



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

Case Reference : CHI/00HN/LDC/2023/0018

Property : Admirals Walk, West Cliff Road,
Bournemouth, Dorset, BH2 5HG

Applicant : Admirals Walk 2000 Ltd

Representative : Napier Management Services Ltd
Mrs A Lacey-Payne

Respondent : Mr K Dixon & Mr D Bell - (Flat 11)
(First Respondents)

Mr D Hacker - (Flat 98)
(Second Respondent)

Representative :

Type of Application : To dispense with the requirement to
consult lessees about major works
Section 20ZA Landlord and Tenant Act 1985

Tribunal Member(s) : Mrs J Coupe FRICS
Mr M.J.F. Donaldson FRICS MCI Arb MAE

**Date and venue
of Hearing** : 29 March 2023
: Havant Justice Centre, Havant, PO9 2AL

Date of Decision : 12 April 2023

DECISION

Decision

In accordance with section 20ZA Landlord and Tenant Act 1985 (“the Act”) the Tribunal grants unconditional dispensation from the consultation requirements of Section 20 of the Act. The relevant works are the repair of damaged concrete either side of the junction where the South return meets the stair core on the West elevation and the raising of scaffolding to facilitate such work.

Background to the Application

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The application was received on 7 February 2023. Tribunal directions were issued on 10 February 2023 setting out a timetable for the exchange of documentation leading to submission of a hearing bundle by 10 March 2023.
2. A number of case management applications were made by the first Respondents and by the Applicant culminating in an oral hearing held on 29 March 2023.
3. The grounds of the application are that whilst investigating water ingress, the Applicant’s appointed surveyor identified cracked and loose concrete panels to upper elevations. Aware that a similar concrete panel had recently become detached from the building, the Applicant immediately instructed the erection of scaffolding and investigation, resulting in the proposal before the Tribunal.
4. Due to the perceived urgency of the proposed works and having recently experienced difficulties in obtaining competitive tenders for similar works at the Property, the Applicant concluded that dispensation from consultation was necessary.
5. The property is a 14 storey, including basement level, concrete framed residential block built in the 1960’s, comprising some 121 self-contained flats of varying size. External concrete staircases provide additional fire escape routes. The property is situated on the West Cliff of Bournemouth overlooking the sea in an exposed location. The property is set in extensive gardens and grounds, with the benefit of both surface and underground parking.
6. The Tribunal was supplied with an electronic bundle of 282 pages and hard copies of the bundle at the hearing. References in this determination to page numbers in the paginated bundle are indicated as [].
7. These reasons address in summary form the key issues raised by the application. **They do not recite each and every point raised or debated.** The Tribunal concentrates on those issues which, in its view, go to the heart of the application.

8. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is confident that on the available evidence that fact is established or proven on the balance of probabilities.

The Hearing

9. At the hearing the Applicant was represented by Mrs A Lacey-Payne of Napier Management Services Ltd (“Napier”), who was accompanied by Mr Mathieson MRICS of Ellis Belk Associates Limited. The first Respondents, Mr K Dixon and Mr D Bell, were in attendance and were predominantly represented by Mr K Dixon. The second Respondent, Mr D Hacker, submitted written representations.
10. Observing the proceedings were Mr White, Mr Watts, Mrs Lewis and Mr Mummery, all resident Directors of the Applicant. Also present were Mr Holiday and Dr Cooper in their capacity as resident lessees.

The Issues

The Applicant

11. The following evidence was given on behalf of the Applicant by Mrs Lacey-Payne, supported by Mr Matheson in his capacity as Chartered Surveyor to the Applicant:
 - a. Historically the building suffered from water ingress resulting in penetrating dampness within individual flats, corrosion of the reinforcement in the cladding and subsequent localised failures of these areas. Adhoc remedial repairs have been undertaken at various times to different parts of the building.
 - b. During June 2021 a section of concrete on the north eastern façade become dislodged and fell into the front car park. Southern Concrete Services Limited (“SCS”) were instructed to erect scaffolding to the height of the affected area in order to protect residents from further falling debris and to enable a closer inspection and localised repairs.
 - c. Ellis Belk were instructed to survey the concrete elevations and to advise Napier on the most suitable method of repair. Having undertaken the most urgent repairs, the Applicant instructed Ellis Belk to prepare a specification of works in relation to the East elevation. Silka Structural Engineers were engaged to assist Ellis Belk, having been involved in previous projects at Admirals Walk.
 - d. The specification of works was put out to four specialist firms for tender, each firm having confirmed their willingness to provide a quotation. In the event, only one firm, that being SCS, chose to submit a tender.

