FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/14UF/LDC/2020/0015**
Properties	**:**	**All Leasehold Properties forming:** **Rockside Hall, DE4 3RW** **Rockside Hydro, DE4 3RX** **Cavendish Apartments, DE4 3FN** **All situated at:** **Rockside Hall, Wellington, Street Matlock**
Applicant	**:**	**Rockside Hall Management Limited**
Representative	**:**	**Property Management Legal Services Ltd**
Respondents	**:**	**The leaseholders of:** **Rockside Hall** **Rockside Hydro** **Cavendish Apartments**
Type of Application	**:**	**An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying works.**
Tribunal Member	**:**	**V Ward BSc Hons FRICS – Regional Surveyor** **T. Wyn Jones BSc Dip Surv FRICS MCIArb MEWI**
Date of Decision	**:**	**28 May 2021**

DECISION

Background

1. By an application received by the Tribunal on 30 October 2020, the Applicant sought retrospective dispensation from all or some of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 ("the Act").

2. Section 20 of the Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to "qualifying works" (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250.00.

3. The Applicant sought dispensation from the consultation requirements for two sets of works that have been carried out:

    a) Works relating to the boiler.

        The leasehold properties at Rockside Hall are served by a communal boiler. Works carried to the boiler during 2019 totalled £16,341.05. The cost of the works was borne by the reserve fund.

    b) Works relating to Exterior Maintenance

        Works were carried out to all three elements of the Rockside Hall development, the costs of which totalled £18,496.80. Again, the cost of the works was borne by the reserve fund.

4. The Applicant is the freeholder of the development and also the management company for the same.

5. The Tribunal directions of 10 November 2020 contained the instruction that the by 1 December 2020, the Applicant serve the following documents on the Respondents, the leaseholders owners of properties at the Rockside Hall development:

    a) A copy of the application form and accompanying documents.

    b) A copy of the Tribunal's directions dated 10 November 2020. These directions invited any Respondent to submit a statement to the Tribunal with one copy to the Applicant, in connection with the application clearly stating

any objections or support for the application and the reasons/grounds relating thereto by 22 December 2020.

c) A statement explaining the purpose of the application and the reason why dispensation is sought.

d) Copies of any specialist reports obtained in respect of the works together with any quotes received and any other appropriate material.

e) Details of the consultation procedure carried out, if any.

f) Relevant photographs. The Tribunal advised the parties that due to Covid-19 Public Health Emergency (PHE), the Tribunal would be unable to carry out a physical inspection of the development.

6. The Applicant confirmed on 3 December 2020 that the directions above had been complied with.

7. The Tribunal issued further directions on 15 January 2021 confirming that due to the continuing PHE, the Tribunal would not be inspecting the development but that the parties could submit photos or videos in mitigation.

8. The Applicant had indicated that they were content with a paper determination in this matter and no Respondent requested an oral hearing. Accordingly, the Tribunal determines this matter on the written submissions of the parties.

9. The Tribunal's directions of 10 November 2020 invited the Respondent leaseholders to comment on the application and confirm whether they supported the application or objected to it.

10. On 8 February 2021, the Tribunal Members met to consider the submissions of the parties.

11. The Tribunal received one objection from Mr T Livermore, leaseholder of no.7 Rockside Hydro. The objection was on two grounds:

a) The supply and installation of the Lowara twin head pump was a completely separate and unrelated project to the boiler replacement and exclusively relevant only to the 15 Lessees of Cavendish Apartments (with a cost equating to £238.87 per lessee) and therefore falls outside the scope of Section 20 consultation requirements and should not have been included in the application.

b) No consideration has been given to the fact that if the costs of the exterior

maintenance works are broken down and allocated correctly to each of the relevant Blocks (Buildings) and the Community, as required by the Lease, doing so would result in costs for Cavendish Apartments and the Community falling outside the scope of Section 20 consultation requirements (£23.33 and £6.90 per affected lessee/freeholder respectively).

12. In the opinion of Mr Livermore therefore, the application should therefore only concern the 34 lessees of the Hall, Hydro and Cavendish Apartments with regard to the boiler replacement (£375.24 per lessee) and the 19 Lessees of the Hall and Hydro with regard to the exterior maintenance works (£951.49 and £685.50 per Lessee respectively).

13. The Applicant was advised by Mr Livermore of this information prior to the application being submitted and as evidence, copies of email correspondence was exhibited.

14. In view of the fact that this information was provided to the Applicant prior to the application being submitted, with the intention of ensuring that the application was factually correct, Mr Livermore considers that the leaseholders should not be financially disadvantaged due to any additional legal costs that may arise as a result of this objection.

