FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal reference	**:**	**CAM/42UD/LDC/2021/0040**
HMCTS code (audio, video, paper)	**:**	**V: CVPREMOTE**
Property	**:**	**Cardinal Lofts, Foundry Lane, Ipswich, Suffolk IP4 1DJ**
Applicant	**:**	**Grey GR Limited Partnership**
Respondents	**:**	**The leaseholders**
Proceedings	**:**	**Dispensation with consultation requirements**
Tribunal members	**:**	**Judge David Wyatt** **Mrs M Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**24 February 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are those described in paragraphs 3 and 4 below. We have noted the contents.

Direction for service

By 4 March 2022 the Applicant shall send a copy of this decision to all Respondents.

Decision (please see explanatory note below)

(1) The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 (the "**1985 Act**") to dispense with all the consultation requirements in relation to:

a) the installation of the fire alarm by 1St Class Fire Protection in accordance with the notice dated 22 June 2021; and

b) the works identified in paragraphs 2(a) to (d) of the Notice of Intention dated 1 March 2021, namely:

i. removal and replacement of external wall systems;

ii. removal and replacement of combustible cladding;

iii. removal and repair or replacement of combustible balcony installations;

iv. removal and repair or replacement of any external wood elements.

(2) The dispensation referred to above is conditional on:

a) by 25 March 2022, the Applicant paying to the Respondents represented by Burges Salmon LLP (the "**Active Respondents**") the legal costs incurred in connection with this application, in the sum of £10,000 plus VAT representing the fees payable to counsel and solicitors who have advised those Respondents in connection with this application;

b) the Applicant:

i. by 4 March 2022, providing to the Respondents the Building Safety Fund ("**BSF**") Portal Code;

ii. by 25 March 2022, providing to the Respondents a reasonable summary of all steps it has taken to recover the cost of the required remedial works from any third party; and

iii. up to and including the time of completion of the works described in paragraph (1)(b) above, using reasonable endeavours to provide updates to the Respondents in respect of the fire safety defects at the Property at reasonable junctures (to include applications to the BSF, any third-party recovery and any progress in respect of the proposed works),

but, for the avoidance of doubt, this paragraph does not oblige the Applicant to disclose any document which is covered by any form of legal professional privilege. Non-disclosure of such

documents will not constitute non-compliance with this paragraph.

(3) The tribunal orders under section 20C of the 1985 Act that all the costs incurred by the Applicant in connection with these 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 Active Respondents.

(4) The tribunal orders under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**") that the liability (if any) of the Active Respondents to pay any administration charge in respect of costs incurred in connection with these proceedings is extinguished.

Explanatory note

This decision relates solely to the statutory consultation requirements, as explained below. It does not concern the issue of whether any service charge costs for the relevant works will be reasonable or payable. Any such issue might be the subject of an application by the landlord or leaseholders in future under section 27A of the 1985 Act.

Reasons for the decision

Application

1. On 5 October 2021, the Applicant landlord, represented by J B Leitch Limited, applied under section 20ZA of the 1985 Act for a determination dispensing with the statutory consultation requirements in respect of two sets of qualifying works. By sections 20 and 20ZA of the 1985 Act, any relevant contributions of the Respondents through the service charge towards the costs of these works would be limited to a fixed sum (currently £250) unless the statutory consultation requirements, prescribed by the Service Charges (Consultation etc) (England) Regulations 2003 (the "**Regulations**") were: (a) complied with; or (b) dispensed with by the tribunal. In this application, the only issue for the tribunal is whether it is satisfied that it is reasonable to dispense with the consultation requirements.

Procedural history

2. On 22 October 2021, the tribunal received the application fee and a procedural judge gave case management directions. These required the Applicant to by 7 November 2021 send to each of the leaseholders (and any residential sublessees) copies of the application form and documents enclosed with it, and the directions, and display copies in a prominent place in the common parts of the Property. The directions included a reply form for any Respondent who objected to the application to return to the tribunal and the Applicant. Any such

objecting Respondent was to respond by 22 November 2021. The Applicant was permitted to produce a reply.

