



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

- Case Reference** : CHI/00HB/LDC/2023/0047
- Property** : Factory No.1 Development –
- 1-31 Consort House, East Street,
Bedminster, BS3 1FU
- 1-19 Tobacco Store, St Johns Road,
Southville, Bedminster, BS3 1FN,
- 1-41 Capstan Room, St Johns Road,
Southville, Bedminster, BS3 1FP
17-20, 36-40, 58-60 Regents House,
Lombard Street, Bristol, BS3 1FT
- Applicant** : Factory No.1 (Bedminster) Management
Company Limited
- Representative** : Warwick Estates Management Limited
- Respondent** : The Leaseholders
(see attached list)
- Type of Application** : To dispense with the requirement to consult
lessees about major works section 20ZA of the
Landlord and Tenant Act 1985
- Tribunal members** : Mr D Banfield FRICS, (Chairman)
Mr B W H Bourne MRICS
Mr M R Jenkinson
- Date and place of
hearing** : 3 August 2023 at Havant Justice Centre and by
video platform
- Date of Decision** : 8 August 2023

DECISION

Respondents named on 20 June 2023 Directions:

<u>Flat No</u>	<u>Name</u>
1 Capstan Room	Rhian Pirie & Barbora Krajcovicova
3 Capstan Room	Niall John Barker & Natalie Jane Pattison
10 Capstan Room	Suk Ha Lam
14 Capstan Room	Adam Matthew David Beveridge and Isabelle Flora Clark
18 Capstan Room	Christopher Amaral and Szabolcs Apro
20 Capstan Room	Charley Jean Beaton and Adam Daniel Fisher
23 Capstan Room	Vaclav Janecek and Eva Janeckova
28 Capstan Room	Christopher Mackenzie Power
34 Capstan Room	Simon Giles White
39 Capstan Room	Seath Herbert and Sarah Herbert
3 Consort House	Alexander John Winn
11 Consort House	Patrick John Liddicoat
14 Consort House	Harry Elliott Holland & Sophie Alessandra Charlotte
22 Consort House	Yuliya Reed
24 Consort House	Daniel Michael Cramphorn
7 Tobacco Store	David Stewarts Mole and Hon Ming Chan
18 Tobacco Store	Anna Emilia Sivula and Andrew Jack Bryce

Additional Respondents:

<u>Flat No</u>	<u>Name</u>
2 Capstan Room	Sophie Clare Allen
5 Capstan Room	Alexandra Jade Barrett
6 Capstan Room	Ealish Swift & Nicholas Richardson
7 Capstan Room	Joe Henry Luke Deplae
12 Capstan Room	Aimee Louise Hawkesford and Charles Alex Tyler Mathias
16 Capstan Room	Ignacio Domenech Blanco and Noemi Aznar Font
19 Capstan Room	Anupam Kumar Gupta and Megha Goyal
22 Capstan Room	George Gonzalez-Aller Buckley
24 Capstan Room	Eloise Morgan West
26 Capstan Room	Lauren Jayne Slate
27 Capstan Room	Emilia Alejandra Manfredi
29 Capstan Room	Emily Jane Rose
30 Capstan Room	Karuniyan Vipulendran
32 Capstan Room	Theocharis Tzionis
33 Capstan Room	Lucy Peers
36 Capstan Room	Joshua James Alexander Carr and Amy Nicol
37 Capstan Room	Tracey Ann Newton-Clarke
41 Capstan Room	Michelle Tracey Ensuque

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. This part retrospective application was received on 17 April 2023.
2. The Applicant explains that a Section 20 Notice of Intention was served on 14 April 2023. Further,

“The works are to replace the heat exchanger units within boilers on the communal hot water and heating system affecting all leasehold properties at The Factory No.1 Development. There is concern that further failure would result in total loss across the site.”
3. Dispensation is sought because,

