FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LDC/2021/0090**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Ryger House, 11-15 Arlington Street, London SW1A 1RD.**
Applicant	**:**	**Ryger Management Co. Limited.**
Representative	**:**	**CMS Cameron McKenna Solicitors** **Mr. James Fieldsend of Counsel** **Ms. Fiona Docherty JAR**
Respondent	**:**	**Ryger Holdings Limited (1)** **Rahman Somni & Zahra Ebrahim (2)** **Liesa Healy (3)** **K. Brooks & J. Drake (Trustees of P. Brooks 2007 Grantor Trust) (4)** **Robertus Henrius Leonardus Maria Thielen (5)** **Smedvig Capital Limited (6)**
Representative	**:**	**Mr. Henry Webb of Counsel for respondents (3) and (4).** **Daniel Glinert Solicitor (4)**
Type of application	**:**	**Application for Dispensation under S.20ZA Landlord and Tenant Act 1985.**
Tribunal members	**:**	**Tribunal Judge Hamilton-Farey**
Venue	**:**	**Remote Video Hearing.**
Date of decision	**:**	**1 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: VIDEOREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of [x] pages, the contents of which I have noted. The order made is described at the end of these reasons. [The parties said this about the process: add as applicable].

Decisions of the tribunal

(1) The tribunal determines that it will exercise its discretion and grant dispensation in relation to the retrospective application, in relation to the repairs to the misting system carried out on 17/18 February 2021 in the sum of £30,607.10 +M VAT.

(2) The tribunal determines that it will not grant dispensation in relation to the prospective works to replace the existing misting system at a cost of approximately £128,000.

(3) The tribunal makes an Order under S.20C of the Landlord and Tenant Act 1985 that the applicant shall not recover the costs of these proceedings as a service charge.

(4) The tribunal considers that relevant prejudice has been suffered by the respondents in relation to the retrospective application, and that the applicants should pay the respondents costs in this matter, that have not yet been quantified, but if there is a dispute as to the quantum of those costs, then the parties may make an application for a determination of those costs. Such determination to be made on the papers provided. If the parties wish to make such an application, they should do so within 28 days of the date of this decision.

The application

1. The Applicant seeks a determination pursuant to s.20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act"), for dispensation from the requirements to consult leaseholders in relation to both retrospective and prospective works. The applicant says that the costs for the retrospective works amount to £30,607.10 + VAT and the prospective application is in relation to works that are likely to cost in the region of £128,000.

2. The application is dated 30 March 2021, and directions were issued by the tribunal on 9 April 2021.

3. A hearing was organised for today 19 May 2021 at 10:00am at which Mr. James Fieldsend of Counsel appeared on behalf of the applicants,

Mr. Henry Webb of Counsel appeared on behalf of the third and fourth respondents. Mr. Rahman Somani represented his son, the second respondent.

4. Also, in attendance were Mr. Steven Poh of Ryger Holdings, Ben Collins, Vibuhti Parmar, Nick Wood, Gabrielle Theumissen-Blackstraw all of Cameron McKenna-Nabarro, Nick Taylor of Smedvig Capital Limited (on the telephone) and Fiona Doherty of James Andrew Residential Limited ("JAR"), the managing agents. Mr. Daniel Gilnert was present on behalf of the 4th respondents and had produced a witness statement which was included within the supplementary bundle. .

5. Prior to the hearing, a supplementary bundle was lodged with the tribunal as was a skeleton argument on the part of the applicants and a witness statement from Mr. Gilnert, together with a supplementary report relating to the misting system. Each of these documents, and the submissions made by the parties during the hearing has been considered by the tribunal before making the decision.

The background

6. The property which is the subject of this application is a purpose-built, mixed use building comprising 5 apartments on the ground to 4th floors and office accommodation on the 5th and 6th floors. It appeared to the tribunal during the hearing that the offices are not fully occupied at the present time, which the respondents say is relevant to their case. Smedvig Capital Limited are the leasehold owners of the commercial space, with Smedvig St. James Limited, the freeholders, a company registered in Jersey. It appears that the building was constructed in 2012-2013 and was described by Mr. Fieldsend as 'high value units'.

7. It is not disputed that the building was fitted with a non-standard 'misting system' supplying each of the units which when activated sent out a mist of water in the event of a fire. The system 'received' its supply from the water mains. This system was in existence when the flats were sold. The system was certified under the relevant Building Regulations in 2015.

