FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MR/LDC/2021/0120
Properties	**:**	Centurion Court & Brecon House Gunwharf Quays Portsmouth Hampshire PO1 3BQ
Applicant	**:**	Gunwharf Quays Residents Co Ltd
Representative	**:**	Alexander Faulkner Partnership
Respondents	**:**	The leaseholders
Representative	**:**	
Type of Application	**:**	Application for dispensation from consultation requirements – s.20ZA Landlord and Tenant Act 1985
Tribunal Members	**:**	Judge MA Loveday Mr MJF Donaldson FRICS
Date and venue of hearing	**:**	18 February 2022 (paper determination without a hearing)
Date of Decision	**:**	24 February 2022

DETERMINATION

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Introduction

1. This is an application for dispensation from consultation requirements under s.20ZA Landlord and Tenant Act 1985 in respect of interim fire safety precautions. The application relates to blocks of flats at the Gunwharf Quays development in the Centre of Portsmouth. The Application originally concerned service charges payable by the leaseholders at three residential blocks, namely Anson Court, Brecon House and Centurion Court. But by an order made on 12 of January 2022, Anson Court was removed from the application. The Applicant is the resident-owned Management Company, which is responsible for management functions under the leases of the flats. The Respondents are the lessees of the flats at Brecon House and Centurion Court.

2. The determination is made without a hearing under Rule 31(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Facts

3. The facts appear in the documents attached to the Applicant's Statement of Case and are summarised below.

4. Gunwharf Quays is a prominent mixed-used development, which was constructed by Berkeley Group between 1998-2001 on the site of the former naval base at HMS Vernon, Portsmouth. The site includes some 310 homes grouped in various blocks. Anson Court (44 flats), Brecon House (64 flats) and Centurion Court (27 flats) form the eastern end of a line of purpose-built blocks along the side of a dock basin, with retail units on the ground floor. The elevations largely comprise white painted render and brick facades.

5. The papers include sample copies of leases of apartments at Brecon House and Centurion Court which are in a conventional "tripartite" form. For present purposes it is unnecessary to deal with the terms of these leases in any detail. Suffice it to say that the leases include detailed

service charge provisions, that the Applicant is a party to the leases as management company, that it has obligations to repair and manage the blocks, and that the Respondent lessees pay their service charges to the Applicant.

6. Following the tragic events at Grenfell Tower, the then managing agents for Gunwharf Quays put in place fire safety checks. The first of these which appear in the bundle are so-called 'desktop' reports by International Fire Consultants Group, which followed a site inspection in June 2020. The reports recommended intrusive surveys to determine whether there was ACM (Aluminium Composite Material) insulation in the walls, as well as to investigate fire separation and other safety features.

7. After some delay, the Buildtech Consultancy exposed various parts of the structure, and prepared External Façade Reports for Brecon House and Centurion Court. Copies of these reports, dated 10 and 12 November 2021, were provided to the Tribunal. Amongst other defects, Buildtech found:

   (a) The white painted render was laid over EPS combustible insulation. Buildtech recommended that the insulation should be removed and replaced with a non-combustible alternative.

   (b) The brick facades were laid over PIR combustible insulation. Buildtech recommended that this should also be removed and replaced with a non-combustible alternative.

   (c) Spandrel panels were laid over combustible extruded polystyrene insulation. Buildtech recommended that this should also be removed and replaced with a non-combustible alternative.

   (d) Combustible materials were also used in the construction of balconies. Buildtech recommended that these should also be removed and replaced with non-combustible alternatives.

   (e) Cavity barriers to window perimeters, slab edges, spandrel panels, party wall junctions etc., were absent or not functioning. Buildtech

recommended that robust purpose-built cavity barriers should be installed.

8. On 25 November 2021, Hampshire Fire Services emailed to say that "the evacuation strategy [for Brecon House and Centurion Court] and any interim recommendations ... should be implemented until remedial works have been completed".

