



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

Case Reference	:	CHI/43UC/LDC/2021/0063
Property	:	The Ebbisham Centre, Derby Square, Epsom KT19 8AG
Applicant	:	Burlywood Properties Limited
Representative	:	Teacher Stern LLP
Respondents	:	Mr O'Neill Mr S J Patel and Ms Linda Courtice
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member	:	D Banfield FRICS Regional Surveyor
Date of Decision	:	4 October 2021

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 to carry out repair works to balconies and to undertake redecoration.

The granting of dispensation is subject to;

- a. No costs in respect of the application for dispensation however incurred shall be recovered from the service charge payers.**

b. A minimum of two quotations from parties unconnected with the applicant or any associated companies to be obtained, the lower of which is to be accepted.

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 this determination to all of the lessees liable to contribute to service charges.

Background

1. The Applicant is the registered proprietor of the leasehold land known as Epsom Ebbisham Centre, 38-40 The Oaks Square and 1-10 Derby Square Epsom. Underleases have been granted to Epsom Lifestyle Development Limited which is the management company and the direct landlord of the residential tenants.
2. 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 1985 Act.
3. The Applicant explains that the Property is a block of 37 flats to which it wishes to carry out repair works to balconies and to undertake redecoration works. It is said that the balcony works are now becoming urgent as pieces of the balconies have fallen off and there is a concern that if the balconies are left unrepaired harm or injury could be caused
4. The application indicates that a consultation process was started in 2019 but was not completed. It is stated that representatives of the leaseholders have confirmed that the works should proceed but that they have not been willing to agree to dispense with the rest of the consultation procedure as they do not want to become liable for the costs of the works under the terms of their leases.
5. The Tribunal made Directions on 16 August indicating that having considered the application the Tribunal was satisfied that the matter is urgent, it is not practicable for there to be a hearing and it is in the interests of justice to make a decision disposing of the proceedings without a hearing (rule 6A of the Tribunal Procedure Rules 2013 as amended by The Tribunal Procedure (Coronavirus) Amendment Rules 2020 SI 2020 No 406 L11).
6. The Directions required the Applicant to send them together with a copy of the application and a sample lease to each Respondent. Included with the Directions was a form for the Leaseholders to indicate to the Tribunal whether they agreed with or opposed the

application. Those Leaseholders who agreed with the application or failed to return the form would be removed as Respondents.

7. The Directions asked the Respondents to provide “Evidence of what they may do/have done differently if the Applicant were or had to comply with the full statutory consultation process.”
8. Two replies were received objecting to the application. The remaining Lessees are therefore removed as Respondents in accordance with the above paragraph.
9. Before making this determination, the papers received were examined to determine whether the issues remained capable of determination without an oral hearing and it was decided that they were, given that the application remained unchallenged.
10. 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

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

S.20 ZA Consultation requirements:

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.

12. 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
 - i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord’s breach of the consultation requirements.
 - ii. 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.
 - iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

- iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- v. 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).
- vi. 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.
- vii. 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.
- viii. 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.
- ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

The Applicant

- 13. The information provided in support of the application are recited in paragraphs 2 and 3 above. In addition a sample lease underlease dated 4 September 2000 and an occupational lease dated 19 September 2000 with Epsom Lifestyle Development Limited (ELDL) named as Lessor was provided.

The Respondents

- 14. Mr O'Neill of Flat 22 objected on the grounds that;
 - a. The balconies are the Freeholder's responsibility
 - b. No remedial works have been carried out
 - c. Due to their disregard for the safety of residents the Freeholders should be accountable