- e. Napier issued the Section 20 Notice of Intention in regard to those works in 2021. However, having received only one tender, Napier were unable to issue the second Section 20 Notice, that being the Notice of Estimates. These works remain outstanding and will be the subject of further consultation or a dispensation application in future.
- f. In July 2022, Ellis Belk were instructed to investigate reports of water ingress within Flat 100. Whilst undertaking his survey, Mr Matheson identified cracked and loose concrete panels outside Flat 100 and Flat 102 on the west elevation, which, in his opinion, posed an immediate risk.
- g. In August 2022, Napier instructed SCS to erect scaffolding to Flat 100 and to undertake emergency repairs.
- h. Whilst undertaking such repairs and with the benefit of scaffolding insitu SCS identified, at higher levels, further areas of suspect concrete on the adjacent stairwell. Scaffolding was subsequently raised to the 7th storey and cordons erected at ground level to protect residents and visitors from falling debris.
- i. On 6 December 2022, SCS advised Napier of their concern that the concrete frame was experiencing structural damage. Napier subsequently, on the same day, instructed Ellis Belk in this matter.
- j. On 20th of December 2022, Godsell Arnold Partners Structural Engineers (GAP), acting on the instructions of Ellis Belk carried out an inspection which identified advanced corrosion to the underlying concrete structure outside and above Flat 100 and Flat 102 and potentially on other upper storeys. The Tribunal were advised that the concrete structure supports the substantial weight of the concrete cladding panels. The Applicant therefore concluded that further urgent repairs were required.
- k. GAP's report also identified cracking to the soffit of the concrete structures that span the width of the stairwell at each storey. These structures support the external cladding panels and without further investigation their surveyor was unable to confirm whether such cracking is superficial or structural.
- l. The Applicant seeks dispensation from consultation in order to urgently progress the remedial works identified. Also, to raise the scaffolding to upper levels in order to carry out such work safely, whilst undertaking further investigations to additional surface areas.
- m. Having regard to the lack of tenders received from specialist firms in relation to the work on the east elevation, the Applicant does not consider it likely that a sufficient number of firms would be willing to submit tenders for this urgent work or to have immediate availability.

- n. The Applicant would willingly undertake statutory consultation and, where possible, obtain at least three competitive tenders. However, the Applicant considers there is neither the time to do so nor, having been through part of the tender process recently, any realistic prospect that in excess of one quotation would be secured. The Applicant is therefore of the opinion that the only option is to apply to the Tribunal for dispensation from consultation.
- o. The Applicant does not consider that the Respondents will be prejudiced by the granting of dispensation from consultation nor that the Respondents have identified any relevant prejudice in their objections.
- p. The Applicant relies upon the expert evidence of Ellis Belk Chartered Surveyors and Fraser Boyce of Godsell Arnold Partnership Structural Engineers.
- q. The Applicant considers that despite being unable to undertake statutory consultation, all lessees have been regularly updated on the status of these and other concrete repair works by way of regular newsletters, copies of which were submitted in evidence, and meetings to which all lessees were invited.
- r. The Applicant is aware that the first Respondents are requesting that the Tribunal order the Applicant to meet their costs in appointing their own Chartered Surveyor to investigate the proposed works and any associated legal expenses. Having taken instructions from her client during a break, Mrs Lacey-Payne stated that her client considers this to be an unnecessary expense as specialist advice has already been sought from both a Chartered Surveyor and a Structural Engineer and that although the Applicants have no objection to the Respondents seeking a second further opinion, this should be at their own cost.
- s. The Applicant noted that the second Respondent, Mr Hacker, stated that he has no objections to the proposed works and that his objections focus on management and administration and, as such, no relevant prejudice is made out.

The first Respondents – Mr Dixon & Mr Bell (Flat 11)

- 12. The following evidence was given by the first Respondents:
 - a. The perceived urgency of the proposed works was challenged, particularly having regard to the period of time which elapsed between the dislodging of a concrete section in June 2021 and the application to the Tribunal for dispensation. Upon cross examination, Mrs Lacey-Payne explained to the Respondents that the dispensation related to proposed works and not works associated with the detached panel in June 2021, which had already been repaired without the need for consultation.