15. The Tribunal found that the Applicant had not complied with Directions stated in paragraph 5 above. All that the Applicant had submitted was simply the application form and accompanying documents which had been provided originally. In compliance with such a Direction, the Tribunal would expect to be provided with a statement outlining the circumstances behind the works for example, for instance, were they urgent and also what the works entailed, not just the brief summary contained within the statement accompanying the application and what could be gleaned from the copy invoices. Depending the circumstances, copies of any quotations obtained before works and photographs are usually provided.

Preliminary Decision

16. As insufficient information had been provided by the Applicant, the Tribunal could have simply refused the application for dispensation. However, as that would have simply lead to a second application and also as there was only one objection, which was in any event qualified, the Tribunal decided to give the Applicant an opportunity to provide the information required for the Tribunal to make an informed decision. The Tribunal therefore issued further Directions on 10 February 2021, instructing the Applicant to provide the additional information requested and also to respond to Mr Livermore's objection, detailed above.

The Initial Submissions of the Parties

The Applicant

17. The Applicant, in their preliminary submissions accompanying the application, gave background on the Rockside Hall Estate and stated that it was composed of the following elements:

- Rockside Hall (11 apartments);
- Rockside Hydro (8 apartments);
- Cavendish Apartments (15 apartments); and
- Six Freehold' properties (which did not form part of this application)

18. The Applicant further explained that all lessees are Respondents to this application and each leasehold property within the development was held on the residue of a 999 year lease from 1 January 2000. The leases for each of the three elements of the development were broadly drawn on the same terms.

19. The Applicant then gave details of the works, which will fell into two categories:

a) Works relating to the boiler.

The Applicant explained that the leasehold properties were served by a communal heating system served by a boiler. During late Spring / early Summer 2019, works were undertaken in respect of the boiler system, including the installation of a replacement Hoval UltraGas boiler, together with the supply and installation of a Lowara twin head pump. The Applicant considered this to be one project of qualifying works. The costs of the project together with details of accompanying invoices are set out below:

Company	Date of Invoice	Amount
Hoval Limited	31-May-19	£7,059.19
Charleson Building Services Limited	16-May-19	£2,006.40
Charleson Building Services Limited	17-Jun-19	£2,006.40
Charleson Building Services Limited	18-Jun-19	£1,791.53
Charleson Building Services Limited	30-Jun-19	£1,791.53
Complete	20-Jun-19	£1,026.00
Shire Crane Hire Limited	25-Jun-19	£660.00
Total		£16,341.05

The costs of the works were drawn from the reserve fund. All lessees had contributed to the reserve fund by payment of service charges.

Unfortunately, no consultation exercise was undertaken in respect of the qualifying works. This is because the previous board of directors had mistakenly understood that consultation was not required, because no additional demand was made, and costs were met by the reserve fund.

The Applicant accepts this approach is incorrect, and now seeks dispensation ex post facto. The Applicant invites the Tribunal to determine that it is reasonable in all circumstances to dispense with the consultation requirements.

b) Works relating to exterior maintenance. The Applicant advises that undertook a series of external works including the following:

- Mortar repairs to verge and repairs to the gutter at Cavendish Hall Apartments;
- inspection, capping and sealing of chimney stacks to Rockside Hall & Hydro;
- Stain stone repairs and repointing to Rockside Hall, together with plaster and render repairs to Rockside Hall Hydro;
- Repairs to address water ingress to the Rockside Hydro terrace around the railing posts;
- Plaster repairs inside the hall and on the stairs within Rockside Hall;
- Repairs to the cement screed beneath the Rockside Hall orangery; and
- Miscellaneous works across all three blocks including works on chimneys, cleaning all accessible gutters, replacement of slipped and missing slates.

Invoices relating to these works were as follows:

Boiler Stone Restoration Limited	17-Jul-19	£16,300.80
Complete	01-Jul-19	£1,761.60
Complete	01-Jul-19	£434.40
Total		£18,496.80

The reason for non-compliance for this series of works was the same as for the boiler, above, and again the Applicant invited the Tribunal to dispense with the consultation requirements.

20. The Applicant then expanded the reasons why the Tribunal should grant dispensation. The Applicant notes that the purpose of the consultation requirements is to ensure that lessees are protected from either paying for inappropriate work; or paying more than would be appropriate for those works.

21. This approach was set down by the Supreme Court in the leading authority of *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. The Applicant then considered the approach set down in *Daejan*; essentially the Tribunal should consider what would have happened if the Applicant had consulted in accordance with the 2003 Regulations.

22. It is the opinion of the Applicant that the extent, quality and cost of works would in no way be affected by the grant of dispensation. In other words, the lessees will be in precisely the position they would have been, had the consultation procedures been followed. The Applicant provides additional background information that the failure to consult was noted when the Applicant changed managing agents with the newly appointed firm, Omnia, noting the Applicant's liability should a leaseholder seek to only pay a £250 contribution towards the works in question. Accordingly, the Tribunal is invited to conclude that the outcome, i.e. the undertaking of the projects of works, would have been no different had consultation been undertaken.