3. On 22 November 2021, Burges Salmon LLP responded with a statement of case on behalf of the leaseholders of 53 of the flats at the Property. Those Active Respondents also sought orders: (a) for the limitation of the Applicant's costs in the proceedings, under section 20C of the 1985 Act; and (b) to reduce or extinguish any liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the 2002 Act. No other leaseholders responded to these proceedings. With an extension of time, the Applicant produced a reply in their electronic bundle of 402 pages. The bundle includes confirmation that the application form, statement of case (without annexures) and directions had been sent to all leaseholders by first class post on 4 November 2021, with a covering letter giving login details for an online portal from which those documents and the annexures to the statement of case were available. They said the login details were also sent by e-mail on 5 November 2021 to all leaseholders for whom the Applicant had e-mail addresses. They confirmed a copy of the documents was also placed on the concierge desk at the Property.

4. On 10 December 2021, the procedural judge noted the active parties appeared largely to be in agreement save as to certain conditions of dispensation and directed a short hearing. On 14 February 2022, following an enquiry from the tribunal office, Burges Salmon produced a supplemental electronic set of update documents (22 pages, including a witness statement from Miss Rebecca Lee, a solicitor from Burges Salmon) and J B Leitch sent an update letter (two pages). On 15 February 2022, a skeleton argument from Miss Nicola Muir, Counsel for the Applicant, was sent to the tribunal. On the morning of the hearing, a draft consent order was produced. At the hearing on 16 February 2022, the Applicant was represented by Miss Muir, with Jodie Michael (from JB Leitch) in attendance. The Active Respondents were represented by Miss Lee.

The Property and Leases

5. It appears the main building at the Property was constructed in about 1900 and used as a foundry. In about 2004, it was redeveloped (probably with additional storeys) into 71 flats which were let on long residential leases. It has a basement and 10 storeys above ground level, with the top (occupied) level said to be 32 metres high.

6. The Applicant landlord purchased the freehold title in January 2018. The management company referred to in the leases was dissolved in about 2020. The sample lease (of flat 8) contains step-in provisions for the landlord and provides for the leaseholder to pay various different service charges. The Applicant referred to paragraphs 20 and 24 of the Second Schedule, paragraph 5 of the Third Schedule, paragraph 2 of

the Fourth Schedule and paragraph 1.1 of the Seventh Schedule to the leases.

Reports

7. This decision mentions only some main points appearing from various reports produced in the bundle which we have taken into account for the purposes of these proceedings. It is not a summary of those reports. It appears that, following an inspection on 1 June 2018, Façade Remedial and Fire Risk Consultants Ltd (which appears to have been dissolved in 2019) gave a report advising on the external cladding. It appears they had been instructed to test cladding outside the penthouse apartment and an apartment on the seventh floor, taking samples, arranging testing if the cladding material might contain asbestos and, otherwise, identifying the product and its specification. They raised various issues but said the metal cladding on the relevant areas was generally of good standard and did not contain asbestos, saying this did not pose a fire risk. They indicated that the insulation product (bonded to the internal surface of the external metal cladding) had "approval" for use in buildings over 18m, giving various details in their report.

8. In January 2020, the MHCLG (as it then was) issued advice (later replaced with other guidance) for owners of multi-storey, multi-occupied residential buildings. Apparently prompted by that advice, and following inspections in August 2020, a "stage 2" façade fire safety survey report was produced by Wintech Façade Engineering Consultancy in September 2020. The survey raised concerns that, amongst other things, areas inspected did not have cavity barriers/firestop solutions and insulation products were not materials of "limited combustibility".

9. Jeremy Gardner Associates ("**JGA**") produced two reports (in October and November 2020) summarising the issues and potential issues identified in the Wintech report. They described four wall types at the Property. It appears they did not expect the front elevations of all levels (type "B") to contain combustible materials because these are largely glazed, appearing to be made of glass and aluminium. As to the other elevations, the main concern appears to have been wall type "D", on the top three storeys. JGA said the insulation behind the metal rainscreen cladding was combustible. They also questioned wall types "C" and "A" (respectively, render onto concrete with small insulation strips under windowsills, on the intermediate floors, and render onto board using timber battens, on the lower floors). They said the investigations had not found cavity barriers and these would be expected for wall types "C" and "D". They said whether cavity barriers were needed on the lower levels would depend on the construction of the walls. They also observed that balconies for services were wooden and would be combustible.