- b. Whilst accepting the Applicant's assertion that maintaining the health and safety of all residents remains a priority, the first Respondents nevertheless remained sceptical that the works now under discussion are in fact as urgent as professed. The Respondents were of the opinion that there had been sufficient time between August 2022 and March 2023 for the Applicant to undertake statutory consultation.
- c. The Respondents stated that there was a lack of transparency, clarity and communication accompanying the proposals and that they would have expected the Applicant to prepare a cost analysis of the works and to have undertaken competitive tendering. However, upon cross examination by the Applicant, the Respondents accepted that they had, in common with all lessees, been provided with regular updates on proposed cyclical repairs to the concrete by Napier in the form of newsletters and meetings to which they had been invited.
- d. The Respondents expressed concern in relation to the association between Napier and the appointed surveyors and structural engineers, suggesting that such relationships lacked professionalism. In direct response to a question from Mr Bell concerning professional indemnity insurance, Mr Mathieson provided assurance that Ellis Belk held appropriate cover to a minimum level of £5 million.
- e. The Respondents expressed disbelief that only one quotation for the works proposed to the eastern elevation, such works having been the subject of a stage one statutory consultation, had been received. The Respondents were of the opinion that specialist contractors located further afield, for example those previously engaged from Wales, should have been invited to submit tenders. Under judicial questioning, the Respondents confirmed that they had neither investigated nor approached any such firms in order to ascertain whether further quotations could have been obtained or to ascertain availability. The Respondents also confirmed that they had not nominated any contractors for the proposed works to the East elevation.
- f. The Respondents explained that their flat was their home and was not simply an investment. They considered that the Applicant was "cobbling together plans and had no long term affordable strategy". Furthermore, the Respondents argued that there is a lack of trust between the parties, that the Applicant should be exploring alternative routes of funding for the works. Alternatively, the landlord should be liable for the costs having allowed the disrepair. As a minimum requirement, the Respondents expected to be consulted on the proposed works and the costings thereof. By taking away their statutory right to be consulted, the Applicant was opening the door to fraud. The Respondent's considered the situation "unfair, not right and shouldn't be happening".

- g. In summary, the Respondents find themselves in a position whereby they are unable to form an opinion as to whether the proposed works are required as, they say, insufficient and inadequate information is before them. In order to allay their concerns, the Respondents invited the Tribunal to require the Applicant to fund a second opinion on the proposed works by a surveyor of their nomination and for the Applicant to meet any legal costs incurred during such process.
- h. In conclusion, the Respondents considered that the Applicant's proposed removal of their right to statutory consultation is, in itself, prejudicial and that such an application exposes the Respondent's to the risk of potential fraud. The Respondents considered themselves already prejudiced by the timing of the works and the manner in which the project had thus far been managed and contracts awarded. The Respondent's argued that granting unconditional dispensation could expose the Respondents to the prejudice of future financial loss.

The second Respondent – Mr Hacker (Flat 98)

- 13. The following written evidence was submitted by the second Respondent.
 - a. Mr Hacker stated "I don't disagree that repairs need to be done, it's by who and how they are managed I have a problem."
 - b. By way of an example of poor management, the Respondent referred to a burst mains water pipe at the Property and explained how the Applicant and Napier had, in his opinion, failed to manage the emergency in a professional and competent manner.
 - c. Further, the Respondent referred to previous emergency repairs and to scheduled works at the Property, and the management thereof, asserting a degree of mismanagement and wasted costs.
 - d. The Respondent queried what measures had been put in place to drain water ingress and condensation from the concrete cladding and the ongoing management of the condition of the Property. Furthermore, the Respondent raised the issues of noise caused by the current works and the lack of prior notice by Napier of such disturbance, additionally the lack of scaffold netting or sheeting resulting in dust blowing across resident's balconies.
 - e. The Respondent invited the Tribunal to review the competence of the managing agent, the ability to carry out works to budget and on time.
- 14. In response to Mr Hacker's submissions Mrs Lacey Payne reiterated her client's opinion, that the second Respondent had not raised any objections to the works themselves, but rather to the administration and management thereof. Further, that previous works referred to by the Respondent had no relevance to the current dispensation application.

15. The Applicant considers the chosen contractor, SCS, to be experts in the works identified and that they benefit from prior knowledge of the Property. The contractor has also confirmed availability and was the only one of four firms approached who were willing to undertake similar work on the eastern elevation. The Applicant stated that supervision of the works would be undertaken independently by Ellis Belk, with Mr Mathieson having prepared the specification of works for the east elevation and who also had the benefit of a detailed knowledge of the Property.
16. In summary, the Applicant argued that the second Respondent had not identified any relevant prejudice that would arise from the Tribunal granting dispensation from statutory consultation.

The Law

17. The relevant section of the Act reads as follows:

S.20ZA Consultation requirements:

Where an application is made to a Leasehold Valuation 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.