“As the heat exchangers are to be replaced by the original manufacturer of the boilers, there is no opportunity to find an alternative quotation that would represent an improvement on the quoted sums.”
4. On 4 May 2023 the Tribunal directed that the application to be dealt with on the papers and on 2 June 2023 the Tribunal confirmed that decision.
5. Further Directions were issued on 20 June 2023 noting that upon examination of the hearing bundle submitted by the Applicant, an objection to hearing the application on paper was discovered and Judge Banfield’s preliminary view that the issues raised in the various objections would benefit from an oral hearing.
6. Following an email dated 4 July 2023 from the lessee of 6 Capstan Room it transpired that a number of responses had not been received and on 14 July 2023 further directions were made enabling those lessees to make further representations and for the Applicant to respond. The hearing was directed to take place on Thursday 3 August 2023 at Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL.
7. The hearing duly took place and was attended by Mr Marc Hurn and Ms Lily Morgan-Knight of Warwick Estates Management Ltd for the Applicant and, by video platform, lessees Mr D S Mole, Mr S Lehman and Ms A Ferrer-Lopez. Mr V Janacek joined briefly but after disconnecting told the case officer that he was happy for the hearing to proceed in his absence.
8. I explained that the purpose of the hearing was to establish whether the lessees had been prejudiced by the lack of consultation and how the outcome might have differed if consultation had been carried out. I reminded the parties that S.20 entitled the lessees to have their representations considered, but not necessarily accepted by the Applicant, to nominate a contractor and for competitive quotations to be received.

9. In addition to determining whether prejudice had been caused the Tribunal would also consider whether any dispensation would be subject to conditions.
10. The Tribunal would not however determine whether the costs were recoverable by way of the service charge that matter being subject to any challenge that a lessee may wish to make under section 27A of the Landlord and Tenant Act 1985.
11. The Tribunal case officer had prepared a bundle of 294 pages which included all of the lessees responses, the Applicant's replies and requests from 4 lessees suggesting conditions that should be imposed should dispensation be granted.
12. On examination of the bundle it was clear that there was no dispute that these were qualifying works and that the majority of representations were in identical or near identical form. It was proposed therefore to refer to one only together with one of those regarding conditions. The Tribunal referred to pdf pages 157 (D S Mole) and 293/4 (S. Lehman) respectively.

The Hearing

13. Mr Hurn confirmed that the work had now been completed and that dispensation had been sought due to their inability to obtain competitive quotations given that the defective parts had to be sourced from the same manufacturer and the need to ensure a continuation of supply without undue delay.
14. Three out of six boilers had failed and it had been necessary to replace their heat exchangers. A warranty claim had been made against the manufacturer of the boilers but which had been resisted on the grounds that the water supplying the boilers was not of the correct pressure and/or sufficient quality. Investigations were ongoing and at present the 3 non-commissioned units would not be brought into use until the cause of the previous failure had been established. Water pressure and water quality were factors for consideration.
15. The Applicant had considered the replacement of the boilers rather than repairing them but said that the costs would be excessive and would be likely to require a re-design of the system.
16. Mr Mole said that he now appreciated the differences between the Tribunal's powers under S.20ZA and that under S 27A and confirmed that he would be making the latter application.
17. Mr Mole questioned the extent to which the Applicant had attempted to rectify the issues with the developer before embarking on the repairs and said that the lessees had no control over the management company and had not had access to any reports relating to the issue. He considered

that the lessees should be provided with independent evidence concerning the issues that had arisen.

18. Mr Lehmann said that the three working boilers were sufficient for supplying the needs of the existing development and that the repairs were to enable the developer to connect additional properties to the system at the current service charge payers' expense.
19. Ms Ferrer-Lopez questioned the adequacy of the design of the system and said that there had been many changes made that may affect its performance.
20. In reply, Mr Marc Hurn and Ms Lily Morgan-Knight explained that the issue of water quality/pressure, which was the reason for the manufacturer's rejecting the warranty claim, was being investigated and that it was not intended to commission the 3 non-commissioned units until the problem had been rectified unless absolutely necessary.
21. They confirmed that the advice received was that whilst three boilers were sufficient to serve the existing development when demand was not high all six were required for the system to work to maximum efficiency.
22. The equipment had been handed over to the Management Company and it was therefore their responsibility to maintain it.
23. The Tribunal then referred to the possible conditions that might be applied should dispensation be granted and referred to the proposals made by Mr Lehmann and Ms Ferrer Lopez summarised as follows;
 - a. The Applicant should manage the issue including establishing the root cause with complete transparency and any technical or legal correspondence should be shared with the Leaseholders.
 - b. If the issue has been caused by any defect on part of the Landlord, its agent or contractors, the Leaseholders to be compensated for any financial loss suffered and any money spent reimbursed to the sinking fund.
 - c. In case it is confirmed a Boiler Supplier defect, to enable the Leaseholders to be declared as impacted party in the proceedings with all costs borne by the Applicant.
 - d. If it is a specification issue all costs for delivering a suitable Boiler system for the planned conditions shall be borne by the Applicants and the Leaseholders should have the possibility to claim damages against the Applicant.
 - e. In achieving item 1 the following should be considered:
 - i. A schedule should be provided for the planned steps for the resolution of the issue,

