FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LDC/2021/0107**
Property	**:**	**The Glass House, Royal Oak Yard, 156b Bermondsey Street, London SE1 3GE**
Applicant	**:**	**Dreamchoice Ltd**
Representative	**:**	**Property Partners Management Ltd**
Respondents	**:**	**The 25 leaseholders at the property as set out in the list annexed to the application**
Representative	**:**	**Farleys Solicitors LLP**
Type of application	**:**	**Dispensation from statutory consultation requirements**
Tribunal	**:**	**Judge Nicol** **Mrs S Redmond MRICS BSc (Econ)**
Date and Venue of hearing	**:**	**10th June 2021;** **By video conference**
Date of decision	**:**	**11th June 2021**

DECISION

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(1) The Tribunal refuses to grant the Applicant dispensation from the statutory consultation requirements in relation to the fire safety works at the property which are the subject of the notices issued on 14th April and 2nd June 2021; and

(2) The Tribunal further refuses the Respondents' application for costs.

Reasons

1. This application for dispensation from statutory consultation requirements under section 20ZA of the Landlord and Tenant Act 1985

was heard by remote video conference held on 10th June 2021. The attendees were:

- Mr Daniel Cusack, Ms Coleen Zaninello and Ms Anemone Jasmin-Baker from Property Partners Management Ltd;
- Ms Claire Bunbury, counsel for the Respondents; and
- Mr Mark Hague from Farleys Solicitors LLP.

2. The documents to which the Tribunal was referred were contained in a bundle of 177 pages, compiled by the Applicant but including the material relied on by the Respondents. The evening before the hearing the Applicant provided a revised bundle with an additional 9 pages of consultation documentation. The Respondents did not object.

The Facts

3. The Applicant is the freeholder of the subject property, a residential block of 25 apartments. Their agents are Property Partners Management Ltd. The Respondents are the leaseholders of the 25 apartments.

4. On 20th January 2021 Property Partners obtained a Health, Safety and Fire Risk Assessment Report identifying a medium likelihood of fire and potential consequences of moderate harm (Report page 40), with an Action Plan containing 23 items (Report pages 42-43). Most of those items were identified as the highest priority for which the timescale was specified as "immediately or as soon as reasonably practicable". The items included:

- Arrange for the timber cladding to balconies to be replaced as soon as possible with a non-combustible system.
- All residents must be made aware that the balconies must be kept clear of ALL storage.
- Follow the recommendations made within the EWS1 (External Cladding) report by Consult Construct November 2020 regards replacing combustible cladding. (The bundle did not include this report.)
- Arrange for all compartmentation works to be carried out **urgently** if not install a WAKING WATCH covering the top three floors (Duplex units).
- Arrange for the doors to be replaced with appropriately fire rated doors.
- Arrange for all gaps and holes in the riser cupboards to be filled with suitable fire rated material.
- It is recommended that all personal items be removed from the communal areas and walkways.

5. By letter dated 11th February 2021 the London Fire Brigade ("LFB") notified the Applicant that, following an inspection, they recommended a schedule of actions to be taken by 3rd June 2021. In particular, they were concerned about adequate emergency routes and exits and achieving a suitable level of compartmentation and fire stopping.

6. Although not evidenced in the bundle, Mr Cusack told the Tribunal that Property Partners then did a number of things, including:

   (a) Meeting with 7 or 8 contractors and a couple of consultants on site in order to scope the necessary works.

   (b) Receiving quotes from some of those contractors.

   (c) Carrying out two flat door surveys, the first on 17th February 2021.

   (d) Carrying out fire safety work to the communal doors on 31st March 2021.

   (e) Conducting a number of visits to the building to clear balconies and communal areas of residents' belongings.

7. The Respondents appeared to be unaware of this work by Property Partners and, assuming nothing at all had been done between the LFB's letter of 11th February 2021 and the issue of this application, criticised them for an unnecessary delay of 2 months. The Tribunal is not satisfied that this criticism is justified.

8. On 18th March 2021 a Risk Assessor from Property Partners met the LFB on site. The LFB warned him that works should be completed within 16 weeks or they risked a waking watch service being implemented.

9. By letter dated 14th April 2021 Property Partners sent out a first notice in purported compliance with section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003. The works to be carried out were said to be remedial works to the flat doors and fire stopping, with details appended to the notice. Observations and any contractor nominations were invited by 19th May 2021.

10. Although they had started the statutory consultation process, the Applicant judged that there was insufficient time to complete it. Therefore, also on 14th April 2021, they made the current application for dispensation from those requirements.

11. On 20th April 2021 Property Partners held an online meeting attended by 9 of the Respondents, 3 of their staff and Mr Tom Foster, a senior building surveyor with Consult Construct, to consider the matters raised in the section 20 notice. Amongst other matters, Property Partners indicated that they would be issuing the second notice required by the statutory consultation process but that, if works were not completed in a timescale to the LFB's satisfaction, a waking watch may need to be implemented.