Discussion

18. In order to grant the application, the Tribunal must be satisfied under s.20ZA of the Act that it is reasonable to dispense with the consultation requirements. In reaching its decision, the Tribunal has taken into account all of the evidence submitted and the objections of the first and second Respondents.
19. In considering this matter the Tribunal has had regard to the decision of the Supreme Court in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 (“Daejan”) and the guidance to the Tribunal that in considering dispensation requests, it should focus on whether tenants are prejudiced by the lack of the consultation requirements of section 20. In summary, the Supreme Court noted the following:
 - i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord’s breach of the consultation requirements.
 - ii. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

- iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - v. 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).
 - vi. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
 - vii. The Supreme Court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation 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.
 - viii. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
20. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and, if so, to what extent, the Respondent would suffer relevant prejudice if dispensation was granted. The factual burden is on the Respondents to identify any relevant prejudice which they claim they might suffer.
 21. The Tribunal now turns to the facts of this application.
 22. Both Respondents expressed concerns about the overall management of the building and both Respondents referred to previous projects which they allege were poorly managed. The first Respondents raised concerns over the contractual relationship between the managing agent and appointed surveyor, a perceived lack of transparency and clarity in scoping the works and undertaking/obtaining competitive tender, and referred to an alleged breach of a previous agreement between the parties and potential fraud.
 23. Whilst such points are clearly of concern to the Respondents, they are not directly relevant to the application before us. In this matter the Tribunal is solely restricted to the question of whether the consultation period may be dispensed with for the reasons set out by the Applicant in their evidence.
 24. The Tribunal has considered the advice of the Chartered Surveyor and Structural Engineer, who both refer to the urgency of the proposed works, for which the scaffolding already onsite will require extending.

25. The Tribunal note that the Applicant intends carrying out cyclical repairs to the concrete structure and that such intention has been notified to the lessees through newsletters, annual general meetings and extraordinary general meetings. The Tribunal record the Applicant's stated intention to consult on such cyclical repairs and also acknowledge that the Applicant issued the Notice of Intention in regard to proposed works on the east elevation.
26. The Tribunal accept that having identified potential serious defects to the concrete structure, the Applicant considers it prudent to engage a specialist contractor to carry out the proposed works and that there appears to be a limited pool of experienced contractors willing to undertake such work on a high-level residential building located in an exposed environment.
27. The Tribunal concurs with the Applicant that the proposed investigations and potential remedial works are clearly urgent, demonstrated recently by a section of concrete falling from an upper level elevation. The Tribunal agrees that in order to carry out further investigations safely and to undertake any identified remedial works at the earliest opportunity, that the scaffolding already erected will require raising.
28. The Tribunal does not accept the contention that works could be delayed whilst additional quotations are sourced. The Tribunal accept the evidence of the Applicant that they have recently experienced difficulties in obtaining competitive quotations for similar works on the east elevation. The Tribunal concur that even if the works were delayed to allow an opportunity for such tendering, there remains a high likelihood that the only suitably qualified tender would be submitted by SCS.
29. Accordingly, having carefully considered the submissions and evidence of both the first and second Respondents, the Tribunal does not find that any relevant prejudice to dispensation of consultation has been identified.
30. Turning next to the request that the Applicant meets the costs of the first Respondents' own expert surveyor to report on the proposed works and for the Applicant to meet the first Respondents' "expert, administration and legal expenses".
31. The reason for such request appears to be predominantly centred on concern that only one firm, that being SCS, tendered for the works proposed on the east elevation and that, by default, that firm is now to be engaged in these works.
32. The first Respondent's referred to a website address linked to 'The Concrete Centre', which provides "material, design and construction guidance". In written submissions, the Respondents stated the company "appear to be very good and worth reaching out to". Upon judicial questioning, the first Respondents acknowledged that they had neither approached this business nor had any basis upon which they formed their opinion that they were "very good". Furthermore, the Tribunal was unable to extract from the Respondents which part of the specification of works the first Respondents contested and hence required a second opinion for.

33. The Tribunal concludes that the first Respondent failed to identify any basis upon which a further expert opinion is required. The Applicant has engaged both a firm of Chartered Surveyors and a Structural Engineer and no specific objections to their reports have been raised by either Respondent. Rather, the first Respondents appear to require a re-examination of the advice already sought. The Tribunal finds such an exercise would not only incur a duplication of costs for all lessees but would delay urgent works further.
34. Accordingly, the Tribunal finds no basis upon which to order that such costs should be met by the Applicant.

DECISION

35. In accordance with Section 20ZA Landlord and Tenant Act the Tribunal grants unconditional dispensation from the consultation requirements of Section 20 of the Act. The relevant works are the repair of damaged concrete either side of the junction where the South return meets the stair core on the West elevation and the raising of scaffolding to facilitate such work.
36. In granting dispensation, the Tribunal makes no determination on whether the costs of the works are reasonable or payable. If any leaseholder wishes to challenge the reasonableness of the costs arising from the relevant works, then a separate application under Section 27A of the Landlord and Tenant Act 1985 should be made.

RIGHTS OF APPEAL

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.