



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

Case Reference : BIR/00FY/LDC/2023/0006

HMCTS : Paper

Property : Castle Exchange, 41 Broad Street Nottingham
NG1 3AP

Applicant : Castle Exchange RTM Company Ltd.

Representative : Knights plc

Respondents 1 : Leaseholders of Castle Exchange

Respondents 2 : Victoria Investments No.2 Ltd.

Representative : None

Type of Application : An Application under section 20ZA of the Landlord and
Tenant Act 1985 for dispensation of specified Section 20
consultation requirements.

Tribunal Member : Nicholas Wint FRICS (Chair)

Date of Decision : **11th August 2023**

DECISION

Introduction

- 1 The Landlord (“the Applicant”) applied to the First-tier Tribunal (Property Chamber) (FTT) in an application for an order to dispense with certain consultation requirements provided for by section 20 of the Landlord & Tenant Act 1985 (“the Act”), as amended by the Commonhold and Leasehold Reform Act 2002. In short, this section together with the Service Charges (Consultation Requirements) (England) Regulations 2003 (‘the Regulations’) requires a landlord to consult with lessees before placing a contract to undertake any ‘qualifying works’ that would cost each tenant more than £250.00. The Regulations set out a timetable for the consultation and identify the procedures to be followed during the consultation.
- 2 However, the Act envisages that there may be occasions where for various reasons a landlord may be unable to consult, for example in cases of emergency, and there is provision in section 20ZA of the Act for a landlord to apply to the Tribunal for ‘dispensation’ to override all or some of the consultation requirements. An application may be made before or after works are carried out.
- 3 In this case, the Applicant has applied for dispensation from all or some of the consultation requirements in respect of acknowledged ‘qualifying works’ so that repair works can be carried out to the Property following a fire. Therefore, the only issue for the Tribunal to determine under this application is whether it is reasonable to dispense with the consultation requirements.
- 4 It is understood that major fire safety remediation work is already taking place at the Property and should the Tribunal grant dispensation the Applicant states that it would represent a cost-saving for the leaseholders for the Works to be carried out at the same time by the same contractors.
- 5 By way of Directions dated 12 April 2023 the Applicant was instructed to write, by 19 April 2023, to the Respondents setting out the following:
 - a) Informing them of the application and including a copy of the 8-page statement of case document and the Directions;
 - b) Advising them that a copy of the application (with all personal details deleted), and all supporting documents will be available on the Applicant’s website, advising them of the URL address and notifying them that any response to the application should be made using the Reply Form at the end of the Directions;
 - c) Informing the Respondents that if they wish to receive a printed copy of the application and supporting documents, they should write to the Applicant by 28 April 2023 who will then send printed copies.
- 6 Further, by 17 May 2023 the Applicant was directed to provide A4 stamped address envelopes for all Respondents to the Tribunal. The postage should be sufficient for a document of approximately 25 pages. These envelopes will be used by the Tribunal to distribute the decision once it is made.
- 7 The Directions also required the Respondents by 17 May 2023 should complete the attached form and return it to the Tribunal with a copy to the Applicant indicating whether:

- a) You consent to the application (ie. Agree to dispensation from full consultation or you oppose the application (in whole or in part) and your reasons why;
 - b) You wish the Tribunal to hold a hearing.
- 8 The Applicant advised the Tribunal that a paper determination was acceptable and, in the circumstances, neither party objected to the application being determined without an inspection or requested a subsequent oral hearing.
 - 9 The Applicants Representative has provided a statement dated 21 February 2023 explaining the purpose of the application, the reason for seeking dispensation, a sample lease in respect of one of the apartments and a schedule of works and various photographs of the fire damage.
 - 10 The Tribunal received a copy reply from two Respondents neither of whom objected to the request for dispensation and agreed for the Tribunal to decide the matter based on written representations only.
 - 11 In light of the above, the Tribunal determines the application based on the written evidence submitted by the Applicant and responses from the Respondents, without an inspection of the subject Property.

The Lease

- 12 The Applicant provided the Tribunal with a copy of a lease dated 22 June 2006 in respect of Plot Number D15, Castle Exchange Lace Market Nottingham.
- 13 It is understood and accepted by the Tribunal that this lease is identical to the other Respondents leases.
- 14 It is held for a term of 999 years from 1 October 2003 at an initial ground rent of £250.00 per annum.
- 15 Schedule 5 of the lease provides for the Decoration and Repair of the Structure more specifically:

‘To keep the interior and exterior walls and ceilings and floors of the Block and the whole of the structure roof foundations and main drains boundary walls and fences of the Block (but excluding such parts thereof as are included in the Flat by virtue of the definition contained in Part 1 of the First Schedule and the corresponding parts of all other flats in the Block) in good repair and condition.’
- 16 The Block is described as:

‘The land and buildings edged blue on the Plan No.1 annexed hereto’.
- 17 The Lessees covenants are set out in clause 3. Clause 3.2 provides that the lessee shall:

‘...pay the Service Charge to the Company ...’.
- 18 The Company’s covenants are set out in clause 4. Clause 4.1 provides that the Company shall:

‘... carry out the repairs and provide the services specified in the Fifth Schedule...’.

- 19 The Lessee's proportion of the Service Charge Expenses is 1/114th of the aggregate Annual Maintenance Provision attributable to the Block for the Block services set out in Part 1 of the Fifth Schedule which do not apply to the lifts and 1/107th part of the aggregate Annual Maintenance Provision attributable to the lifts under Part 1 of the Fifth Schedule, clause 14.
- 20 Accordingly, the Tribunal finds that the lease provides that the cost of repairing and maintaining the structure of the building falls within the Applicants repairing obligation and that each Applicant is responsible for the cost, as a relevant cost, which is to be paid through the service charge.
- 21 The consultation provisions in section 20 of the Act and the Regulations would, therefore, normally apply as the total cost of the repairs exceeds the £250.00 threshold per leaseholder.

