FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LDC/2021/0134 [PAPERREMOTE]**
Property	**:**	**Ellesmere Court, 367 Fulham Road, London SW10 9TN.**
Applicant	**:**	**Adriatic Land 7 Limited (Incorporated in Guernsey).**
Representatives	**:**	**JB Leitch Limited**
Respondent	**:**	**The Leaseholders listed in the application.**
Representative	**:**	**Not applicable**
Type of Application	**:**	**Application for the dispensation of consultation requirements pursuant to S. 20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Prof Robert Abbey** **Mr Trevor Sennett**
Date and venue of Hearing	**:**	**26 July 2021 by a paper-based decision**
Date of Decision	**:**	**26 July 2021**

DECISION

Decisions of the tribunal

(1) The Tribunal grants the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (Section 20ZA of the same Act).

(2) The reasons for our decisions are set out below.

The applications

1. In relation to the several flats at Ellesmere Court 367 Fulham Road London SW10 9TN ("the properties") the applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act, (see the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987), Schedule 4.) The request for dispensation concerns major fire precaution works ("the major works") carried out to the properties.

2. The relevant legal provisions and rules and appeal rights are set out in the Appendix and Annex to this decision.

The hearing

3. This has been a remote hearing on the papers which has been consented to or not objected to by the parties. The form of remote hearing was classified as P (PaperRemote). A face-to-face hearing was not held because it was not practicable given the COVID-19 pandemic (and the need for social distancing) and no one requested the same or it was not practicable and all issues could be determined in a remote hearing on paper. The documents that the Tribunal was referred to are in the electronic bundle supplied by the applicant.

4. In the context of the COVID-19 pandemic and the social distancing requirements the Tribunal did not consider that an inspection was possible. However, the Tribunal was able to access the detailed and extensive paperwork in the trial bundle that informed their determination. In these circumstances it would not have been proportionate to make an inspection given the current circumstances and the quite specific issues in dispute.

5. The tribunal had before it a trial bundle of documents prepared by the one of the parties in accordance with previous directions. The trial bundle comprised electronic versions of copy deeds, contracts, documents, letters and emails.

The background and the issues

6. The Premises consists of a three-tiered basement car park, ground and 6 upper floors. The ground floor comprises staff facilities, a fire-fighting lift that accesses all floors and two staircases, one which accesses all floors and the other that leads to the basement car park. In addition, the Premises includes a retail unit currently occupied by Pret A Manger. The Premises comprises a total of 41 flats starting from the first floor. Most of the external facade of the Premises is insulated render. The individual properties are let on long leases and are all in the same format and include all the same provisions covenants and conditions.

7. The respondent/tenants hold long leases of the individual properties which require the applicant/landlord to provide services and the tenant to contribute towards their costs by way of a service charge. The applicant tenants must pay a percentage defined in their leases for the services provided.

8. The application to be considered by the tribunal focused upon fire precautions. The application was made to seek dispensation under section 20ZA of the 1985 Act from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act carried out to the properties. With regard to the grounds for seeking dispensation the applicant stated in the S20ZA application, (and reference to Annexes refers to annexes to the applicant's statement of case), that

> *"The Applicant had been made aware that works were required to the Premises due to issues relating to the external wall system, cavity barrier system, and cavity insulation of the Premises. The discovery of the problem with the external facade came about due to the testing of the external facade system on the Premises. Tri Fire Consultants ("Tri Fire") were instructed to produce a report ("the Tri Fire Report") to investigate the issues with the external facade. Thereafter, Harris Associates Ltd prepared an executive summary in respect of the issues with the external facade at the Premises. A copy of the Tri Fire Report and Harris Associates executive summary appears at "Annex 3".*
>
> *8. Tri Fire were instructed to report on whether the external facade of the Premises demonstrates compliance with an adequate standard of safety. The Tri Fire Report assessed the materials comprising the external facade of the Premises by reference to the Regulatory Reform (Fire Safety) Order 2005, Building Regulations, the MHCLG Guidance 2020, and Approved Document B 2019 Volume 1. The Tri Fire Report confirms that the following areas are non-compliant with safety guidelines:*
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> *a. The insulation to the render system has been identified as being combustible expanded polystyrene system (EPS).*

b. No fire breaks or cavity barriers have been identified throughout all areas inspected.

c. At slab level, the mineral wool has been installed incorrectly with gaps in place due to there being an insufficient amount and with no mechanical fixing to secure it in place.

d. The timber cladding and insulation behind it are not materials of limited combustibility.

e. At penthouse level, the aluminium sandwich panels have a rigid plaster core insulation infill which are not materials of limited combustibility.

9. The Tri Fire Report concludes that "in our view there is a need to implement interim fire safety measures for the building due to the presence of [combustible] material on the facade, in line with NFCC Guidance… ".

10. The Applicant had therefore been made aware that an adequate standard of safety is not achieved, and of the remedial measures required. A copy of the EWS1 form dated appears at "Annex 4".

