FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/LDC/2021/0244**
Property	**:**	**Hippersley Point**
Applicant	**:**	**Adriatic Land 5 Limited**
Representative	**:**	**JB Leitch Limited**
Respondent	**:**	**The leaseholders of Hippersley Point**
Representative	**:**	**In person at present**
Type of Application	**:**	**Application for dispensation under s 20ZA Landlord and Tenant Act 1985**
Tribunal Member	**:**	**Judge Shepherd** **Chris Gowman MCIEH**
Date of Decision	**:**	**20th December 2021**

DECISION

The application for dispensation is approved.

1. In this case the Applicants, Adriatic Land 5 Ltd ("The Applicants") seek dispensation from the consultation requirements under section 20 of the

Landlord and Tenant Act 1985. The application is made pursuant to section 20 ZA of the same act.

2. The Applicants are the freehold owners of a building at Hippersley Point, 4 Tison Bright Square, Felixstowe Road, Abbey Wood, London SE2 9DR. The building is a single block. It is 10 storey and is mixed use with commercial interest on the ground floor and 32 residential apartments above. The height of the premises exceeds 18 m.

3. In their application the Applicants state that following guidance relating to the construction of the external wall system of the premises it had been discovered that the construction comprises combustible materials and poses a risk of fire spread. Accordingly, remediation works are required to the external façade of the premises. In addition, interim fire safety measures are required. The Applicants' agent began the consultation process in relation to the cladding works. However, the consultation process has not been completed. This is because it is stated that the interim works are urgent. In addition, it is stated that the design and build method adopted for the works means that the applicant is unable to complete the consultation process. Pausing here the tribunal were unimpressed by this second argument. The fact that a building scheme is a design and build scheme with a chosen consultant does not in anyway preclude a freeholder from carrying out consultation in relation to that particular consultant. The focus here therefore is on the urgency of the works and the question of prejudice.

4. The Tomasson Partnership Ltd were instructed by the Applicants' agents and they appointed the Design Fire Consultants Ltd to identify the external wall construction details and to provide an opinion as to whether there was compliance with the Regulatory Reform (Fire safety) order 2005. The Design Fire Consultants made recommendations in respect of the long term remedial works in a report dated 21 September 2020. Tomasson produced a report on 16 October 2020. The Tribunal has considered both reports which identify

remediation measures that are required to ensure compliance with the standards in the 2000 edition of Approved Document B. Self-evidently because these works are proposed the building does not comply with ADB. The Applicants intend to put this right by carrying out works including the replacement of combustible cladding, composite panels, metal clad areas, the installation of cavity barriers and the taking down and reinstatement or replacement of existing brickwork and metal composite cladding. These works were set out in Tomasson's tender appraisal report dated 4 August 2021. In the report Thomasson requested that contractors provide a price for two main options for remediation, option one was replacing the brickwork with new brickwork option two was reusing the brickwork and a third option was replacing the brickwork with brick slips.

5. Tenders were sought from seven contractors. Unfortunately, only two contractors tendered which probably does demonstrate that there is a high demand for contractors for this sort of work presently. The two contractors to quote were Intelligent FS Ltd and Fil Metalbrau UK Ltd. The lowest tender was from Intelligent FS Ltd but a decision was made to go with Fil Metalbrau based on the standard of documentation and the programme duration. The intention is to proceed with the cladding works via a design and build contract procurement route. There is also a plan to carry out interim works following a holistic fire risk assessment of the premises. These works seek to carry out the extension of existing fire alarm systems at the premises. The works are in accordance with the National Fire Chiefs Council revised documentation issued on 1 October 2020. The Applicants have obtained tenders from three firms for the interim works and they identify an intention to proceed with Future Fire Systems who provided the lowest quote of £33,354 excluding VAT.

6. The Applicants have unsurprisingly made an application for funding under the government Building Safety Fund. It is not known yet whether full or partial funding will be obtained for the work proposed however if the funding is approved it is likely that the works will need to commence soon after.

7. Leaseholders from a number of the flats in the building have objected to the dispensation application. The objections can be summarised as follows:

- The consultation should have been seen through so that alternative quotes could have been sought by the Applicants.

- The leaseholders have not been given sufficient time to seek their own alternative contractors for the tender process.

- The alleged urgency in the application was caused by delays by the Applicants themselves.

- The leaseholders complain that they have not been sent relevant document's in time for them to consider them.

- The Applicants had sufficient time to carry out the consultation exercise.

8. It must be stressed at the outset that any decision made by the Tribunal at this stage pursuant to section 20ZA does not in anyway inhibit the leaseholders from challenging the reasonableness and payability of the cladding works in the future pursuant to section 27A of the Landlord and Tenant Act 1985.