10. JGA advised on action to be taken, assuming that the areas tested in the Wintech report were representative of the whole building. In essence, they recommended full investigation/testing/assessment and remedial work as necessary, saying that replacement of non-compliant wall materials was likely to be the simplest method. In the interim, they recommended a common automatic fire alarm and detection system throughout the building at level five and above. Until that was installed and operational, they recommended a waking watch as a short-term solution. After that advice, the Applicant arranged a waking watch at a cost which is said to have been between £25,000 and £45,000 per year. They wrote to leaseholders on 6 November 2020 to notify them and explain the position.

Works

11. The Applicant instructed Tuffin Ferraby Taylor LLP ("**TfT**") to seek tenders for the proposed external works using a two-stage process. They issued first-stage tender documents for return in November 2020. Only two of the three invited potential contractors were willing to tender. TfT proceeded to the second stage with "ADI", who had submitted the lowest combined stage one tender. In the second stage, ADI submitted a tender figure of £6,473,872.78, which was substantially higher than the first-stage tenders and excluded various contingencies, professional fees and VAT. TfT indicated that the total project costs are likely to be in the region of £7,719,067 plus VAT, but this figure still excludes various potential additional costs.

12. The Applicant confirmed it had registered the Property with the BSF seeking the full cost of the external works, recognising that full funding may not be granted. They said that on 5 February 2021 the MHCLG (as it then was) confirmed the Property had passed "technical eligibility" and the Applicant was awaiting confirmation of costs following additional intrusive surveys. The deadline for a full costs application had been 30 June 2021 and the deadline for works to begin had been 30 September 2021. The Applicant referred to the indication in the relevant MHCLG guidance ("*Building Safety Fund for the remediation of non-ACM Cladding Systems Fund Application Guidance*") that building owners must continue to work to meet these deadlines but: "*…if more time is needed this may be permitted on a case by case basis*". The Applicant said at paragraph 32 of their statement of case that if the Applicant is eligible for full or partial funding it is not yet known when this will be decided, but the Applicant will need to have made arrangements for the contractor to be: "*…in place to commence works at short notice with the cost of the works agreed*".

13. Through TfT, the Applicant invited tenders from four contractors by 5 March 2021 to install the alarm system. They said the specification was for a category L5 automatic fire detection and alarm system. They received tenders ranging from £62,475 to £99,995.50. They selected 1st

Class Fire Protection, who had given the lowest tender and apparently proposed the shortest delivery time. The Applicant said this work was ultimately completed for £49,475, less than the estimated contract price, but this did not include professional fees and "contingencies". They obtained funding of £59,130 from the Waking Watch Relief Fund towards the costs. They said they would be seeking to recover a balance of £22,195 through the service charge for the fire alarm works.

Consultation

14. The relevant consultation requirements (for procurement of qualifying works for which public notice was not required) are set out in Part 2 of Schedule 4 to the Regulations. These requirements are summarised in Daejan Investments Limited v Benson and Ors [2013] UKSC 14 at [12]. The Applicant suggested it had complied with the first stage of the requirements (the notice of intention required under paragraph 8 of Schedule 4) in relation to both sets of works.

15. It appears that, on 11 December 2020, the Applicant gave notice of intention in respect of the fire alarm works. On 22 June 2021, following a change of managing agent, a further notice of intention was given for those works under cover of a letter informing leaseholders that dispensation would be sought. It appears the fire alarm works were then carried out in July/August 2021. The initial delay was not explained but the Applicant said (in essence) that, in view of the urgency and to avoid further costs of the waking watch, it was reasonable to proceed with the fire alarm works without waiting to comply with the remaining consultation requirements in relation to them.

