



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

Case Reference	: CHI/00HP/LDC/2020/0083
Property	: Moriconium Quay, Lake Avenue, Poole, Dorset BH15 4QP
Applicant	: Moriconium Quay Management Company Limited
Representative	: Napier Management Services Limited
Respondent	: None
Representative	:
Type of Application	: To dispense with the requirement to consult lessees about major works
Tribunal Member(s)	: D Banfield FRICS Regional Surveyor
Date of Decision	: 4 January 2021

The Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 to strengthen the Eastern Inner Marina Wall by the installation of 5 additional piles.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

The Applicant is to send a copy of the Tribunal's determination to each lessee liable to pay service charges.

Background

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the Landlord and Tenant Act 1985.
2. The Applicant explains that works are required to strengthen the Eastern Inner Marina Wall. The works will require 5 additional piles to be installed at a cost of approximately £50,000. The application explained that the Applicant seeks dispensation as a suitably qualified contractor is already on site carrying out similar works to a different part of the marina wall. The works are needed to ensure there is not a catastrophic failure of the wall.
3. The Tribunal made Directions on 9 November 2020 requiring the Applicant to send a copy of the application and the Tribunal's Directions to each lessee. Attached to the Directions was a form for the lessees to return to the Tribunal indicating whether an oral hearing was required, if the application was agreed to or opposed and if the latter a statement was to be sent to the Applicant by 8 December 2020.
4. The Directions noted that those parties not returning the form to the Tribunal and those agreeing to the application would be removed as Respondents.
5. The Tribunal received completed forms from 20 lessees all of whom agreed with the application. In accordance with paragraph 4 above all lessees have therefore been removed as Respondents.
6. No objections were received to the application being determined without an oral hearing and it is therefore determined on the papers received in accordance with rule 31 of the Tribunal Procedure Rules 2013.
7. The Tribunal's Directions required the Applicant to prepare and electronically submit an agreed bundle. This has been received and it is upon this that the Tribunal's determination is made. Reference to page numbers in the bundle are indicated by [x]
8. The only issue for the Tribunal is whether it is reasonable to dispense with any statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be reasonable or payable.**

The Law

9. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

- a. (1) Where an application is made to a Leasehold Valuation 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.
10. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. In summary the Supreme Court noted the following
- b. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
 - c. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - f. 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's application under section 20ZA (1).
 - g. 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 tenants.
 - h. 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.
 - i. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

The Applicant's case

11. In the Applicant's statement of case [83] it is explained that having successfully completed the works to the western side of the marina wall the same problems have arisen on the eastern side.

12. The delay in starting the works to the western side allowed the wall to move to a point where it was no longer possible for it to be saved and this is not a situation that should be repeated.
13. In this instance however, the same solution employed on the western side can be employed for the eastern side and the skills already developed by the contractors involved in the initial project are transferable to the proposed site. The value of the proposed works will be less than 5% of the works already undertaken on the western side.
14. Starting the process of locating alternative contractors during the pandemic will delay the start of the work and increase the cost. Alternative contractors would have to;
 - mobilise substantial marine equipment from further afield when the current contractor has all such items to hand and is based some 1 mile from the site
 - need to learn the skills that are now honed by the existing contractor
 - will not have a long-term connection with the development and the advantages this provides in terms of knowledge and historic nature of the site etc.
15. It is important to ensure that the works are completed before the spring when the wetter winter weather will lead to much higher levels of movement in the marina wall as shown on a timeline [84].
16. Regular newsletters have been sent to owners on the progress of the current wall project and that of November 2020 [94] refers to the need for the works now proposed.
17. No formal objections have been received and 23 people have written in support.
18. Three generic observations have been received, one from a freeholder and two from leaseholders. [89,91 & 92] a response to which is included in the November newsletter.
19. The issue of the Eastern Wall was discussed at the Company AGM on 30 October 2020 and a copy of the presentation made and subsequently circulated to the shareholders/lessees is attached [290].
20. A copy of the Tribunal's decision and the submissions made in respect of the Western wall is at [100 and 114].

Opposing submissions

21. The freeholder of No 7 has written to the Applicant in terms which the lessees of Flat 2 and 30 have adopted. As S.20 is only respect of leasehold property the freeholder of No 7 has no standing in these proceedings. Although the Lessees of Flats 2 and 30 have not sent objections to the Tribunal and are therefore no longer Respondents the content of their identical letters has nevertheless been considered.
22. These letters assert that the work is not urgent, that the remedial works to the western wall are not effective, that the contractors have already removed their plant from site and by making the application the Managers of the Estate are seeking to circumvent the normal shareholder participation in the process.

Determination

23. As indicated in the Tribunal's Directions and repeated at paragraph 8 above the Tribunal's decision solely relates to whether, in the circumstances, it is reasonable to grant dispensation from the consultation requirements of Section 20.
24. The guidance given by the Daejan case referred to above provides that it is for the tenant to identify that they have suffered prejudice by not being consulted then it is up to the landlord to rebut it.
25. Nothing in the letters referred to in paragraph 22 above identifies a "credible case for prejudice" as referred to in the Daejan case. The question the Tribunal must consider is whether it is reasonable to require the works that have already been decided upon to go to competitive tender and to give lessees the opportunity of making comments on the proposed works and nominating a contractor from which a tender should be sought.
26. Whilst an alternative proposal to the works to be carried out has been suggested by two lessees I am not convinced that, should a S.20 consultation have been carried out, those views would have altered the proposed scheme in any way. I am also satisfied that using a contractor familiar with the site and situated nearby is a sensible option outweighing any potential benefit in seeking competitive tenders.
27. Accordingly, I am not satisfied that it has been demonstrated that the lessees will suffer the type of prejudice referred to in the Daejan case and as such it is reasonable for dispensation to be given.
28. **In accordance with the above the Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 to strengthen the Eastern Inner Marina Wall by the installation of 5 additional piles.**

- 29. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**
- 30. The Applicant is to send a copy of the Tribunal's determination to each lessee liable to pay service charges.**

**D Banfield FRICS
4 January 2021**

- 1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making application by email to rpsouthern@justice.gov.uk and quoting the Case number and address of the property.**
- 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 appeal is seeking.**