- ii. An external third party, at the Applicant's expenses should be used in establishing the root cause of the defect and the works required to provide a satisfactory service.
 - f. If the warranty claim fails then;
 - i. a claim should be made to the Applicant's insurers.
 - ii. Any shared costs should be calculated by reference to the complete number of units forecasted.
 - g. Pending determination of causation of the failure of the System, all money spent from the Service Charge shall be reimbursed to a separate sinking fund by the Landlord and held on trust for the benefit of the Leaseholders.
 - h. The Applicant shall guarantee that the new equipment bought is not used until an external report has been provided in the absence of which no claim will be made on the service charge.
 - i. A warranty of 10 years to be provided from the date the works are completed.
 - j. The Applicant shall ensure that the Leaseholders are not more than 24h without hot water supply in the Development.
 - k. A certificate of completion, including commissioning tests reports should be communicated to the Leaseholders on completion of the development and acceptance of the Boiler system by the Applicant.
24. In response, the Applicants said that they had no issue with sharing all reports and relevant correspondence on the matter with the leaseholders. They were not however prepared to commission an independent report on the installation.
25. It was not their intention to bring the 3 non-commissioned units into use until the cause of the failure had been established unless absolutely necessary to ensure heating/hot water service was maintained. In answer to the Tribunal's suggestion that a poll of the lessees should be taken as to whether they supported the decision Ms Morgan-Knight said that this would be possible as long as it was directed by the Tribunal.
26. All other proposed conditions were more relevant to an application under S.27A rather than the present application.

The Law

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

S.20 ZA 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.

28. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. In summary the Supreme Court noted the following.
- a. 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.
 - b. 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.
 - c. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - d. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - 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 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.
 - g. The 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.
 - h. 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.
 - i. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Discussion and Decision

29. As previously stated the Tribunal's determination is solely in respect of whether dispensation should be granted and if so whether any conditions should be applied. It is not whether the costs are reasonable or indeed recoverable from the Lessees, that being a matter more suitable for an application under S.27A of the Landlord and Tenant Act 1985.
30. The Tribunal is satisfied that it was appropriate for the Applicant to have the works carried out by the manufacturer of the failed equipment rather than engage a third party, which as suggested would have to source the parts from the manufacturer with the additional cost that this is likely to incur.
31. Given that it was not possible for the Applicant to obtain sufficient quotations to satisfy the requirements of S.20 their only alternative was to make this application for dispensation.
32. The objections raised by the Respondents largely relate to their liability for any costs rather than whether the lack of consultation has resulted in the type of prejudice referred to in the Daejan case described above and as such the Tribunal is not satisfied that such prejudice has been occasioned.
33. The Tribunal now turns to whether the consent should be made subject to any conditions. It considered the request for an independent report to be prepared at the expense of the Applicant but is not satisfied that this would assist the resolution of the issues which are largely related to the allocation of costs rather than the specification and installation of the heating system.
34. The Tribunal welcomes the Applicant's agreement to the sharing of all information regarding these issues with the lessees and will make this a condition of granting dispensation.
35. The Tribunal also considers that the lessees liable to contribute to the costs occasioned by any failure in the replacement heat exchangers due to their premature use should decide whether to forgo the service or take the risk of additional costs. The Tribunal will require a poll to be taken and the majority view to prevail.
36. Finally, the Tribunal will impose a condition that the costs of this application are met by the Applicants.
37. **The Tribunal therefore grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 in respect of works comprising the replacement of three heat exchangers.**

- 38. Dispensation is subject to the following conditions;**
- a. The Applicant and/or its appointed agents will send to each and every leaseholder liable to contribute by way of service charge all existing and future reports and correspondence relating to the design, installation and financial liability for the heating system the subject of this application.**
 - b. Unless the cause of failure of the three heat exchangers has been identified and any remedial works required completed, the replacement units will not be brought into service without a ballot in favour from all of the lessees liable to contribute by way of service charge.**
 - c. The costs incurred by the Applicants in making this S.20ZA application are not to be recovered from the Lessees by way of service charge or otherwise.**
39. The Tribunal will send a copy of this determination to each lessee listed on page 2 of this decision.

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.