there has to be some evidence of prejudice.

41. Turning to the decision of the Upper Tribunal in *Wynne v Yates*, Judge Cooke, noting the above statement by Lord Neuberger, stated as follows in paragraph 10 of her decision: *"So the tenant must demonstrate some prejudice arising from the failure to consult; it is not for the landlord to demonstrate, in the absence of any evidence of prejudice, that the tenants were not prejudiced".* Then in paragraph 39 she commented specifically as follows: *"[The tenants] gave no evidence that there was a possibility that they could have suggested a way to get the work done more efficiently or more quickly or more economically. In the absence of any such suggestion there was no reason not to grant a dispensation".*

42. Mr McAlonan has commented on the Applicant's delay in making this application, but the delay is not relevant to the issue of prejudice as Mr McAlonan has failed to show how that delay has prejudiced him. Likewise, the Applicant's explanation for its failure to serve the section 20 notice at the correct address is not relevant, because even if the failure was understandable it does not follow that no prejudice was suffered.

43. On the issue of prejudice, Mr McAlonan has asserted in his written statement of case that he has suffered prejudice but, in our judgment, he has failed to identify or articulate what prejudice he has suffered. Indeed, in trying to identify prejudice he has specifically cross-referred to paragraphs 4(a) to (e) of his statement, but none of these paragraphs constitutes evidence of prejudice. Paragraph 4(a) is simply an assertion that the Applicant did not consult, paragraphs 4(b), (d) and (e) are not relevant to the dispensation issue, and paragraph 4(c) does not seem to be connected to the non-receipt of the section 20 notice.

44. It might be argued that it is difficult to demonstrate the existence of prejudice, particularly if a leaseholder feels that they are lacking the information to enable them to work out what prejudice they have suffered. However, first of all it is clear from the decisions in *Daejan v Benson* and *Wynne v Yates* that there does have to be some evidence of prejudice. Secondly, there is evidence in the hearing bundle of a

significant amount of information having been provided by the Applicant to Mr McAlonan which he could have used to establish whether there was any actual evidence of prejudice. Thirdly, Mr McAlonan has not submitted any surveyor's opinion or any other tangible evidence of prejudice nor even properly articulated what prejudice there has been or what he would have said or done (and what difference it would have made) if he had received the section 20 notice in a timely manner. He has made some very general comments as to what sort of prejudice might have been uncovered, but in our view there is nothing in those comments which sufficiently identifies any real prejudice.

45. It is clear from the decision of the Supreme Court in *Daejan v Benson* that even when minded to grant dispensation it is open to a tribunal to do so subject to conditions, for example where it would be appropriate to impose a condition in order to compensate for any specific prejudice suffered by leaseholders. However, as there is no evidence of actual prejudice there is nothing for which Mr McAlonan should be compensated.

46. Accordingly, we grant unconditional dispensation from compliance with the consultation requirements. It should, though, be noted that this determination is confined to the issue of consultation and does not constitute a decision on the reasonableness of the cost of the works.

Costs

47. There have been no cost applications.

Name: Judge P Korn **Date:** 30 June 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason

for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.