8. It also does not appear to be disputed that the seals to the gas cannisters triggering the system appeared to have failed and required replacement. In addition to the seals some of the additional infrastructure associated with the cylinder and pump in the plan room was at the end of its useful life. The applicants sought a recommendation from the contractors responsible for the installation and maintenance of the system, Marioff, and this recommendation was that all seals, cylinders, valve seals and hoses should be replaced. This work was completed on 17 and 18 February 2021 and is the subject of the retrospective application for dispensation.

9. At the time these repairs were carried out, it was identified that some of the sprinkler heads were leaking, and the system was therefore put out of commission until a full inspection of all the sprinklers could be carried out. This was completed on 22 February 2021, and Marioff advised at that time, that there was signs of corrosion/limescale, and that the sprinklers, ancillary pipework and seals should be replaced, the system cleaned, and because they believed the degradation of the system had been caused by hard water, the system should be disconnected from the mains and water imported to re-fill the system with fresh clean water. In Marioff's opinion this would extend the life of the system. These works are the subject of the prospective application for dispensation.

The applicant's case:

10. Mr. Fieldsend took us through the bundle. He said that due to the constraints of the building, it had not been possible to install the more usual sprinkler system, and that, contrary to the respondents' views, the fire suppression was not only for the benefit of the commercial units but was also for the benefit of the residential occupiers. He also said that each of the respondents, is the original lessee and had occupied/owned their unit since the first lease sales.

11. He said that there was no header tank in the building (because of the height constraints) and that there was an inadequate water pressure to the building. He referred to the approval of the system at pages [4.1.5 – 4.1.7] of the bundle. At page [253] he also drew attention to the Building Regulations certificate and stressed that this had been obtain prior to the occupation of the residential units.

12. Although the work that had already been carried out did not require access to the units, the proposed works did, and this had been refused by the respondents. He said that his client had not wished to apply for injunctions to gain access but preferred to have the determination under S.20ZA as a precursor to obtaining access, assuming that dispensation would be granted.

13. It was his view that the respondents had not suffered any prejudice as per Daejan v Benson[1] because they had a remedy under S.19/S.27A of the Act where they could make an application to the Ft-T for a determination of reasonableness and payability of the final costs.

14. He said that the applicant's approach was rational and well-reasoned. The works were not 'inappropriate' but were urgently required due to their nature.

[1] Daejan Investments Limited v Benson and others [2013] UKSC 14

15. He said that it was not challenged by the respondents that the applicant had a repairing obligation, he said that following the judgment in *Waaler v Hounslow*[2] and that the choice of repair was at the discretion of the landlord.

16. He said that the objectors missed the point of the need for a system and that it was better with than without, particularly when reasons for the installation were considered.

17. He also said that the objections raised by the respondents were in fact 'observations' as per S.20, and that these had been considered and responded to by the applicants, and the necessity for a system had not been challenged by the respondents.

18. He drew the tribunal's attention to the Stay Safe UK Report relied on by the respondents and said that he did not accept this as expert evidence because it did not contain a statement of truth or confirm the writers' obligations to the tribunal. He did not however object to the report's inclusion in the bundle.

19. He said that the respondents had had plenty of time to seek expert evidence or obtain alternative quotations for the works but had not done so, and that no 'terms' should be imposed on his client because no relevant prejudice had occurred, and the respondents would be in the same position now as if the full S.20 consultation had been carried out. He also said that the respondents have not wasted any expense, because their material could be used in any S.27A application.

20. With respect to the S.20C application he said that it was not just and equitable to make such an award, that it was self-evidence the works were required, and that the application should be refused.

The Respondents' case:

21. Mr. Webb's submission in relation to the retrospective application were, that in the absence of urgency, it would be unreasonable to not consult with the respondents. He said that no evidence had been supplied by the applicants in the form of expert reports to say the works were urgently required, and that the applicants relied on an Acord report that had been produced in 2012 prior to the building being redeveloped. It was not a report that addressed the urgency of the works, or whether different system should be used.

22. He said that no Fire Risk Assessment had been undertaken by the applicants, and that there was no evidence that works should be done now or were required for Building Control purposes. Despite the

[2] The London Borough of Hounslow v Waaler [2017]EWCA Civ 45

applicants not applying for injunctions, the respondents had been threatened with this action, but it had not been pursued, and this confirmed that the works were not urgent, and it was therefore hard to see why consultation could not be undertaken.

