FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/LDC/2019/0099**
Property	**:**	**The Lumiere Building, 544 Romford Road, E7 8AY**
Applicant	**:**	**Chaplair Limited**
Representative	**:**	**Katie Gray, instructed by Glovers Solicitors**
Respondents	**:**	**The leaseholders of The Lumiere Building**
Representative	**:**	**(for those 27 leaseholders objecting) Ms Townley (leaseholder of Flat 10)**
Type of application	**:**	**S20ZA application to dispense with consultation**
Tribunal members	**:**	**Judge Hargreaves** **Duncan Jagger FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**7th August 2019 (orally)** **9th August 2019 (written, with variation as to conditions)**

DECISION

On hearing the Applicant's application for the dispensation of the consultation requirements of s20 Landlord and Tenant Act 1985 in respect of works particularised in the witness statement of Benjamin Preko dated 1st August 2019 (tab 5 of the bundle) namely

(i) The removal of unsafe cladding and insulation materials from the exterior of the building
(ii) Making the building weatherproof pending the recladding of the building
(iii) Appropriate skip provision
(iv) Appropriate protective fencing provision

The Tribunal directs as follows:-

1. Dispensation from complying with the statutory consultation requirements of s20 LTA 1985 is granted in respect of items (i) (iii) (iv) above but not in respect of item (ii).

2. Dispensation is granted subject to conditions as follows

   (i) The costs of the de-cladding exercise are limited to the Avalon Abseiling quotation for £26,775 plus VAT
   (ii) In the case of the provision of skips and the removal of rubbish to be provided in relation to the removal of exterior cladding, the Applicant is limited to re-charging no more than £10,000 including VAT
   (iii) In the case of the provision of Heras type security fencing to be provided in relation to the removal of exterior cladding the Applicant is limited to re-charging no more that £10,000 including VAT
   (iv) By **5pm 21st August 2019** the Applicant shall provide (and make provision for circulation to each leaseholder who objects to this application and any others who want a copy) a method statement written by an appropriately qualified expert surveyor or engineer or project manager providing a detailed account of the intended methodology for removing the exterior cladding and in respect of the de-cladding project as a whole (including, without limitation to the generality of this direction), the proposed methods for removal and disposal of the cladding panels, the estimated time of the project, the size of the workforce, health and safety details as to a safe system of work, any impact assessment on the occupiers of The Lumiere
   (v) No later than **5pm 14th August 2019** the Applicant must issue each leaseholder/occupier with the name and contact details of a suitably qualified surveyor or engineer or project manager who can be contacted by any leaseholder during the de-cladding project in respect of any issues during both normal working hours and in the case of an emergency.

3. Costs: the Applicant shall not recover any of the costs of this application from the leaseholders.

REASONS

1. This decision has been provided in a short time since the hearing on 7th August with a view to enabling the Applicant to present it if necessary to insurers on Monday 12th August. Any brevity must be considered in this context.

2. The grounds for the s20ZA application were helpfully outlined in Ms Gray's skeleton argument which amplified Mr Preko's witness statement dated 1st August 2019. It became clear during the hearing that the details provided in this witness statement were inadequate in some respects: it should not be necessary when there is an application for s20ZA dispensation for the Tribunal to feel compelled to make inquiries as to basic facts, as all the relevant evidence should be fleshed out at the outset. Mr Preko's statement (tab 5 of the bundle) rather underlined why the leaseholders who appeared before us felt short-changed in respect of the quality of communication provided by the landlord and Salter Rex, the managing agents. The lack of detailed relevant information has at least in part resulted in the application of conditions.

3. In particular this is demonstrated by the fact that it only became clear at the hearing to those leaseholders who attended (five) and/or as the result of reading Mr Preko's statement that: (i) planning permission would be required for any re-cladding, which would add time to the process (ii) weatherproofing is therefore necessary in the meantime (iii) the costs of a waking watch which will be necessary if the cladding is not removed will cost around £10,000 pcm (tabs 16-18)[1].

