



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

Case reference : **CHI/24UJ/LDC/2023/0098**

Applicant : **Hythe Marina Village Ltd**

Representatives : **Rendell & Ritter Ltd**

Respondent : **The Leaseholders**

Property : **Hythe Marina Village, West Street,
Hythe, Hampshire SO45 6DX**

Type of Application : **Application for the dispensation of
consultation requirements pursuant to
S.20ZA of the Landlord and Tenant Act
1985**

Tribunal Members : **Duncan Jagger MRICS**

Venue : **Paper determination**

Date of Decision : **26th September 2023**

DECISION

Decisions of the Tribunal

- (1) The Tribunal grants the application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (Section 20ZA of the same Act).
- (2) The reasons for the Tribunal's decision are set out below.

The background to the application

1. Hythe Marina comprises approximately 225 residential units with associated car parking spaces and marina berths. (the residential element) and a number of commercial units (the commercial element) The Marina lies immediately adjacent Southampton Water and Shamrock Way ("the road") connects the Marina to West Street. This road is located above a stream which feeds into Southampton Water and the River Itchen.
2. The Tribunal did not inspect the property as it considered the documentation and information before it in the set of documents prepared by the Applicant enabled the Tribunal to proceed with this determination.
3. This has been a paper hearing which has been consented to by the parties. The documents that were referred to are prepared by the Applicant, plus the Tribunal's directions, the contents of which we have recorded. Therefore, the Tribunal had before it an electronic bundle of documents extending to 315 pages prepared by the Applicant, in accordance with previous directions.
4. The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all the consultation requirements imposed on the landlord by section 20 of the 1985 Act, (see the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987), Schedule 4). The request for dispensation concerns qualifying works for the repair of the access road following the collapse of a culvert beneath the road on the 11th May 2023. Following initial site investigations by RSK Geosciences, the two phased works comprised initial temporary access via a metal bridge, safety fencing and associated health and safety procedures. The second phase is the reconstruction of the culvert, excavation of the road and resurfacing.
5. The application is said to be urgent, as the works are necessary to provide access and egress to the Marina. The Applicant's contractors are Earlsote Construction and Plant Hire Ltd who have undertaken the initial temporary access and Marbas Group Ltd who have been instructed to prepare a design and specification for the remedial works. It is stated by the applicant that their choice of contractor and consultant was restricted due to the regulatory stipulations of Natural England, and the

Environmental Agency who's consent for the works was required, together with the fact that the two parties have considerable previous experience on the project. The approximate cost of the temporary works is £29,000 and the estimated cost of the remedial works are said to be in the region of £250,000 plus VAT. It is stated Earlsote has agreed to access costs on an "open book" basis which suggests this budget will increase. The Applicant has confirmed the works will take approximately 6 weeks to complete.

6. The Respondents have been informed in a letter dated 4th July 2023 from Rendell and Ritter Ltd that following an inspection of the site by the loss adjuster on the 26th May 2023 insurance cover is not available and this decision will be pursued.
7. Section 20ZA relates to consultation requirements and provides as follows:

"(1) 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.

*(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.*

*....
(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.*

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

7. The Directions on 23rd August 2023 required any of the leaseholders who opposed the application to make their objections known on the reply form

produced with the Directions. Five objections were received which are considered below.

8. By the same Directions of the Tribunal dated 23rd August 2023 it was decided that the application be determined without a hearing and by way of a paper case.

The issues

9. The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether or not service charges will be reasonable or payable.

Findings

10. Having read the evidence and submissions from the Applicant and having considered all of the documents and grounds for making the application provided by the applicants, the Tribunal determines the dispensation issues as follows.
11. Section 20 of the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.
12. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by an application such as this one before the Tribunal. Essentially the Tribunal must be satisfied that it is reasonable to do so.
13. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14, by a majority decision (3-2), the Supreme Court considered the dispensation provisions and set out guidelines as to how they should be applied.
14. The Supreme Court came to the following conclusions:
 - a. The correct legal test on an application to the Tribunal for dispensation is: “Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord’s failure to comply with the requirements?”
 - b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

- c. In considering applications for dispensation the Tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.
 - d. The Tribunal has the power to grant dispensation on appropriate terms and can impose conditions.
 - e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
 - f. The onus is on the leaseholders to establish:
 - i. what steps they would have taken had the breach not happened and
 - ii. in what way their rights under (b) above have been prejudiced as a consequence.
16. Accordingly, the Tribunal had to consider whether there was any prejudice that may have arisen out of the conduct of the applicant and whether it was reasonable for the Tribunal to grant dispensation following the guidance set out above. There were 5 objections to this application from leaseholders as follows:
 17. The first was from Heather Quillish: in her letter of objection, it is averred that there was a three- month time delay between the event and the application and therefore there was sufficient time to commence section 20 proceedings. Further, any dispensation should be conditional upon establishing actual responsibility for the cause of the damage and costs.
 18. A second objection was from Susan Eyre who states that the temporary works were sufficient for such an application and a tendering process commence to establish "cause, required works and quotations" Once again, the question of liability is made, and no monies should be paid through the service charge until this is established and apportioned.
 19. A third objection was received from Alan King who objects to the application that it is out of time and if dispensation is to be granted this should be made conditional upon "all costs (including the application itself) shall only be charged to the leaseholders when the reasonability for remedying has been proved beyond all reasonable doubt to fall to the leaseholders and the costs have been independently verified".
 20. A fourth letter was received from Helen Easter, the Deputy Chair of Marina Association Ltd. The Association does not object to the granting of dispensation due to urgency of the works and would request that it is conditional upon meeting the respondents' costs of legal advice in the sum of £3,500 plus VAT. Further, it should be conditional upon the respondents' being able to pursue an application under 27A and 20C if need be. Each

of these conditions have been agreed by the applicant. This response was made by 58% of the total membership.

21. Finally, there was a fifth objection from Mr and Mrs Gorecki with no reasons provided.
22. The Tribunal has carefully considered the letters of objection from each of the parties and a common theme is related to the potential ability to recover sums from third parties or liability for the repairs to the road. It is the opinion of the Tribunal this matter is not related to any potentially relevant prejudice. Therefore, the Tribunal considers that no prejudice has been demonstrated to any of the leaseholders of the property by the granting of dispensation relating to the remedial works to the road as set out in the documentation in the bundle submitted in support of the application.
23. The Tribunal was mindful of the fact that the works are being undertaken by experienced contractors and the fact that the specification for the works must be approved by Natural England and the Environmental Agency
24. The Applicant believed that the works were vital in order to provide residents access to their homes and remove the risk of further significant collapse. On the evidence before it, the Tribunal agrees with this conclusion and believes that it is reasonable to allow dispensation in relation to the subject matter of the application. The Applicant is required to ensure that the roads and pathways to the Marina are properly maintained to the satisfaction of the leaseholders in accordance with the terms of the lease. The remedial works to the road were therefore carried out as a matter of urgency, hence the decision of the Tribunal.
25. The Applicant shall be responsible for formally serving a copy of the Tribunal's decision on the leaseholders named on the schedule attached to the application. Furthermore, the Applicant shall place a copy of the Tribunal's decision on dispensation together with an explanation of the leaseholders' appeal rights on its website (if any) within 7 days of receipt and shall maintain it there for at least 3 months, with a sufficiently prominent link to both on its home page. It should also be posted in a prominent position in the communal areas. In this way, leaseholders who have not returned the reply form may view the Tribunal's eventual decision on dispensation and their appeal rights.

ANNEX - RIGHTS OF APPEAL

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).