23. The Applicant confirms that all lessees were notified of the intention to apply for retrospective dispensation by way of a letter dated 8 September 2020 and the reasons why. The letter sets out that lessees can participate in this application, and also indicates lessees have the option to object to the application. The Applicant has, therefore, endeavoured to be entirely transparent with its lessees.

24. The Applicant also reminds the Tribunal that the Applicant is a lessee owned and controlled vehicle. Its sole function is to provide services for the benefit of all lessees within Rockside Hall Estate.

25. In the opinion of the Applicant, although it is unfortunate that consultation was not undertaken prior to the commencement of the works, no prejudice has been caused to any lessee as a result of this oversight and accordingly invites the Tribunal to dispense with all consultation requirements relating to both projects of works.

The Respondents

26. The Tribunal received one objection from Mr T Livermore detailed above.

The Further Submissions of the Parties

The Applicant

The Witness statement of Christopher Raw

27. The Applicant's further submissions included a witness statement by Christopher Raw, Director of the Applicant company. Mr Raw explains that he and several

others were appointed Directors of the company in addition to the existing Directors on 29 October 2019 and at that time, the managing agent for the development was Complete Property Management Solutions Limited ("Complete").

28. Following disquiet about how the development was run and managed, Omnia Estates ("Omnia"), were appointed in place of Complete from 31 January 2020. Following Omnia's appointment, the Directors realised how much had been spent on two large contracts in or around June/July 2019 and also the implications in respect of section 20 of the Landlord and Tenant Act 1985 which was the catalyst for this application.

29. Whilst not in post at the time of the large contracts, Mr Raw provided a summary of the events that led to the works, from documentation including minutes of Directors' meeting held on 7 February 2019, where a Mr Darren Norris of Complete was in attendance. There were maintenance issues to be addressed, and Complete were tasked with seeking opinion on causes and remedies. In particular, a damp issue in Rockside Hall was discussed, and the following actions were agreed

- Check chimney stacks are properly capped and sealed.
- Strip off damp plaster/render to expose stonework/substrate
- Use camera to check what's beneath 1-2 Hydro Terrace
- Check drain report to establish whether location of collapsed drain could be cause of problem.

30. In addition, at the same meeting it was also noted that there was a leak on one of the boilers. Again, Mr Norris was tasked with liaising with organisations to establish potential solutions to this. Thereafter, on 9 April 2019, a new boiler was ordered from Hoval. On 15 April 2019, a quote was obtained from Expert Roofing. Mr Raw notes that this quote is incomplete, in that it does not cover all of the maintenance works which were later undertaken under the Bolton Stone contract.

31. A further Directors' meeting was held on 9 May 2019, again with Mr Norris in attendance. The meeting appears to have been used to discuss previous maintenance issues, and also to flag new issues for Complete to progress. This was the first occasion on which the contractor Bolton Stone have been mentioned, in the documentation directors have access to.

32. These minutes report that a new boiler had been ordered from Hoval and also that quotes had been received from Charleson for installation, and Shires Cranes for contract lifting. The minutes record that it was agreed to proceed with these unless a contact "could suggest a better alternative". There was no mention of the consultation requirements set down by section 20.

33. On 9 May 2019, Bolton Stone carried out a site survey, and subsequently submitted a report setting out the costs for undertaking the works. The Bolton Stone contract works commenced on 17 to 21 June 2019.

34. On 3 June 2019, the new boiler was installed by Charleson. Unfortunately, and within just a matter of days, the twinhead pump supplying Cavendish Apartments failed. Charleson and Pumpcare quoted for quoted for a replacement. On 1 July 2019, a new pump was installed by Charleson.

35. The AGM held on 29 October 2019 was fractious and argumentative, and ended abruptly before all agenda items had been discussed as Mr Norris, who was chairing the meeting as company secretary, left the meeting and announced his resignation and that of Complete. It was at this time that Mr Raw and others joined the board.

36. At the subsequent meeting on 28 November 2019, the newly appointed directors called for a financial review. This followed a period of disagreement between the new and existing directors and Complete over access to the company's full financial information. This ultimately led to Omnia being appointed with effect from 31 January 2020. Financial information was received from Complete on 6 July 2020 and after consideration of this, the Board sought legal advice regarding the consultation issues, and the consequences of failing to undertake the same.

37. As noted above, on 8 September 2020, Omnia wrote all lease holders advising of the fact that consultation had not taken place in respect of these contracts but that it was the intention to make a retrospective application.

38. In summary, Mr Raw asks the Tribunal to note that no lessee has actually challenged the utilisation of the reserve fund. There have been no complaints raised, and no challenges brought against the Applicant in the Tribunal. The Directors of the Applicant management company are keen to ensure they adhere to the requirements of the legislation hence the reason for the application.