9. The Applicant's board of directors asked Buildtech to commission fire safety reports by Pyrosafety Fire Risk Management Consultants. Copies of their reports, dated 9 and 10 December 2021, were provided to the Tribunal. The executive summary for both reports stated that:

> "Until such time as the remedial actions are completed, interim measures will be required. Pyrosafety recommends the implementation of a temporary fire alarm system to be designed and installed in accordance with the specifications identified in the National Fire Chief's Council (NFCC) guidance on simultaneous evacuation. As the installation of this system might not be undertaken immediately, a waking watch should be put in place to ensure the safety of residents in the event of a fire. And until the temporary fire alarm system has been installed and commissioned."

Para 8 of each report gave further details:

> "Based on the intrusive survey carried out by Buildtech at inspected locations, it is Pyrosafety's view that this building can receive a B2 on the EWS1 form. This means that interim measures should be put in place to ensure that residents are not put at risk of fire spread in the building. The interim measures should conform to the National Fire Chief's guidance for Simultaneous Evacuation ... Interim measures should be put in place until such time as the building is made safe and all works are complete to satisfy the objective. It is Pyrosafety's view that a temporary fire alarm system would be more effective than a waking watch in providing early warning of fire and facilitating a simultaneous evacuation. However, a waking watch should be put in place until such time as the temporary fire alarm system is installed."

10. The Pyrosafety reports were peer reviewed by M10 Fire Safety Consultancy Ltd, and on 15 December 2021 M10 issued an EWS1 Form for each

block with a B2 rating. The covering letters from M10 referred to the Buildtech and Pyrosafety reports. It is worth noting that in the B2 rating, M10 expressly confirmed that the certifier had *inter alia* "identified to the client organisation the "interim measures required".

11. The Applicant urgently sought funding of £173,842 from the Waking Watch Relief Fund before the funding window closed on 10 December 2021. The application form suggested quotations had already been obtained for the temporary fire safety system (varying from £80,000 to £100,000 for Brecon House and £43,000 to £48,000 for Centurion Court). The waking watch would begin on 9 December 2021 and would cost around £600 + VAT per month per flat. Funding (in full) was approved on 21 December 2021.

12. The Applicant also produced copies of various letters and emails to the lessees, dated 9, 10, 15, 16 and 23 December 2021 and 21 January 2022, informing them of the interim measures and the longer-term proposals. In particular, the emails of 15 and 16 December 2021 enclosed detailed Q&A sheets. The answers to questions 1, 2, 30, 34, 44, 51, 57, 59, 65, 67 on the Q&A sheets dealt with the costs of the waking watch, whilst the answers to questions 12, 31, 44, 52, 57, 60 and 66 dealt with the costs of the fire safety system. Significantly, question 68 asked why no s.20 consultation had taken place, to which the Applicant's agents answered:

> "Because there was no time in which to undertake this ahead of safety measures needing to be put in place. The Board will be applying to the First Tier Tribunal for dispensation of the requirements under Section 20 of the Landlord and Tenant Act 1985."

13. In its Statement of Case dated 27 January 2022, the Applicant stated that at that stage "installation of the fire alarm systems had been commissioned and the waking watch put on notice to terminate". More detail is given in a letter to Berkeley Homes dated 12 January 2022, where the agents stated that they had commissioned CPC Electrical to install the alarm system, and that work to the interiors of the apartments would

take place between 26 and 28 January. It was anticipated the waking watch could be stood down on 28 January (Centurion Court) and 7 February (Brecon House). It is therefore likely that by the date of this decision, the fire alarm works will have been completed, and the waking watch costs will have been fully incurred.

The Applicant's Case

14. The application dated 20th of December 2021 seeks dispensation in relation to the relevant costs of:

    (a) the installation of the interim fire safety system; and

    (b) the waking watch.

    The Applicant referred to the recommendation of a change of the fire strategy for the buildings. It submitted that there was a risk to life presented by the combustible materials in the external walls. The fire safety system would support the new strategy and remove the need for the waking watch. It was urgent to control the immediate fire risk identified by the fire engineers.