4. This is a post-Grenfell case in which the evidence is accepted that the construction of the property requires the cladding to be removed (p118, p149). The timing is due to the facts that a report on the cladding was received on 12th June 2019 (tab 10). That was followed by a fire risk assessment report which concludes that the cladding is high risk (tab 10, p162). There is no plan for re-cladding as the Applicant's case is that a method has to be devised depending on what transpires after the de-cladding is completed.

5. To add to the sense of urgency (and indeed pressure on the Tribunal) it is said that the insurers will decide what to do about the premium on 12th August, the clear implication being that if the de-cladding cannot go ahead speedily, there will be adverse consequences in terms of insurance (including the requirement to implement a waking watch system). We accept that there is urgency in the application as presented to the Tribunal, though there is a slight mismatch between the application itself (tab 1) and application as presented at the hearing based on Mr Preko's statement and Ms Gray's skeleton argument.

6. We deal with the application as presented at the hearing and that is encapsulated in his statement, paragraphs 4 and 8 (p18B-C). So the focus of

[1] The Applicant submits that no s20/s20ZA is required for a waking watch: be that as it may, it has significant costs implications for the leaseholders which should be clear to them in the context of issues raised in this application, so they can consider their interests properly

the hearing was (i) de-cladding (ii) associated skip hire costs (iii) associated security fencing costs (eg Heras) (iv) weatherproofing.

7. The basic plan is three stage: (i) remove cladding (ii) weather proof (iii) re-clad once a decision has been made and planning permission has been obtained. The s20ZA application seeks advance dispensation in relation to (i) and (ii) with the intention of going through a proper s20 consultation process on stage (iii). Stage (iii) also requires a compartmentation survey to be carried out, and the Applicant's case is that this has to await the de-cladding. It appears that samples only have so far been removed, not entire panels.

8. It was initially thought in 2017 that the cladding was not high risk (p64-65). New regulations introduced in December 2018 have changed that and prompted the further testing and report referred to above.

9. There are 71 flats over 10 floors in a former council office block, with undercroft parking. Ms Townley (Flat 10) spoke on behalf of the 27 leaseholders who have objected to the application. Just under one third of the leaseholders objected to the application. So it is fair to assume that more support the application than object to it, or could not be bothered either way to respond (only fourteen responded with "no objection"). We are grateful to Ms Townley for the way in which she made her submissions and expressed concerns with realism and brevity, by usefully outlining the objectors' position on the items listed in paragraph 8 of Ms Gray's skeleton argument.

10. To recap, the objectors' oppose (a) (permission for de-cladding and weatherproofing); would prefer (b) (full-consultation at this stage not just for re-cladding); so object to (c) (the de-cladding quotes); regard (d) as irrelevant at this stage (the Avalon Abseiling quote for de-cladding); and agree that the Avalon quote works out at about £453 per flat.

11. The Applicant has obtained quotes for de-cladding. The decision is to proceed by using an abseiling firm: see the cheapest quote which is from Avalon Abseiling dated 27th June 2019 (tab 13) because that is £26,775 plus VAT as opposed to scaffolding costs exceeding £150,000. But the quotation at p194 states that "It is unclear at this stage the removal method for the cladding and the fixings. Once we know the method to be used adjustments to the quotation many need to be applied." That seems potentially disadvantageous and is not referred to in Mr Preko's evidence at paragraphs 6-7 (p18B) which implies the quotation is fixed. It appears to us that Ms Townley also regarded this as a fixed quotation.

12. The fact that there is no method statement was a matter of concern to us and we canvassed this at the hearing. We do not recall noticing or asking for submissions on this sentence in the Avalon quote. The answers we got were less than convincing. We are not assured that anyone has thought through who will manage the de-cladding apart from the in-house team at Salter Rex, and there is no evidence to suggest who if anyone there has relevant expertise. The evidence begs the questions: what is the plan for de-cladding?