The Witness statement of Michael Harrison

39. The Applicant also included a witness statement by Michael Harrison, Senior Property Manager at Omnia Estates Limited, the incumbent managing agents for the development which provided photographs of the areas of the development affected by the works.

The Applicant's statement in response to Mr Livermore's objection.

40. The Applicant considers that Mr Livermore has fundamentally misunderstood the consultation requirements as set down by section 20, as supplemented by the 2003 Regulations, as he argues that, if the costs of the exterior maintenance works are broken down and allocated to each of the relevant blocks and the community, doing so would result in the costs for Cavendish Apartments and the community falling outside of the scope of section 20 consultation requirements, therefore, the application should only concern the 19 lessees of Rockside Hall and Rockside Hydro with regards to the exterior maintenance works.

41. The Applicant states that section 20 operates as a limitation on the recovery of service charges, and limits the "relevant contributions" of lessees unless the consultation requirements have either been complied with in relation to the works, or dispensed with in relation to the works. Section 20 (3) makes clear that the limitation is engaged where relevant costs exceed an "appropriate amount". This is dealt with by Regulation 6 to the 2003 Regulations, which explains that, for the purposes of subsection (3) of section 20, the appropriate amount "is an amount which results in the relevant contribution of any tenant being more than £250".

42. It does not matter, therefore, whether some lessees will contribute more than £250, and others will contribute less than £250. What matters is that the threshold is triggered. Once the threshold has been triggered, it is an obligation on any landlord to consult with all lessees, not just those who might be required to contribute more than £250.

43. All lessees would have been included in a consultation exercise. It is entirely right and proper (and indeed a requirement) that all lessees are Respondents to this application, including those who will contribute less than £250. Mr Livermore's understanding of section 20 and the requirements is fundamentally flawed. This misunderstanding has been demonstrated by Mr Livermore both in his capacity as lessee, and also in his capacity as director, given that Mr Livermore was a director of the Applicant company at the time the works were undertaken.

44. For the reason set out above, and in particular when following the approach set down by the Court of Appeal in *Phillips v Francis* [2014] EWCA 1395, the Applicant states the boiler works are a single set of qualifying works.

<u>Mr Livermore</u>

45. In response to the Applicant's comments regarding his original objection, Mr Livermore clarified his previous objection where he was simply trying to ensure that the application was factually correct. The replacement of the boiler and the twin head pump are, in Mr Livermore's opinion, clearly two separate and unrelated projects, as evidenced by the timeline of events and the statement provided by the contractor concerned. Similarly, the minor exterior maintenance works to

Cavendish Apartments are unrelated to the more extensive works to Rockside Hall and Rockside Hydro. If the fact that including separate projects on the same purchase order, for administrative convenience and expediency, means that they should be considered as one set of qualifying works, then Mr Livermore has no objection to dispensation being granted or refused in that manner.

The Law

46. As intimated above (paragraph 2), 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.

47. 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.

48. In *Daejan*, the Supreme Court noted the following:

i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

ii. The financial consequences to the landlord of not granting the dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

iv. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some 'relevant prejudice' that they would or might have suffered is on the tenant. It is not appropriate to infer prejudice from a serious failure to consult.

v. The court considered that 'relevant' prejudice should be given a narrow definition: it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable

amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.

ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.

x. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord application under section 20 ZA (1).

49. 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.

50. 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).

Deliberations

51. Initially, the Tribunal would deal with Mr Livermore's qualified objection. This is not an objection to the principle of dispensation *per se* but is rather that the application should have been in relation to specific areas of the development for specific works. However, even following the second tranche submissions, the

Tribunal does not consider that it has sufficient information to conduct a *Phillips v Francis* analysis as to how many "sets" of works were carried out but in any event would not consider it a proportionate use of its time to consider the same.

52. As set out in *Daejan*, prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).

53. No Respondent has made a statement to the effect that they have suffered any prejudice. Whilst ample opportunity has been given to Respondents both as a result of the procedural elements of these proceedings and further as a result of Omnia's letter of 8 September 2020, no Respondent has made a statement to the effect that they have suffered any prejudice.

54. Whilst it appears clear that consultation was not carried out, it is not appropriate on the basis of this alone for the Tribunal to infer prejudice. There is no evidence before the Tribunal that the works carried out were unreasonable in terms of cost or quality hence the Tribunal must grant dispensation.

Determination

55. The Tribunal therefore grants dispensation from the consultation procedures for the following works:

    a) Works relating to the boiler totalling £16,341.05.

    b) Works relating to Exterior Maintenance totalling £18,496.80.

56. 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 or that the works had not been carried to a reasonable standard.

Appeal

57. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

V Ward