d. The Freeholders, Epsom Borough Council should carry some or all of the costs

15. Mr S J Patel and Ms Linda Courtice explained that they were Directors of ELDL the owners of the leases of the 37 individual flats and which acted as a residential management company. They objected on grounds summarised as the application is inaccurate, not needed and serves the commercial interests of the Applicant rather than for health and safety reasons.
16. In support of their objections they referred to the slow pace adopted by Teacher Stern, the initial consultations having commenced in 2019, they have not said they do not want to be liable for the costs but want the work fully scoped and properly costed. They referred to the Notice of Estimates dated 3 June 2020 as being aborted as it did not include adequate cost information.
17. The pieces of balcony that are said to have “dropped off” have been small sections of wooden soffits on the underside of the balconies which could be attended to as general maintenance. In any event the balconies are not demised to the residential parts as they provide lighting for the commercial premises and as such are charged to Epsom Square as a whole as confirmed by Colliers in an email of 10 October 2020.
18. Due to the delays in progressing the works the only rational explanation for doing so now can be a desire to enhance the look and feel of the overall “Square” for Burleywood’s commercial interest.
19. The Tribunal are asked to direct the Applicant to bear the legal costs of this action and to direct Burleywood Properties Limited to reveal who there ultimate controlling interests are.
20. Appended to the statement are various email exchanges relating to affordability and whether the removal of cladding should be prioritised.

The Applicant’s response

21. The Applicant says that as quotes have been previously obtained no prejudice will be suffered by the lessees and that full consultation was curtailed by the pandemic although from correspondence submitted efforts have been made to by the Applicant to co-ordinate the works with them.
22. There is no dispute that the work should be done but that other works should be prioritised.

23. The landlord has formed a reasonable view that the balcony works are required as they form a danger to residents, occupiers and users of the Property.
24. The terms of the lease are clear,, paragraph 1 of the Sixth Schedule imposing a repairing obligation in relation to Common Parts and Maintained Property (which includes Main Structure which in turn includes balconies) on the Applicant.
25. The Seventh Schedule gives rise to an obligation to pay the “Lessee’s Proportion” of the services carried out by the Applicant and as such are recoverable under the leases.

Determination

26. Dispensation from the consultation requirements of S.20 of the Act may be given where the Tribunal is satisfied that it is reasonable to dispense with those requirements. Guidance on how such power may be exercised is provided by the leading case of Daejan v Benson referred to above.
27. As was stated in Judge Dobson’s Directions and repeated above, the issue is whether the Respondents have been prejudiced by not being consulted as required by Section 20 Landlord and Tenant Act 1985 and not whether the costs are either reasonable or are recoverable under the service charge.
28. The purpose of imposing consultation on landlords is to ensure their lessees have adequate notice of their proposed liability, are able to engage with their landlord in the process by making observations and nominating a contractor and that competitive tenders are obtained.
29. In this case it is clear from the email correspondence referred to by the second Respondent that discussions on the process have continued over a significant period and competitive quotations have been obtained albeit some 2 years ago. Whilst the Landlord is obliged to seek observations from the lessees it is not required to adopt them and it remains that the decision as to priorities is that of the Applicant.
30. The grounds of the application are that the matter is urgent and presumably that to follow the full consultation procedure would incur unnecessary delay. That this urgency may have come about due to the past management of the building is not relevant to whether dispensation should be granted now.
31. With regard to the objections relating to which party should bear the cost of the works; whilst the Tribunal makes no determination on this matter, the respective obligations of both landlord and

tenant are set out in the leases referred to above and are binding on the parties. Any challenge as to payability may be the subject of an application under S.27A of the Landlord and Tenant Act 1985.

32. With the largely unchallenged assertion that parts of balconies are unsafe and given the time that has already passed I determine that it is reasonable for the work to be carried out without further consultation. Redecoration does not have the same risks that delaying works to the balcony carry, however as scaffolding will no doubt be required it makes sense for the two operations to be carried out together. Dispensation for redecoration is therefore also given.
33. I am concerned however that costs have no doubt been incurred in the carrying out part at least of the consultation procedure 2 years ago and that it would be unreasonable to now incur further costs by making this application. Dispensation will therefore be conditional as indicated below.
34. **The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 to carry out repair works to balconies and to undertake redecoration.**
35. **The granting of dispensation is subject to;**
 - a. **No costs in respect of the application for dispensation however incurred shall be recovered from the service charge payers.**
 - b. **A minimum of two quotations from parties unconnected with the applicant or any associated companies to be obtained, the lower of which is to be accepted.**
36. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**
37. **The Applicant is to send a copy of this determination to all of the lessees liable to contribute to service charges.**

D Banfield FRICS
4 October 2021

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.