23. He relied on the report by Stay Safe UK Limited that had been the result of an inspection of the property and perusal of the documents by Mr. Henry Lloyd MRICS CbuildE MCABE MIAS and Barry Kiddell who was the former Head of Building Control at the London Borough of Merton from 1992 to 2016. In their report Stay Safe said that the building did not require a sprinkler system under the Building Regulations at the time the redevelopment took place. This seemed to confirm the 'belt and braces' comment by Mr. Fieldsend, and that the system installed would not have complied with the British Standards being the relevant regulations in any event.

24. On the issue of prejudice, he said that it was possible that the respondents could run an argument during a determination under S.27A, it would actually be a fait accompli, he said that a positive determination under S.20ZA for the applicant would reinforce and give effect to S.19 of the Act. That there was already prejudice to the tenants because the initial repair works had been carried out at a cost of £30,000 without the residents being consulted.

25. He also said that no contractor would give a sensible quotation, because work had already been done, and that it could not be 'right'. He said that it was necessary to consider whether works were appropriate and, on the Stay, Safe report they were not required, would not be to a British Standard and there would be other cheaper systems.

26. The other issue that concerned the respondents was the fact that any repaired/replaced system probably had a life span of 5 years as discussed in the papers, and that a sprinkler system had a much longer life.

27. The Acom report had already looked at sprinklers and had concluded that a standard tank would not be appropriate, but the applicants had not considered any alternative non-standard fittings, which might be a reasonable alternative.

28. It was his opinion that the applicants were 'locked into' a contract with Marioff, but that it was only right that alternative solutions be explored, given that although this was not an application to determine payability, it was likely that each leaseholder would be required to pay in excess of £10,000 towards the work, against the estimate of £5,000 from Stay Safe.

29. He said in relation to the S.20C application that if dispensation was granted the application should be considered, and that if dispensation were to be granted, a condition should be imposed that the applicant should not recover its costs but pay the respondents' costs. These he said were not included within the bundle but could be provided at a later stage.

Mr. Somani.

30. Mr. Somani briefly said that he agreed with Mr.Webb, that there was no need for a new system because of the presence of a dry-riser, and that the new system would only last for 5 – 6 years even with imported water. It was not known what the difference in running costs would be with the new system.

Mr. Fieldsend's final response:

31. Mr. Fieldsend reiterated his points and stressed that the residents were not prejudiced by the lack of consultation, that it was important to remember that observations had been made by the respondents to the proposals and these had been responded to by the applicants. That we should remember the compromising space in the building and the rejection of sprinklers by the applicants' advisors

32. He finally said that the extent to which non-compliance with S.20 prejudices the respondents had not been targeted and that it was still possible for the tenants to argue that an alternative system should be installed, but that no argument had been made of what they would have done differently had they been consulted.

33. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The retrospective application:

34. The tribunal considers that it should dispense with the requirements to consult in respect of the repairs to the seals etc, because this was a reasonable response to the disrepair of the system. However, the tribunal is not persuaded that the responses by the respondents could be classified as 'observations' as suggested by the Regulations, and that the failure to involve the residents in the decision to carry out repairs, has resulted in relevant prejudice. The respondents were not in a position to obtain alternative quotations, and may have been able to do so, on the evidence of the Stay Safe report. In the circumstances, the tribunal grants dispensation for this part of the application on condition that the applicant reimburses the respondents costs of these proceedings.

35. The respondents should therefore quantify their costs so as to enable a summary assessment and send this to the applicants within the next 28 days for consideration. If the parties cannot agree the costs, then the respondents may make an application to this tribunal for a determination of that matter.

The prospective application:

36. The tribunal declines to grant dispensation in relation to the prospective works because the applicants have not demonstrated that the works are necessary, given the use of the building and the existence of a dry riser inlet.

37. In addition, the applicants rely on historic advice, and it would have been prudent for them to have had a fire risk assessment carried out to support any works.

38. The tribunal does not suggest that the landlord may choose whichever system they wish, but where the respondents have produced evidence disputing the need and efficacy of the landlord's proposals, some further investigation, involving the respondents is necessary in the tribunal's view, and this can be achieved through a full S.20 coonsultation.

Application under s.20C.

39. Having heard the submissions from the parties and considering the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Tribunal Judge Hamilton-Farey **Date:** 1 June 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).