Relevant Law

- 22 Section 20 of the Act, as amended, and the Regulations provide for the consultation procedures that landlords must normally follow in respect of 'qualifying works' (defined in section 20ZA(2) of the Act as 'work to a building or any other premises') where such 'qualifying works' result in a service charge contribution by an individual lessee in excess of £250.00.
- 23 Provision for dispensation in respect of some or all such consultation requirements is made in section 20ZA(1) of the Act which states:

'Where an application is made to a leasehold valuation tribunal (a jurisdiction transferred to the First-tier 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.' (*emphasis added*).

- 24 In *Daejan Investments Ltd. v Benson et al.* [2013] UKSC 14 (*Daejan*), the Supreme Court set out the proper approach to be taken to an application for dispensation under section 20ZA of the Act. In summary, this approach is as follows:
 - a. The Tribunal should identify the extent to which lessees would be prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the consultation requirements;
 - b. That no distinction should be drawn between 'a serious failing' and 'technical error or minor or excusable oversight' on the landlord's part save in relation to the prejudice it causes;
 - c. The financial consequences to the landlord of not granting a dispensation are not relevant factors when the Tribunal is considering how to exercise its jurisdiction under section 20ZA; and
 - d. The nature of the landlord is not relevant.
- 25 Further, in exercise of its power to grant a dispensation under section 20ZA of the Act, the Tribunal may impose such terms and conditions as it thinks fit,

provided only that these terms and conditions must be appropriate in their nature and effect.

- 26 For the sake of completeness, it may be added that the Tribunal's dispensatory power under section 20ZA of the Act only applies to the aforesaid statutory and regulatory consultation requirements in the Act and does not confer on the Tribunal any power to dispense with contractual consultation provisions that may be contained in the pertinent lease(s).

Applicant's Submission

- 27 The Applicant's case is set out in the Application and in their statement prepared by Mr David Nuttall of St Ives Chambers and Lucy Walsh, Partner at Knights plc.
- 28 The Building is described as a multi-storey residential development of 119 apartments. The development comprises an 8-storey central tower and three and four-storey buildings as well as dedicated car parking.
- 29 It is understood a fire broke out in flat D602 which activated the sprinkler system and called for the fire brigade to attend the Building. The result was fire, smoke and water damage as evidenced by the photographs submitted.
- 30 The Applicants contractor has carried out an assessment of the necessary works and these have been costed at £142,214.88 including £15,000 contingencies.
- 31 It is also understood that the Applicants contractor, Breyer Group plc, were initially appointed following an earlier tender to address various issues concerning fire safety remediation works the costs of which are being paid for by the Government's Building Safety Fund. The extent of these works is shown in the attached Document 4 and these works were commenced in May 2022 and it is anticipated will take approximately 19 months to complete.
- 32 It is, therefore, the Applicants submission that as Breyer are presently carrying out fire safety remediation works a full consultation exercise would delay the works unnecessarily and the fact that there is some overlap/ duplication between the fire safety works and the Works required which would lead to savings for the leaseholders and that some of the works will be covered by the Building Safety Fund. This will reduce the costs in respect of the curtain walling and enable a simpler sign-off for Building Control and the Fire Engineer as well as avoiding new warranties and insurance from a second contractor as well as possible health and safety issues with two separate contractors working on site at the same time.

Respondent's Submission

- 33 No specific evidence was submitted to the Tribunal by any of the Respondents.

The Tribunal's Determination

- 34 The Tribunal has had regard to the evidence provided by the Applicant, the relevant law and its knowledge and experience as an expert Tribunal. It also noted that none of the Respondents objected to the dispensation sought in the application.

- 35 It is clear to the Tribunal from the information supplied by the Applicant that the works are urgently required to the Property.
- 36 Section 20ZA does not expand upon or detail the circumstances when it may be reasonable to decide dispensing with the consultation requirements. However, the Supreme Court in *Daejan* found that the Tribunal in considering whether dispensation should be granted must consider the extent to which lessees would be prejudiced by a landlord's failure to consult.
- 37 There are essentially three stages in the consultation procedure:
- Stage 1 - the pre-tender stage notifying the parties of the intention to carry out works;
- Stage 2 - the tender stage notifying the parties of proposals including estimates; and
- Stage 3 - advising the leaseholders that the contract has been placed and the reasons behind the same.
- 38 The dispensation sought in this matter is, in effect, a means for expediting the carrying out of the Works required which will reduce the costs and minimize the disruption caused to the leaseholders.
- 39 The Tribunal is therefore satisfied that the Applicant should be permitted to dispense with the normal consultation requirements. In the circumstances and applying the tests set out in section 20ZA and the approach specified in *Daejan*, the Tribunal finds that the lessees would not be prejudiced by granting the dispensation of the section 20 consultation requirements in the Act and in the Regulations to the extent sought in the application and that it would be reasonable to grant such dispensation. Therefore, dispensation is granted.
- 40 Parties should note that this determination relates only to the dispensation sought in the application and does not prevent any later challenge by any of the lessees under sections 19 and 27A of the Act on the grounds that the costs of the works incurred had not been reasonably incurred or that the works had not been carried to a reasonable standard.

Appeal to the Upper Tribunal

- 41 If any party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).
- 42 If the party wishing to appeal does not comply with the 28-day time limit, the party 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.
- 43 The application for permission to appeal must identify the decision to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Nicholas Wint FRICS

Date: 11th August 2023