



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **MAN/00BY/LDC/2022/0062**  
**HMCTS code** : **P:PAPERREMOTE**  
**(audio,video,paper)**

**Property** : **Circle 109, Henry Street Liverpool L1 5BU**

**Applicant** : **Circle 109 Management Ltd**

**Applicant's Representative** : **Kerrington Property**

**Respondents** : **The various Residential Long Leaseholders referred to in the Schedule hereto**

**Type of Application** : **Landlord and Tenant Act 1985 – s 20ZA**

**Tribunal Members** : **Judge J.M.Going**  
**J.Gallagher MRICS**

**Date of decision** : **10 May 2023**

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**DECISION**

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## **The Decision**

**Any remaining parts of the statutory consultation requirements relating to the insulation works which have not been complied with are to be dispensed with.**

### **Preliminary**

1. By an Application dated 5 December 2022 (“the Application”) the Applicant applied to the First-Tier Tribunal Property Chamber (Residential Property) (“the Tribunal”) under section 20ZA of the Landlord and Tenant Act 1985 (“the 1985 Act”) for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of insulation works (“the insulation works”) required at the property (“Circle 109”).
2. The Tribunal issued Directions on 1 March 2023.
3. The Applicant, through its Managing Agent Kerrington Property (“Kerrington”), provided a bundle of documents including a statement of case, copies of a sample lease, a variation report (“the Variation Report”), and a quotation for the insulation works from the main contractor employed to replace the unsafe cladding at Circle 109. As part of the Directions, the Applicant was mandated to send copies of these documents to each Respondent (“Long Leaseholder”).
4. None of the Long Leaseholders has indicated to the Tribunal any objection to the Application, and none of the parties have requested a hearing.

### **The facts and background to the Application**

5. The Tribunal has not inspected Circle 109 but understands that it is a purpose-built block of 109 residential flats (apartments) constructed approximately 15 years ago.
6. It is also understood, from the sample Lease, that each Long Leaseholder owns one or more apartments within Circle 109 under a common form of 999-year term lease and is due to pay a share of the costs of maintaining and repairing the main structure and walls of the building through the service charges.
7. The Applicant’s statement of case confirms that “in the middle of 2020 the building received an inadequate rating on its external wall fire review. This set-in motion a series of events that required the building to change its cladding as it was deemed not-compliant. An application... made to the Building Safety fund (BSF)... was successful and a grant of £6.4 million including VAT was approved for the project... A few months into the project we were made aware that there was a lack of the correct amount of insulation in the make-up of the

external wall. This would need to be supplemented... An application -as a cost variation- was submitted to the BSF to fund this additional work. In the meantime the QS on the project gave the green light for the contract to carry on adding the insulation so that the project would not slow down. This was done in conjunction with advice from Homes England. We would have lost more money and time stopping work on site”. In the event the application for additional funding was refused “in June 2022”. Advisers to Homes England/BSF noted “the requirement for the provision of the insulation, to the internal side of the I beam, is not in dispute. However, it is required due to a pre-existing defect (insufficient fire protection) and not as a consequence of the eligible cladding remedial works”.

8. The Variation Report in April 2022 by Quantum Experts, the quantity surveyor appointed under the Contract, explained that the need for requisite insulation had been specified by the Architect and was required to comply with building regulations. The Variation Report referred to an extract from part of the original specification to the Contract where it was stated “none of the fire reports attached suggests the replacement of the infill insulation as the current void between the steel framing is fully filled with noncombustible insulation. If required, this will be treated as a variation”. It further confirmed that the need for variation was because “the insulation specified was not existing” and the works were proceeded with to avoid “a site delay and further on costs”.

9. Kerrington confirmed in the Application that it had “kept all leaseholders informed at all times with letters and online meetings”.

10. None of the evidence has been disputed.

11. The Tribunal’s Directions confirmed that any Long Leaseholder who opposed the Application should, within the stated timescale, send to the Applicant and to the Tribunal any statement they might wish to make in response and to confirm if they wished to attend an oral hearing.

12. None have done so, and the Tribunal convened on 10 May 2023.

## **The Law**

13. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) (“the Regulations”) specify detailed consultation requirements (“the consultation requirements”) which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

14. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to go through a 4 stage process: –

- Stage 1: Notice of intention to do the works  
Written notice of its intention to carry out qualifying works must be given to each tenant and any tenants association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons

for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought, allowing at least 30 days. The Landlord must have regard to those observations.

- Stage 2: Estimates

The Landlord must seek estimates for the works, including from a nominee identified by any tenants or the association.

- Stage 3: Notices about estimates

The Landlord must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

The Landlord must give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the tenants' nominee.

15. Section 20ZA(1) states that: –

“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... the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.”

16. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others (2013) UK SC 14* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;
- The purpose of the consultation requirements which are part and parcel of a network of provisions, is to give practical support is to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
- In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord to comply with the requirements;
- The financial consequences to the landlord of not granting of dispensation are not a relevant factor, and neither is the nature of the landlord;
- The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
- The more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that tenants had suffered prejudice;

- Once the tenants have shown a credible case for prejudice the Tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application;
- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed to compensate the tenants fully for that prejudice.