11. Following the Tri Fire Report recommendations, the Applicant implemented a waking watch at the Premises as an interim fire safety measure to safeguard the residents against the fire safety risks. The waking watch was a significant financial burden to the residents costing approximately £5,500.00 per week. Copies of all waking watch invoices appear at "Annex 5".

12. In order to dispense with the need for the waking watch, the Applicant instructed a contractor to install heat detectors at the Premises. The Applicant's proposals in this respect were accepted by the Fire Safety Inspector of the London Fire Brigade as providing satisfactory simultaneous evacuation without the need for waking watch. A copy of this email correspondence appears at "Annex 6".

13. The specification for the heat detector system is in accordance with the National Fire Chiefs Counsel ("NFCC") guidance, namely the installation of a Category L5 system (in accordance with the recommendations of BS 5839-1). A copy of the NFCC guidance appears at "Annex 7". The Applicant carried out the following works (more particularly particularised hereunder) which constitute major works for the purpose of section 20 Landlord and Tenant Act 1985 ("LTA"):

a. Installation of a heat detection system with sounders in each of the residents' individual flats.

14. The above works shall collectively be referred to as the "Works" where required throughout this statement.

15. The Applicant has made this application under Section 20ZA LTA for dispensation of the usual Section 20 LTA requirements to consult with all Respondents in respect of the installation of the heat detection system. The Application has been made due to the nature and urgency of the installation being completed, given the significant cost of the waking watch that had been in place."

9. The matters in issue now fall to this Tribunal to determine as more particularly set out below.

The dispensation issues and decision

10. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements in respect of the installation of a heat detection system with sounders in each of the residents' individual flats. This application does not concern the issue of whether or not service charges will be reasonable or payable.

11. Having considered all of the copy deeds documents and legal submissions provided by both parties, the Tribunal determines the issue as follows.

12. Section 20 of the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.

13. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by such an application as is this one before the Tribunal. Essentially the Tribunal have to be satisfied that it is reasonable to do so.

14. The works carried out by the applicant were emergency fire safety works that arose after a fire safety survey had been carried out. After the survey it was clear that the properties did have problems with cladding, the lack of fire breaks and materials in the properties that were not materials of limited combustibility and that as such a waking watch was put in place along with the subsequent installation of a heat

detector system. But of course, due to the emergency nature of the major works no consultation process occurred prior to the commencement of the major works.

15. The applicant states in its evidence to the Tribunal that "*We note that we have not received any responses or objections to our application and statement of case*." The Tribunal did not receive any objections sent directly to it. Therefore, the Tribunal takes the view that there are no objections to this application.

16. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14 by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.

17. The court came to the following conclusions:

    a. The correct legal test on an application to the Tribunal for dispensation is:
    "Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

    b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

    c. In considering applications for dispensation the Tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

    d. The Tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

    e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

    f. The onus is on the leaseholders to establish:

        i. what steps they would have taken had the breach not happened and

        ii. in what way their rights under (b) above have been prejudiced as a consequence.

18. Accordingly, the Tribunal had to consider whether there was any prejudice that may have arisen out of the conduct of the lessor and

whether it was reasonable for the Tribunal to grant dispensation following the guidance set out above. It should also be remembered that no leaseholder lodged an objection to this application.

19. The tribunal was of the view that they could not find significant relevant prejudice to the tenant/respondents. The tribunal accepted the landlord's submission in this regard was sufficient to enable the Tribunal to make a finding allowing dispensation given the emergency nature of the major works and the obvious need to try to keep residents as safe as possible. The absence of objections underlines this and the removal of a waking watch will hopefully reduce the fire precaution costs substantially.

20. The applicant believes that the works are vital given the nature of the problems reported. The applicant also says that in effect the tenants of the properties have not suffered any prejudice by the failure to consult. On the evidence before it the Tribunal agrees with this conclusion and believes that it is reasonable to allow dispensation in relation to the subject matter of the application. It must be the case that fire precaution works should be carried out as a matter of urgency to ensure the safety and comfort of all leaseholders and to try to limit the cost and hence the decision of the Tribunal.

21. Rights of appeal made available to parties to this dispute are set out in an Annex to this decision.

22. The applicant shall be responsible for formally serving a copy of the tribunal's decision on all leaseholders. Furthermore, the applicant shall place a copy of the tribunal's decision on dispensation together with an explanation of the leaseholders' appeal rights on its website (if any) within 7 days of receipt and shall maintain it there for at least 3 months, with a sufficiently prominent link to both on its home page. Copies must also be placed in a prominent place in the common parts of the block. In this way, leaseholders who have not returned the reply form may view the tribunal's eventual decision on dispensation and their appeal rights on the applicant's website.

Name:	Judge Professor Robert M. Abbey	**Date:**	26 July 2021

Appendix of relevant legislation and rules

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

20B Limitation of service charges: time limit on making demands.

(1)If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2)Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20ZA Consultation requirements

(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.
(2)In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
....
(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
(5)Regulations under subsection (4) may in particular include provision requiring the landlord—
(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b)to obtain estimates for proposed works or agreements,
(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.

Annex - Rights of Appeal

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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.