15. In its Statement of Case, the Applicant said that it had acted on the advice of the facade specialists and fire engineering consultants that the defects required a change of fire strategy, as they presented a risk to life. The buildings had not been built for supporting evacuation, and there was no means to raise the alarm in the event of a fire. The Applicant acknowledged its responsibilities and had taken the necessary action. Compliance with the full s.20 consultation procedure would have delayed deployment of the waking watch and installation the fire alarm system. This would have been a material risk to life.

Representations from Respondents

16. In accordance with directions from the Tribunal given on 4 January 2022, the Applicant wrote to each leaseholder with *pro-forma* response sheets. The Tribunal has received written responses and/or *pro-forma* replies from several lessees.

17. The following agreed with the application for dispensation:

AJ Coxhead	3 Brecon House
Peter & Carol Crick	32 Brecon House
Suzanne Chissell	36 Brecon House
Dr Nigel Ainsworth	61 Brecon House
Julie & Clive Andrews	9 Centurion Court
David Futcher	22 Centurion Court

18. The application was opposed by the lessees of two flats. Mr Richard Hillier (26 Brecon House) objected to the ending of the 'stay put' fire strategy which resulted in the interim fire safety measures. He also questioned Buildtech's recommendations for remediation and interim measures. Julieta and Alexander Gegova (31 Brecon House) suggested that lack of consultation was contrary to NFCC guidance. They quoted extracts from para 5.8 of the NFCC's Simultaneous Evacuation Guidance (3rd Ed, 1 October 2020), the full text of which is as follows:

> "5.8. Following the immediate procurement of the waking watch if necessary, the Responsible Person for the building should consult with residents and especially leaseholders about the options available to mitigate the building's deficiencies. Cost options should be provided to leaseholders, and leaseholders should be involved in the choice of interim measures that is made."

The cladding problem had been known about for many years. In any event, fire safety should be responsibility of freeholder.

19. One lessee agreed with the application but asked for a condition to be attached. Mr Andrew Foster (34 Brecon House) asked the Tribunal to qualify its decision by stating that it was not an approval of the recommendations made.

The Tribunal's decision

20. The material provisions of s.20ZA of the Landlord and Tenant Act 1985 are as follows:

> "**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.
> ...
> (4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
> ..."

21. In England, the regulations made under s.20ZA(4) are the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the consultation regulations") . The requirements which are or may be relevant to this application appear to those regulations at Sch.1 (qualifying long-term agreements) and Pt.2 of Sch.4 (major works).

22. The principles on which dispensation is considered were of course dealt with by the Supreme Court in the leading case of Daejan Investments Limited v Benson and others UKSC 14; [2013] 1 W.L.R. These principles can be summarised as follows:
    (a) The main, indeed normally, the sole question for the tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
    (b) The financial consequences to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
    (c) It is not appropriate to distinguish between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes.

(d) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

(e) The tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA(1).

(f) The legal burden of proof remains throughout on the landlord. The factual burden of identifying some 'relevant' prejudice that they would or might have suffered is on the tenants.

(g) 'Relevant' prejudice is given a narrow definition; it means whether non-compliance with the requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

(h) Tribunals will view the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works or services would have cost less (or, for instance, that major 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. The more egregious the landlord's failure, the more readily a tribunal would be likely to accept that the tenants had suffered prejudice.

(i) Where the tenants were not given the requisite opportunity to make representations about proposed works to the landlord, the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it.

(j) Once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it.

23. In this case, the Tribunal is satisfied that the Applicant has acted reasonably in its approach to the costs of the interim fire safety measures.

These measures were specifically recommended by independent fire safety consultants Pyrosafety, peer reviewed by M10, certified in the Form EWS1, endorsed by Hampshire fire brigade. Implementation involved a risk to life. The measures were plainly urgent, and there was simply insufficient time to implement a consultation with lessees within the timetable laid down by Sch.1 and/or Sch.4 to the consultation regulations. There is some evidence (in the case of the fire safety system) that the Applicant managed to obtain competitive quotations for the works. It may also be that none of the costs will eventually fall on the service charge account, if grant funding is sufficient for this purpose or that claims against third parties succeed. The lessees have also been kept informed of developments throughout, and the Applicant applied for directions promptly. The responses and *pro-formas* suggest there is at least some support for the application amongst lessees - and limited active opposition to it. The Applicant's failure to comply with the strict consultation requirements is not 'egregious' in the sense used in Daejan v Benson. In the circumstances, there is no reason for the Tribunal readily to accept that the tenants have suffered prejudice.