### **The Tribunal's Reasons and Conclusions**

17. The Tribunal began with a general review of the papers, to decide whether the case could be dealt with properly without holding an oral hearing.

18. None of the parties requested an oral hearing and having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing.

19. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –

- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.
- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.
- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Long Leaseholders retain the ability to challenge the costs of the works under section 27A of the 1985 Act.
- The consultation requirements are limited in their scope and do not tie the Applicant to follow any particular course of action suggested by the Long Leaseholders, and nor is there an express requirement to have to accept the lowest quotation. As Lord Neuberger commented in *Daejan* "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 done by, and what amount is to be paid for them".
- Albeit, as Lord Wilson in his dissenting judgement in the same case also noted "What, however, the requirements recognize is surely the more significant factor that most if not all of that amount is likely to be recoverable from the tenant."
- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, even in the simplest cases.
- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)..."

20. Applying the principles set out in *Daejan* the Tribunal has focused on the extent, if any, to which the Long Leaseholders have been or would be prejudiced by a failure by the Applicant to complete its compliance with the consultation requirements, insofar as it has not done already done so.

21. As the Upper Tribunal has made clear in the case of *Wynne v Yates [2021] UKUT 278 (LC) 2021* there must be some prejudice to the leaseholders beyond the obvious fact of having to contribute towards the costs of works.

22. The Tribunal finds no evidence of any actual relevant prejudice: it is clear that the Long Leaseholders have been aware of the core issues for many months; there is no evidence that any of the Long Leaseholders dispute the need for the additional insulation required under the contract specification and to comply with the building regulations; and which the Applicant's evidence confirms has been acknowledged by the contract administrator and quantity surveyor and the advisers to Homes England.

23. As *Daejan* confirms the factual burden of identifying some form of relevant prejudice falls on the Long Leaseholders, and the Tribunal finds the Long Leaseholders, none of whom have objected to the Application, have not identified any relevant prejudice within the context of the Regulations.

24. The Tribunal is not surprised by the lack of any objection to the Application because the potential adverse cost consequences of delaying the multimillion-pound contract to allow for the consultation requirements to be fully worked through, once the need for the insulation works became apparent, was likely to have been clear to all.

25. The Tribunal, in the absence of any written objections from any of the Long Leaseholders and having regard to the steps that have been taken, has concluded that the Long Leaseholders will not be prejudiced by dispensation being granted.

26. The Applicant has made out a compelling case that the works were, and insofar as they have not already been completed remain, necessary and urgent.

27. The Tribunal is satisfied that to insist now on the completion of the consultation requirements, insofar as they have not already been completed, would be otiose.

28. For these reasons, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements.

29. It is however emphasised that nothing in this decision should be taken as an indication that the Tribunal considers that any service charge costs resulting from the insulation works will be reasonable or indeed payable. The Long Leaseholders retain the right to refer such matters to the Tribunal under section 27A of the Landlord and Tenant Act 1985 at a later date, should they feel it appropriate.

**Tribunal Judge J Going,  
10 May 2023**

**The Schedule hereinbefore referred to:-  
The Long Leaseholders**

Anil Kumar Shah  
Blanca Bolos Camarasa  
Camilla Hikarda  
Carne Bolos Camarasa  
Dan George Taune  
Eifion Roberts  
Georgia Lauren Duffy  
Jamie Povall  
Jessica Amy Smith  
Joseph Robb  
Kay Hawkins  
Matthew Thomas Barlow & Jessica Thompson  
Mr & Mrs S Kirby  
Mr D G Webster  
Mr D Hatton  
Mr D Jennings  
Mr D L Barwick  
Mr E & Mrs J Martin  
Mr Frank J Hamlin  
Mr G & Mrs V Marland  
Mr G Boone  
Mr G Macara  
Mr I & Mrs S Cohen  
Mr I Dudak & Mrs N Yupanqui  
Mr J & MRS C Gardiner  
Mr K & Mrs F Morrissey  
Mr Michael Duty  
Mr O S Dudley  
Mr P & Mrs D Owen  
Mr P & Mrs V Bratty  
Mr P Harrison  
Mr P McArd & Mr N Durr  
Mr P S Green  
Mr R F Martin  
Mr R L Gill  
Mr R W Smith  
Mr T & Mrs E Lawler  
Mr T Keating & Miss Kavanagh  
Mr Y & Mrs G Pathmanathan  
Mrs D A Allard  
Mrs Lynn Berry  
Mrs S Aynsworth  
Ms A Farrell  
Ms G Roach  
Ms M V Degannes  
Ms N Middleton & Ms P Collingwood  
Ms O J Williams  
Ms S Gulab



Ms S Kerr  
Paul Carney  
Robin Ian Turner  
Roumiana Dimitrova and Ivan Dimitrov  
Silvia Gonzalez Rodriguez Rafael Gonzalez Casado  
Steven Kelly & Tracy Ann Kelly  
William Edward Davies