FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00FY/LDC/2022/0030**
Property	:	**Crusader House and George Street Trading House, Nottingham NG1 3BT**
Applicant	:	**Crusader House and George Street Trading House RTM Company Ltd**
Representative	:	**J H Watson Property Management Ltd**
Respondent	:	**The leaseholders of Crusader House and George Street Trading House**
Representative	:	**None**
Type of application	:	**An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation from the consultation requirements in respect of qualifying works**
Tribunal members	:	**Judge C Goodall** **Mr V Ward, FRICS, Regional Surveyor**
Date and place of hearing	:	**6 March 2023 at Nottingham Magistrates Court**
Date of decision	:	**19 April 2023**

DECISION

Background

1. This application concerns residential apartments off Thurland St and George St in Nottingham, known as Crusader House and George St Trading House. Crusader House has 90 apartments and Trading House has 58. The residential blocks are separate buildings but they incorporate a car park on three levels between them which results in their being managed together by one RTM company.

2. Through their agent, J H Watson Property Management Ltd, ("Watsons"), Crusader House and George Street Trading House RTM Company Ltd ("the Applicant") has applied to this Tribunal for an order under section 20ZA of the Landlord and Tenant Act 1985 ("the Act") that it may dispense with consultation requirements in respect of:

    a. Works on communal doors to improve fire safety;

    b. Installation of lightning protection;

    c. Upgrades to the fire alarm system;

    d. Works to improve compartmentation of the buildings;

    all of which is advised by a Fire Risk Assessment carried out in October 2021 (the 'FRA"). These works are described as the Proposed Works.

3. The Applicant (through Watsons) arranged for service of copies of the application and directions made by the Tribunal on 17 October 2022 upon all lessees in both buildings. Seventeen lessees responded to the Directions. Nine indicated they opposed the application, for a variety of reasons. Eight were in support.

4. The Tribunal directed an oral hearing, which took place on 6 March 2023, preceded by an inspection. Two directors of the Applicant (who are both lessees) attended the hearing (Mr Spence and Ms Lamb). One non-director lessee also attended (Mr Dykes). Watsons attended, represented by Mr D Spencer and Mr I Omant.

5. The application and the supporting documentation had not explained why the Applicant wished to dispense with consultation, rather than consult. On 13 March 2023, the tribunal directed that the Applicant must provide additional documents to support the rationale it offered at the hearing in support of its request for dispensation.

6. Additional documents were supplied to the Tribunal under cover of emails from Watsons dated 3 April 2023.

7. This decision sets out the Tribunal determination on the application and the rationale for it.

Law

8. The Landlord and Tenant Act 1985 ("the Act") imposes statutory controls over the amount of service charge that can be charged to long leaseholders. If a service charge is a "relevant cost" under section 18, then the costs incurred can only be taken into account in the service charge if they are reasonably incurred or works carried out are of a reasonable standard (section 19). Under section 27A, the Tribunal has jurisdiction to determine the payability of a service charge.

9. Section 20 imposes another control. It limits the leaseholder's contribution towards a service charge to fund "qualifying works" to £250 unless "consultation requirements" have been either complied with or dispensed with. There are thus two options for a person seeking to collect a service charge for qualifying works on the building or other premises costing more than £250. The two options are: comply with "consultation requirements" or obtain dispensation from them. Either option is available.

10. The question of what works are covered by the need for consultation is firstly answered by reference to section 20ZA(2) of the Act, which defines "qualifying works" as "works on a building or any other premises".

11. That definition was considered in the case of *Philips v Francis [2014] EWCA Civ 1395*. The Court of Appeal decided that consultation was required for each "set" of works proposed which potentially exceeded the financial threshold. What constituted a single set of works (the Court of Appeal said):

> "… should be determined in a commonsense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree."

12. To comply with consultation requirements a person collecting a service charge has to follow procedures set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (see section 20ZA(4)) ("the Regulations"). The processes (for this application) are set out in Schedule 4 of the Regulations. Very broadly, they require that lessees are notified of the proposal to carry out works, give them the right to make representations on the carrying out of the works, allow them to propose contractors, and to have the right to receive information as the process progresses.