How reasonable is it to expect abseilers to know what to do? Plainly, the quote above suggests they expect to be told, but we were not provided with further details except that they have no more than a three week lead in period.

13. Exchanges on this issue made us canvass the requirements we set out above as conditions (iii) and (iv), and these were, we think, ultimately accepted by Ms Gray as a somewhat inevitable outcome/resolution to meeting the Tribunal's reasonable line of questioning on this matter. They certainly meet a huge gap in the Applicant's plans and are furthermore justified by the line quoted in the Avalon estimate. However, on further consideration we consider the condition imposed at (i) is reasonable and required to avoid escalating costs on a basis potentially not available for consideration by the Tribunal. This was not outlined by us at the hearing because we had not seen the qualification in the Avalon quote which is set out above. If (i) produces a real dilemma for the Applicant, then it will have to return to the Tribunal on an application for further dispensation. But the case was presented to us and the leaseholders in Mr Preko's evidence on the basis that the Avalon quotation provides a firm price and that is not the case for at least one of the reasons which troubled us ie the lack of a method statement produced by an expert. As we say, clearly Avalon have not seen one either.

14. Furthermore, there are no quotations for skip hire/rubbish removal or security fencing. Again, we were surprised and considered that some basic ball park figure could and should have been provided, as both are important elements of the proposed stage (i) de-cladding works. Again, that generated an exchange on conditions (i1) and (iii), which seem to have been accepted by Ms Gray as reasonable.

15. As to refusing s20ZA permission at this stage for weatherproofing, Ms Gray suggested that this part of the application be adjourned for the provision of further evidence as a response to our concerns. There is simply no evidence before the Tribunal as to proposed methods or costs or length of project or management of the weatherproofing of the building (to name but a selection of the sort of issues on which we would expect evidence – preferably expert - to be provided, even if preliminary). If there is no evidence of relevance on weatherproofing then there is nothing on which the Tribunal can reasonably exercise the discretion required under s20ZA. It would simply be sanctioning a request by the Applicant, no details of which have been provided. On this important point we made it clear that the Applicant will have to make another application supported by clear evidence on which an informed view can be taken. Obviously we accept – as do the objectors – the principle of weatherproofing, but the application needs to be supported by more than a statement of the obvious. In this instance the Applicant's case does not get off the ground so to speak.

16. The leading authority in relation to s.20ZA dispensation requests is *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 ("*Daejan*") in which the Supreme Court set out guidance as to the approach to be taken by a Tribunal when considering such applications. This was to focus on the extent, if any, to which the lessees were prejudiced in either paying for inappropriate

works or paying more than would be appropriate, because of the failure of the landlord to comply with the consultation requirements. In his judgment, Lord Neuberger said as follows;

> 44. Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
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> 45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with.

17. The factual burden of identifying some relevant prejudice is on the leaseholders. They need to show that they have been prejudiced by the failure of the landlord to comply with the statutory consultation procedure. If a credible case of prejudice is established, then the burden is on the landlord to rebut that case. In this case, in respect of weatherproofing, skips, fencing, expertise in project management and liaison, the objectors have been able to rely on gaps in the Applicant's evidence, although they accept that they did not file any evidence of prejudice themselves. On these items the Applicant has failed to provide any evidence but we consider that the conditions as a whole enable the de-cladding to proceed.

18. The Tribunal's discretion under s20ZA is wide. Although the objectors have failed to demonstrate that they would be prejudiced as required by *Daejan* in respect of the de-cladding, they would have had a hard time proving prejudice in the absence of any evidence on the matters listed. To that extent we consider it reasonable to dispense with the consultation requirements relating to de-cladding only, and on the basis of certain conditions which are justified by the evidence as presented to us.

Judge Hargreaves
Duncan Jagger FRICS
9th June 2019

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).

Appendix of relevant legislation

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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).