16. On 1 March 2021, the Applicant gave notice of intention in respect of the proposed external works. This indicated that further detailed investigations were being undertaken to finalise a full schedule of works required to remediate any compromising material or construction methods. The description of the works included the wording at paragraph 1(b) of our decision and: "*…any other works recommended by a fire engineer as necessary to ensure the safety of the building*". The Applicant told us they intended to procure the external works using a design and build arrangement, where a main/supervising consultant is appointed to "facilitate" the design and construction of the works and act as lead contractor. It said (in essence) that due to the nature of these works, the BSF requirements for funding and the proposed procurement method, it was reasonable to dispense with the consultation requirements in relation to the proposed external works.

17. There were meetings with leaseholders on 20 April and 12 June 2021 where relevant matters were discussed. A newsletter in June 2021 referred to intrusive surveys having been carried out in late May 2021,

but no substantive information was provided about the outcome of those surveys. The newsletter indicated the surveys were being reviewed in conjunction with a "final scope" and the costs were expected to vary from previous estimates. It emerged (from enquiries made of the BSF by the leaseholders' MP) that, apart from delays for other reasons, additional intrusive surveys had been carried out in late 2021 to check for any potential structural issues and (at that time) the relevant reports were awaited.

Law on dispensation

18. Under section 20ZA of the 1985 Act, the tribunal has jurisdiction to dispense with all or any of the consultation requirements in relation to any qualifying works "*…if satisfied that it is reasonable…*" to dispense with the requirements. In Daejan, Lord Neuberger for the majority observed [at 40-41] that it would be inappropriate to interpret this as imposing any fetter on the exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself and any other relevant admissible material. The circumstances in which applications for dispensation are made: "*…could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.*" He confirmed [at 54] that the tribunal: "*…has power to grant a dispensation on such terms as it thinks fit - provided, of course, that any such terms are appropriate in their nature and their effect.*"

19. By reference to sections 19 to 20ZA of the 1985 Act, Lord Neuberger said [at 43] that: "*…the obligation to consult the tenants in advance about proposed works goes to the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works.*" Given that purpose, it was indicated [at 44] that the issue on which the tribunal should focus when entertaining an application for dispensation: "*…must be the extent, if any, to which the tenants were prejudiced … by the failure … to comply …*" and [at 45]: "*…in a case where it was common ground that the extent, quality and cost of the works were in no way affected by … 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)…*"

20. Lord Neuberger referred [at 65] to *relevant* prejudice, saying the only disadvantage of which tenants: "*…could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.*" He noted [at 67] that, while the factual burden of identifying some relevant prejudice would be on the tenants: "*…the landlord can scarcely complain if the LVT views the tenants arguments sympathetically, for instance by resolving in their favour any doubts whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have*

been carried out in a different way), if the tenants had been given a proper opportunity to make their points." Further guidance on terms of dispensation is at [68].

Conclusion

21. The Active Respondents said in their statement of case that they did not accept all the proposed work was necessary, but did not particularise or explain that. They had been represented by Burges Salmon, but had not yet taken expert advice on the proposed works. They had in their statement of case and until just before the hearing sought as a condition of dispensation an indemnity for up to £40,000 plus VAT against the costs of seeking expert advice on prejudice, but ultimately agreed the proposed consent order without this. In their statement of case, the Active Respondents had raised various other concerns, including differences between the 2018 and subsequent reports disclosed by the Applicant (briefly mentioned above). They asserted the works could be procured for less. They did not say how, but they may have meant by following the type of simple competitive procedure expected by the consultation requirements. Miss Lee said some prejudice was demonstrated by her witness statement. This referred to the indemnity for expert advice which was then being sought, arguing that without this the Active Respondents could not understand whether and to what extent they had suffered prejudice, and produced a fee estimate of £34,575 from a potential expert.

22. Miss Lee also referred in her statement to concern about the lack of information being provided about investigations to date. In their statement of case, the Active Respondents argued the Applicant's approach meant they could not assess whether they would suffer any prejudice from the failure to comply with the consultation requirements. That argument appears to have some force. It may not be practicable to prepare a traditional specification and whatever has been prepared may change following the more recent surveys mentioned. However, the Applicant did not explain why more up to date information, particularly whatever draft scope of works or similar document(s) are being used by the Applicant's procurement consultants, could not have been shared with the leaseholders to enable them to take any appropriate advice and if appropriate make specific comments on the proposed works and procurement approach.