13. To obtain dispensation, an application has to be made to the Property Chamber of the First-tier Tribunal who may grant it if it is satisfied that it is reasonable to dispense with the consultation requirements (section 20ZA(1) of the Act).

14. The Tribunal's role in an application under section 20ZA is therefore not to decide whether it would be reasonable to carry out the works or enter into the long term agreement, but to decide whether it would be reasonable to dispense with the consultation requirements.

15. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; if so, it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

Documents

16. The application form included the following documents relating to the Proposed Works:

    a. The part of the FRA that listed the works recommended, being 35 action points in relation to fire safety at the premises;

    b. A quote from a company called MIES for works on upgrading or replacing doors in Crusader House in the sum of £18,885.00 plus VAT;

    c. A quote from MIES for compartmentation and fire stopping works in Crusader House in the sum of £31,281.55 for Crusader House and £18,806.45 plus VAT for Trading House;

    d. Two competitive quotes for lightning protection from Stone Technical Services Group Ltd ("Stone") and from Omega Red Group Ltd ("Omega"). Stone quoted £10,240.48 for Crusader House and £6,616.59 for Trading House. Omega quoted £22,350.00 for external lightning protection for Crusader House and Trading House together (VAT is not mentioned) and an additional £14,000.00 for Trading House for the installation and supply of surge protection devices.

17. The following additional documents have been provided in accordance with the Directions dated 13 March 2023:

    a. A full copy of the Fire Risk Assessment dated 7 October 2021 and carried out by Fire Prevent Ltd recommending 35 action points in relation to fire safety at the premises;

    b. Emails from a Principal Environmental Health Officer at Nottingham City Council dated 12 August, 15 August, 9 September 2022, and 17 January, 14 & 17 February, and 2 March 2023;

    c. Copies of 14 emails from the Applicant's insurance brokers regarding the insurers requirements in connection with fire protection.

The hearing

18. The Tribunal firstly asked the parties about a preliminary point that had been raised by Ms Lamb. In her response to the application, she had indicated that the Board of the Applicant company had not authorised Watsons to bring these proceedings on its behalf. She was in a position to know this as she is one of the three directors currently in post.

19. The Tribunal pointed out to the Watsons representatives present at the hearing that if they had no authority to bring the proceedings, their actions in doing so would be likely to be regarded by the Tribunal as an abuse of process, and the application would be likely to be struck out.

20. Mr Omant told the Tribunal that he had agreed with Mr Spence, also a director of the Applicant, that the application should be brought to the Tribunal in a telephone call some days before the application was submitted. Mr Spence confirmed that both he and the third director, Helen McClaren, had both agreed that Watsons should bring the application.

21. The Tribunal indicated that the combined evidence of Mr Omant and Mr Spence indicated that two of the three directors had approved the application. Failure to comply with internal company procedures, such as failing to call a board meeting to approve the application (this being Ms Lamb's complaint at the hearing) did not need to be investigated by those dealing with the company in good faith (see sections 39 and 40 Companies Act 2006). The Tribunal considered that the application had been properly bought, and informed the parties of that view at the hearing. It was up to the shareholders to police failure to comply with internal procedures.

22. Mr Omant moved on to take the Tribunal through the FRA action points. The following were outstanding:

    a. Action points 1 – 4, 17 and 30 - all related to doors. Designated doors were not self-closing FD30S doors and required to be replaced. Locks, hinges, intumescent strips and door fitting issues required to be resolved;

    b. Fire stopping issues required remediation, including a full compartmentation survey – action points 6 – 8 and 24;

    c. Fire alarm issues – action points 16, 18, 19, 22;

    d. Lightning protection – action points 26.

23. All other items identified on the list of action points had either already been resolved or had been identified as satisfactory in the FRA.