12. Emails were also exchanged after the meeting in which some of the Respondents set out their objections. The Respondents then instructed Farleys Solicitors LLP who wrote to Property Partners on 6th May 2021. Property Partners replied on 7th and 10th May 2021 with detailed answers to various queries.

13. On 2nd June 2021 Property Partners issued a second section 20 notice which included:

(a) There were 3 tenders for the flat door remedial works ranging from £26,772 to £30,516.

(b) There was one tender for the fire stopping works of £36,117.25, one contractor having failed to return a tender.

(c) The tenders were available for inspection.

(d) None of the Respondents had taken the opportunity to nominate a contractor.

(e) The observations received in response to the first notice were summarised in an Appendix which included answers from Property Partners to various questions raised by the Respondents.

(f) Having read the Respondents' observations, Property Partners agreed not to proceed with the works to the lower floor doors for now but strongly advised the leaseholders of the lower floor apartments to change their doors for the safety of all residents and the building.

(g) Observations were invited by 7th July 2021.

14. One of the Respondents, Mr Rupert Lord, provided what purported to be a witness statement dated 12th May 2021 in response to the dispensation application. The fact that he did not attend the hearing for cross-examination would have been subject to stringent criticism from the Tribunal but for the fact that the statement was not of matters witnessed by Mr Lord but a statement of case, setting out a series of comments on the documents and submissions, and it was treated as such by the Tribunal. Mr Lord made a number of points:

(a) The substantive part of Mr Lord's statement starts at paragraph 4 by saying, "The Application is opposed as it appears it is being used as a way of circumventing the interests of the Respondents in favour of the Applicant's own interests." In paragraph 5 he alleges that, "The Application appears to have been made to prevent disclosure" of relevant matters. These allegations would appear to be a follow-up to an allegation made in Farleys's letter of 6th May 2021 that "the freeholders pockets are being lined by their associated companies being contracted to do works that are not required." These are serious allegations which should not be made without a solid foundation. The allegations were made after professional legal advice had been obtained. Property Partners invited Farleys to withdraw the allegation in the letter of 6th May 2021 but they have not done so, despite not pursuing it any further and not making available any evidence which could have supported it. On the material in front of the Tribunal, the only possible conclusion is that Property Partners, while not acting perfectly, have behaved professionally and conscientiously and that these allegations were grossly unfair and should never have been raised.

(b) Mr Lord goes on to state that the purpose of the section 20 Landlord and Tenant Act 1985 procedure is to hold the landlord to account. However,

the Supreme Court held in *Daejan* that accountability is *not* one of its purposes (see further below).

(c) In paragraph 5 Mr Lord objects to not being provided with estimates but some had, in fact, already been provided by email dated 10th May 2021.

(d) In paragraph 6 Mr Lord alleges that dispensation would deprive the Respondents of the required contents of the first notice under the statutory process, namely a description of the proposed works, a statement of why the landlord regards them as necessary and an invitation to make observations on a particular timescale and to a particular address and to nominate a contractor. This submission makes no sense in the light of the fact that Property Partners issued the first notice on the same day as the application. By the time of Mr Lord's statement, the Respondents had received the notice, participated in a meeting called by Property Partners to discuss the issues arising from it and had taken the opportunity to provide written observations, both direct to Property Partners and through their solicitors.

(e) Mr Lord made a further point which Ms Bunbury emphasised in her submissions, namely that, in their letter of 11th February 2021, the LFB had characterised the matters they wanted done as "recommendations". Mr Lord accuses the Applicant of being "disingenuous" on the basis that the LFB's deadline of 3rd June 2021 was not "hard and fast". In the Tribunal's opinion, it is the Respondents who are being disingenuous. It is clear that, in context, the LFB were not suggesting that the recommended steps were optional but, rather, not subject to formal action at that stage. The LFB's letter carried the clear threat of further action if works were not carried out to their satisfaction. Property Partners relied not only on what the LFB said in their letter of 11th February 2021 but also on what the LFB officers said to their staff verbally at the site meeting on 18th March 2021. In the Tribunal's opinion, Property Partners were quite right to be concerned that, if they did not comply with the deadline, the LFB might take further action against them or the Applicant or may insist on further fire safety steps, including a waking watch, which would incur significant expense for the Respondents.

(f) Mr Lord does make a good point that Property Partners did not ask the LFB about the potential consequences of failing to meet their deadline, at least after the LFB's initial warning at the site meeting on 18th March 2021. There would have been, and there is, a range of actions available to the LFB depending on their view of how close the necessary works are to completion and of the efforts of Property Partners towards getting them done. Without knowing what the LFB might want to do, it is difficult to judge just how urgent the works are. Property Partners have recently tried to contact the LFB about this but were unable to reach them for a discussion before the hearing.