23. However, even with all this in mind, the Active Respondents said they relied on indications from the Applicant that, to give the best prospect of funding from the BSF to ameliorate the potential financial burden on leaseholders, the Applicant needed to be able to place the proposed contract for the external works on short notice. The Active Respondents said nothing should be done which might jeopardise the application to the BSF for funding towards the cost of the works. Miss Lee confirmed that, for this reason and in view of the compromise

conditions proposed in the draft consent order to address the concerns described in her witness statement, the Active Respondents agreed it was reasonable to dispense with the consultation requirements. The application was not opposed by the other Respondents, who did not identify any prejudice they might suffer or any other reason why we should not dispense with all the consultation requirements in relation to the relevant works.

24. In the circumstances, we consider that it is reasonable to dispense with all the consultation requirements on the terms set out at the start of this decision. These are substantially the same as those which had been agreed between the Applicant and the Active Respondents in their draft order, subject to the specific matters mentioned below. In relation to paragraph (1), Miss Muir contended the Applicant had complied with the relevant "stage one" consultation requirements (i.e. those in paragraph 8 of Schedule 4 to the Regulations) for the notices of intention in respect of each set of works, as summarised above. Miss Lee had not realised that argument would be made; there had been no exchange of skeleton arguments and the Applicant's statement of case refers to the notices of intention but simply seeks dispensation with "the usual" consultation requirements. To avoid any potential dispute in future about whether the relevant notices fully complied with paragraph 8, Miss Muir and Miss Lee agreed we should determine to dispense with all the consultation requirements.

25. In relation to paragraph (2)(b), the draft consent order proposed, amongst other things: "*The Applicants to provide … An update on the remedial works required in respect of the fire safety defects at the Building to the Respondents at any relevant juncture (to include applications to the BSF, any third party recovery and any progress in respect of the proposed works).*" We asked whether conditions in such terms might risk disproportionate disputes about whether they had been complied with "at any relevant juncture" over a long or uncertain period of time, and so whether the dispensation had taken effect (per Daejan at [19-21]). We took a break for the active parties to consider this and any compromise wording to reduce any risk in this respect, or whether to agree a binding undertaking or the like instead, rather than a condition. After the break, Miss Muir explained the Applicant's solicitors had not been able to take instructions on any proposed undertaking. Miss Muir was confident the agreed condition would not cause problems, but suggested it could be softened by providing for "reasonable endeavours" to update at "reasonable/relevant" junctures. Miss Lee had no objections to this. She said a fixed time limit would not be appropriate, but suggested updates be provided up to and including the time of completion of the relevant external works. Bearing all this in mind, we have used wording we consider reasonable for the condition. However, we would like to make it clear that we use this limited wording only because this is a condition of dispensation. Leaseholders should be provided with more information and engaged with as appropriate; failure to do so may be relevant to any issue as to

the reasonableness or payability of any relevant service charges for the costs of the proposed works.

26. As to paragraphs (3) and (4), the Applicant confirmed they would not charge their legal or professional fees in connection with this application through the service charge or as an administration charge. The Applicant and the Active Respondents agreed proposed wording under section 20C and paragraph 5A in this respect. As explained at the hearing, we can only make such orders in respect of the Active Respondents, because there was no application by or on behalf of the other leaseholders for such orders (and the tribunal would need to see evidence that those other leaseholders had authorised anyone else to apply for such orders on their behalf). We have used our own wording, but we are satisfied that it is just and equitable to make orders which have the effect agreed with the Applicant in respect of the Active Respondents, to ensure there is no possible dispute about this in future. This does not preclude other leaseholders from applying for such orders in the event that the Applicant attempts to make service or administration charges for the costs of these proceedings.

Name: Judge David Wyatt **Date:** 24 February 2022

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).