24. Turning to the two objectors, neither produces evidence of the kind of narrow 'relevant prejudice' considered in Daejan v Benson. The objectors do not suggest they would have proposed other or cheaper contractors as an alternative to those chosen by the Applicant in the circumstances where the interim measures were urgently needed. The arguments made by Mr Hillier are effectively that the Applicant should not have followed the advice given by Pyrosafety. This argument (which, it should be said, seems somewhat unlikely at this stage) would still be available to him or any other lessee in a challenge to any service charges the Applicant may demand for the interim measures. Such a challenge could still be made under s.19 of the 1985 Act. The same applies to the suggestion by Julieta and Alexander Gegova that the costs should be the responsibility of the freeholder. The gist of the arguments advanced by both objectors is that the Applicant was wrong to move away from a 'stay

put' evacuation procedure – not that they suffered prejudice by failure to consult. These arguments can all be made in any future challenge to the service charges.

25. The only argument which directly relates to consultation is that para 5.9 of the NFCC Simultaneous Evacuation Guidance recommends consultation with leaseholders about "options available to mitigate the building's deficiencies." There are two answers to this. First, the context of para 5.8 of the guidance makes it clear that consultation may follow the "immediate procurement" of interim safety measures. There is no suggestion in the guidance that one must therefore delay implementation of urgent "temporary" fire safety measures while lessees are consulted. Secondly, the Guidance does not override the rather more detailed provisions of Sch.1 or Sch.4 to the consultation regulations. The Tribunal is bound by the service charge regime and Daejan v Benson, not by the NFCC guidelines, which were prepared for other purposes.

26. Finally, there is Mr Foster's suggestion that a condition should be attached to any s.20ZA dispensation. The Tribunal has already indicated that any leaseholder remains free to object to any service charges relating to the interim measures - if and when the Applicant demands a contribution to those costs. An objection might be on the basis that relevant costs were not reasonably incurred under s.19 of the 1985 Act, or because the leases of the flats do not require the lessees to contribute to those costs. The Tribunal agrees that a s.20ZA dispensation does not signify any acceptance that the lessees must necessarily pay for the interim measures. It is unnecessary to add this as a specific condition to the s.20ZA order, but the Tribunal is happy to make this position clear.

Other matters

27. The Tribunal has not seen a copy of agreements with CPC Electrical for the installation of the fire alarm system or the agreement with the waking watch contractors. Some figures have been given for the cost of the

fire safety system and it is likely that they fall within the financial threshold for major works set out in regulation 6 of the consultation regulations and that consultation is required under Pt.2 of Sch.4. But there is no evidence at all that the costs of the waking watch are "major works" or that they relate to a "qualifying long-term agreement" as defined by s.20ZA. It is also unclear whether the costs of the waking watch meet the financial threshold in regulations 4 or 6 of the consultation regulations. The Tribunal assumes the Applicant has to consult about the costs incurred in relation to both of the fire safety measures, without necessarily finding that this is the case.

28. For largely the same reasons, it is not entirely clear which parts of the consultation requirements the Applicant seeks to dispense with. The application could relate to Sch.1 or Pt.2 of Sch.4 to the consultation regulations, or indeed both. But since the costs now appear to have been fully incurred, it would be pointless to delay matters while the Tribunal further explores this issue with the Applicant. The Tribunal therefore frames its order under s.20ZA as a dispensation from both the consultation requirements of Sch.1 and Pt.2 of 4 to the consultation regulations, recognising that one or other may not actually apply to this case.

Decision

29. For the reasons given above, the Tribunal grants dispensation from the requirements of Sch.1 and Pt.2 of Sch.4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 in respect of the relevant costs of (1) the interim fire alarm and detection system; and (2) the waking watch.

Judge Mark Loveday

24 February 2022

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.