15. It is noteworthy that Mr Lord's statement does not address the one factor that looms above all others, namely the safety of the residents. There is nothing in his statement which acknowledges the fact that Property Partners and the LFB were seriously concerned that residents were, as

the Fire Risk Assessment put it, at risk of injury, including serious injury, if a fire were to break out.

The Law

16. Under section 20ZA(1) of the Act, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:

(a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42]

(b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]

(c) 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. [45]

(d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]

(e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]

(f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]

(g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]

(h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]

(i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

(j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]

(k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]

17. The Tribunal has to consider whether dispensation should be granted as at the date of the hearing and in the light of matters known by the time of the hearing. As at the date of the hearing, the Applicant has yet to fail to comply with any part of the statutory consultation process and the Respondents have not suffered any prejudice.

18. As for the future, the remaining parts of the consultation process under Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 are:

(a) The period for responding to the second notice expires on 7th July 2021. The Respondents say they haven't yet had sufficient time to consider the information which has just been provided in the second notice of 2nd June 2021 and that they need the full consultation period in order to provide any observations.

(b) The Applicant will have to consider any observations provided by that date – in relation to the first notice, it took them no more than 2 weeks after the expiry of the consultation period before they were ready to move on to the next stage.

19. On that basis, the consultation process is now likely to be complete within a further 6 weeks. Neither party anticipated when the application was made that this would be the case at the time of the hearing before the Tribunal but it is the situation which the Tribunal now has to address. The Respondents' case is that the situation has never been so urgent as to require any attenuation of the consultation process. Even if that were not true in the circumstances then known to the parties in April, the argument is stronger when there are only 6 weeks left.

20. The Tribunal pointed out to Mr Cusack that granting dispensation now would only make a difference of about 6 weeks and asked him what was the basis for doing so, given that it was a relatively short time. He raised concerns about he, his company or his client potentially being accused of having committed a criminal offence but that is not a realistic possibility when a combination of the law and a Tribunal decision would have forced his hand.

21. Mr Cusack then said he remained concerned about what action the LFB could take. As he had experienced before in relation to other properties, they could attend without notice and then question why works had not even commenced, let alone completed. There still remained the risk of having a waking watch imposed but, if that happened, it is the Respondents who would bear the brunt of the consequences of that and they are insistent both that they do not believe that risk is significant and that they would not regard a delay in order to complete consultation as being the Applicant's responsibility.

22. Before considering matters such as prejudice to leaseholders or conditions to be attached to a grant of dispensation, there is a precedent question which didn't come up for consideration in *Daejan*. That question is whether there is any point to granting dispensation. Put simply, there must be a rational basis for granting dispensation in the first place. In this case, that comes down to whether the Applicant's concerns about action from the LFB are justified or not. However, as intimated above, the problem is that Mr Cusack does not know what the LFB's current attitude would be, having not received an update on their position since 18th March 2021.

23. It is for the Applicant to show that dispensation should be granted. If the Tribunal had considered the application in April, it would have been more likely to have granted dispensation but the delay caused by the Tribunal's inability to bring the application on for hearing any sooner has allowed matters to move on.

24. The Applicant and Property Partners are to be commended for looking to complete as much of the consultation process as they could before the Tribunal hearing, thus answering many of the Respondents' concerns and allowing them at least some significant participation in the decision to carry out fire safety works. However, the Tribunal is not satisfied that they have made out their case that the consultation process now needs to be brought to an end just 6 weeks before it is due to end anyway.

25. Given the risk identified in the Fire Risk Assessment Report and the LFB's intervention, it is entirely understandable why the Applicant and Property Partners issued this application and the question whether to grant dispensation was finely balanced. However, the statutory consultation process is an important right for leaseholders which should only be removed when there is a clear basis for doing so. In the circumstances prevailing by the time of the hearing, the Tribunal has decided to refuse dispensation.

26. The Respondents sought their costs of responding to the application. They provided a statement of costs in court form N260 totalling £8,910 which Ms Bunbury asserted should be awarded on an indemnity basis. However, the jurisdiction relied on for the award of costs is that referred to in *Daejan* and recently discussed further in *Aster Communities v Chapman* [2021] EWCA Civ 660; [2021] 4 WLR 74 at paragraphs 47-51. This jurisdiction is to require a landlord to pay a leaseholder their relevant costs as a condition for the grant of dispensation. If dispensation is not granted, there is nothing for a condition to attach to and so there is no power to award costs.

27. No other basis was put forward for the award of costs, nor can the Tribunal see any basis for awarding costs using any of its limited powers in relation to costs such as rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Therefore, no order is made in relation to costs.

Name: Judge Nicol **Date:** 11th 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).