24. On the question of why the Applicant was seeking dispensation from consultation, rather than conducting a consultation, Mr Omant explained that there was some urgency to have the works carried out. The local authority were pushing for them, and the insurers for the buildings were threatening not to renew the insurance. Their premium quotes had in any event increased

substantially from £68,000 in March 2021 to a quote of £90,000 for renewal in March 2023. The insurers were seeking monthly updates on progress with the fire protection works. In addition, Watsons were finding it difficult to persuade contractors to quote for the Proposed Works. Even now, no quote for upgrading the fire alarm system had been obtained.

Objections

25. As mentioned above, written objections to the Tribunal granting dispensation were received from Ms Lamb, Mr Dykes (who also attended the hearing), and from Mr Elmer, Mr Garton, Mr Hadjipakkos, Mr Patel, Mr Sefton, Ms Shang, and Ms Smee.

26. Reasons varied between the objectors, but the main concerns related to:

    a. Whether there was a need to obtain dispensation, as there was no urgency;

    b. The perception that dispensation would result in the lessees being obliged to pay the costs of the works carried out;

    c. Lack of clarity on how the Building Safety Act 2022 would impact on the proposed works. Some objectors saw little point in a dispensation application for works which the freeholder would have to pay for, or which could not be included in a service charge demand under that Act;

    d. Use of the sinking fund to fund the costs of the Proposed Works, which some objectors considered was not lawful.

27. Of course, two of the objectors were present at the hearing: Ms Lamb and Mr Dykes. Mr Dykes's written representations were dated November 2022. In them, Mr Dykes said he did not understand why a consultation had not commenced once the FRA had been received. That was in October 2021, and had it commenced then, it would have been complete by now. By the time of the hearing, Mr Dykes had changed his view on the dispensation application. He now felt that it was necessary to get on with the Proposed Works, and he would be in favour of the dispensation application as yet more delay would not assist anyone.

28. Ms Lamb maintained her view that there was no reason why proper consultation could not be carried out. She felt that the position under the Building Safety Act had not been fully ascertained, and she was conscious, as a director of the Applicant, of the penalties that can be imposed under that Act if leaseholders are asked to pay service charges for sums which the Act exempts them from paying.

Additional documents

29. As explained at paragraph 5 above, the Tribunal requested supporting documents to justify the rationale for this application. The documents requested have been identified in paragraph 16 above.

30. The full copy of the FRA does not add a great deal. The meat of the FRA is in section 4, which was copied to the Respondents and discussed at the hearing (see paragraph 22 above).

31. Emails from Nottingham City Council in February and March 2023 do not refer to the Proposed Works at all. They are concerned with a new External Façade Fire Spread Assessment PAS 9980 which was completed on 22 December 2022. This new report suggests work to the cladding of the buildings is required. Any such works are not the subject of this application for dispensation.

32. Of some concern, Watsons emailed the Council on 19 December 2022 stating that "we are currently going through a dispensation to allow us to complete the PAS9980 FRA that should be back with us shortly." This would appear to be the new report referred to in the previous paragraph. If so, as stated above, work on cladding is not within the scope of this application.

33. The remaining emails from the Council (dated 6 & 11 July, 12 August, 9 September 2022 and 17 January 2023) are chasing emails enquiring of progress with remedial works proposed under the FRA. None of them contain any suggestion that the Council express any impatience with the progress of actions by Watsons, or threaten any regulatory action.

34. There are 15 email trails showing correspondence between Watsons, the insurance brokers for the Applicant, and the ultimate insurers. The insurers are clearly keen to know the state of progress regarding compliance with fire protection measures advised by the FRA and all other specialist reports. They are equally concerned with the new report suggesting cladding works and other works dated 22 December 2022 (which the Tribunal has not seen). It appears that insurance will be placed for 2023/24 as from 1 April 2023. None of the emails suggest that insurance will be refused, though the tenor of the emails is that the insurers expect the Applicant to comply with the requirements of their professional fire-protection reports.