Relevant law

Landlord and Tenant Act 1985,s.20ZA

20ZA Consultation requirements: supplementary

(1) Where an application is made to [the appropriate 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.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(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.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Daejan

9. In Daejan Investments v Benson [2013] UKSC 14, the landlord was the freehold owner of a building comprised of shops and seven flats, five of which were held by the tenants under long leases which provided for the payment of service charges. The landlord gave the tenants notice of its intention to carry out major works to the building. It obtained four priced tenders for the work, each in excess of £400,000, but then proceeded to award the work to one of the tenderers without having given tenants a summary of the observations it had received in relation to the proposed works or having made the estimates available for inspection. The tenants applied to a leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985 , as inserted, for a determination as to the amount of service charge which was payable, contending inter alia that the failure of the landlord to provide a summary of the observations or to make the estimates available for inspection was in breach of the statutory consultation requirements in paragraph 4(5) of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 so as to limit recovery from the tenants to £250 per tenant, as specified in section 20 of the 1985 Act and regulation 6 of the 2003 Regulations in cases where a landlord had neither met, nor been exempted from, the statutory consultation requirements. The landlord applied to the tribunal under section 20(1) of the Act for an order that the paragraph 4(5) consultation requirements be dispensed with, and proposed a deduction of £50,000 from the cost of the works as compensation for any prejudice suffered by the tenants, which offer they refused. The tribunal held that the breach of the consultation requirements had caused significant prejudice to the tenants, that the proposed deduction did not alter the existence of that prejudice, and that it was not reasonable within

section 20ZA(1) of the Act, as inserted, to dispense with the consultation requirements. The Upper Tribunal (Lands Chamber) dismissed the landlord's appeal and the Court of Appeal upheld the Upper Tribunal's decision.

10. The Supreme Court , allowing the appeal (Lord Hope of Craighead DPSC and Lord Wilson JSC dissenting), held that the purpose of a landlord's obligation to consult tenants in advance of qualifying works, set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 , was to ensure that tenants were protected from paying for inappropriate works or from paying more than would be appropriate; that adherence to those requirements was not an end in itself, nor was the dispensing jurisdiction under section 20ZA(1) of the 1985 Act a punitive or exemplary exercise; that, therefore, on a landlord's application for dispensation under section 20ZA(1) the question for the leasehold valuation tribunal was the extent, if any, to which the tenants had been prejudiced in either of those respects by the landlord's failure to comply; that neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation was a relevant consideration for the tribunal; that the tribunal could grant a dispensation on such terms as it thought fit, provided that they were appropriate in their nature and effect, including terms as to costs; that the factual burden lay on the tenants to identify any prejudice which they claimed they would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted; that once a credible case for prejudice had been shown the tribunal would look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice; and that, accordingly, since the landlord's offer had exceeded any possible prejudice which, on such evidence as had been before the tribunal, the tenants would have suffered were an unqualified dispensation to have been granted, the tribunal should have granted a dispensation on terms that the cost of the works be reduced by the amount of the offer and that the landlord pay the tenants'

reasonable costs, and dispensation would now be granted on such terms. Per Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Sumption JJSC. (i) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted (post, para 45). (ii) Any concern that a landlord could buy its way out of having failed to comply with the consultation requirements is answered by the significant disadvantages which it would face if it fails to comply with the requirements. The landlord would have to pay its own costs of an application to the leasehold valuation tribunal for a dispensation, to pay the tenants' reasonable costs in connection of investigating and challenging that application, and to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the tribunal would adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue (post, para 73).

Determination

11. The Tribunal will allow the application for dispensation in this case. It is clear that the building is presently unsafe in terms of fire risk. The public's attention is focused on this worrying issue at present. It is also clear that the building may not have been built to satisfactory standards at the outset. This situation has to be rectified. It is simply not an option to delay works to unsafe premises.

12. The Tribunal accepts that the Applicants have sought to tender the works widely. The Tribunal also accepts that the Applicants have to a limited degree at least sought to keep the leaseholders up-to-date as to the proposed works.

13. The focus on any dispensation application has to be on prejudice suffered by leaseholders as a result of the failure to consult. Here it is impossible to identify

any prejudice suffered by the leaseholders because no comparative estimates (even on a global level) have been provided by the leaseholders. If such estimates had been provided the Tribunal would be able to assess the value of potential prejudice suffered. It seems likely that had the leaseholders sought to obtain alternative estimates they would have suffered the same problems as the Applicants in trying to get quotes for this sort of work. The question of fire safety in large buildings is very much a live issue. Companies that provide re-cladding services are likely to be overwhelmed with enquiries considering the number of buildings affected across the country.

14. Whilst it would have been preferable that the Applicants had carried out a full consultation process there is no real evidential indication that this would have made any difference. The tender analysis report is detailed. This is not a case in which the Applicants are seeking to avoid their responsibilities in relation to the leaseholders. Far from it they are seeking to ensure that an unsafe building is made safe as quickly as possible.

15. If funding is given by the government for the works this is plainly to the advantage of the leaseholders and any obstacle put in front of the application e.g. a delay in works within a timescale imposed by the government will itself cause prejudice to the leaseholders.

16. Accordingly, the Tribunal has no hesitation in confirming that dispensation should be given in this case. The Tribunal does however consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. This is because dispensation is essentially a forbearance by the Tribunal and it would be unfair for the landlord to recover costs from any of the leaseholders living at Hippersley Point in the present case. Although not all of the leaseholders raised objections the Tribunal were satisfied that those that did were making general submissions which applied to all of the leaseholders. Accordingly, the dispensation is given on

condition that the Applicants are prohibited from seeking their costs of this application from the leaseholders at Hippersley Point.

Judge Shepherd

30th June 2022

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
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 state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.