Discussion

35. Where dispensation is sought from consultation prior to works being carried out, it is this Tribunal's view that an applicant needs to persuade the Tribunal there is a valid reason for seeking dispensation rather than using the standard consultation procedure required under section 20 of the Act and by the Regulations. Section 20ZA talks of the need to satisfy the Tribunal that it is reasonable to dispense with consultation – a reason is therefore required (and see *Daejan* referred to in paragraph 15 above). The arguments for the two options – one of consulting under the Regulations, and the other of dispensing with the consultation - must be balanced against each other. The touchstone for determining whether to approve dispensation is "prejudice" to the lessees. There is always some prejudice to the lessees in granting dispensation, as they then do not have the protections set out in the Regulations. The question is whether that prejudice is outweighed by other considerations, such as cost or urgency.

36. The grant of dispensation from consultation does NOT mean that the Tribunal authorises the expenditure on the Proposed Works, still less that it authorises the Applicant to charge those costs to the Respondents, whether through the sinking fund or by a direct invoice for new funds. The decision to proceed with the Proposed Works is a matter entirely for the Applicant. Any lessee asked to contribute towards the cost incurred through the service charge has a right to challenge the service charge costs then arising by bringing a case to this Tribunal under section 27A of the Act for a determination of whether the service charge costs claimed, or to be claimed, are reasonably incurred and of a reasonable standard, and whether a service charge is "payable". The latter point can include consideration by the Tribunal of whether sinking funds can be used to fund the Proposed Works (even if only to fund works whilst a claim is pursued against the building owner).

37. For this reason, the questions of who should pay the costs (and particularly whether adjustments are required because of the protections contained in the Building Safety Act 2022) are not relevant to the Tribunal's determination of this application.

38. The additional documents confirm that Nottingham City Council are keeping a watching brief over the progress of fire protection measures, but there is no hint yet of additional regulatory pressure being applied to the Applicant. Similarly, whilst the Applicants' insurers are demanding to be kept informed of the progress of the Proposed Works, and other works recommended by subsequent reports to the FRA, insurance is still available for the buildings.

39. Nevertheless, it would be of no benefit to the Applicant or the Respondents to risk the possibility of enforcement action should the Council take the view that the Proposed Works were not being progressed in a timely manner. We can also see that there is a risk of continuing difficulties in obtaining insurance at reasonable premium rates if work advised in a professional report is not progressed with reasonable speed.

40. We have carefully considered the written representations of the Respondents who have objected to the grant of dispensation. Our decision on the application must focus on the extent to which any Respondent is prejudiced by the granting of dispensation. Objections based on whether the Respondents should have to pay a service charge for the costs incurred, or whether the Applicant is entitled to draw upon any sinking fund to fund the Proposed Works, are not relevant for this decision, as we have explained in paragraph 36 above.

41. Our view is that refusal to grant this application would be likely to cause prejudice to the Respondents as there would be further delay and cost resulting from the necessity then to commence a full consultation exercise. We note that all Respondents have had the benefit of sight of the relevant part of the FRA and the quotes obtained. None of the objectors have suggested alternative contractors, or that the Proposed Works should be undertaken in a different way.

42. The Tribunal would be concerned that refusing the application now, and thus requiring the Applicant to start a full consultation on the Proposed Works would

delay the carrying out of those Works. Any delay to recommended fire protection works is, in our view, to be avoided if possible, for obvious reasons. It is our view that the Proposed Works should be carried out as quickly as possible to minimise the possibility of risk to life.

43. Carrying out the balancing exercise we referred to in paragraph 35, the Tribunal's view is that the application for dispensation from consultation in respect of the Proposed Works should be **granted**.

44. For the avoidance of doubt, this decision does not grant dispensation from consultation for any other works apart from the Proposed Works. In particular, if the Applicant intends to carry out works arising from the External Façade Fire Spread Assessment PAS 9980 which was completed on 22 December 2022 which crosses the consultation threshold, consultation will be required, or a new application for dispensation will need to be made.

Appeal

45. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)