



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

Case Reference : BIR/00CW/LDC/2023/0016

Property : 37 Park Dale East Wolverhampton WV1 4TD

Applicant : Wallace Estates Limited

Representative : Premier Estates Limited (Vicki Cooper)

Respondents : The Leaseholders of 37 Park Dale East

Type of Application : An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying works.

Tribunal Members : Judge T N Jackson
Mr W Jones FRICS

Date of Paper determination : 10 November 2023

DECISION

© Crown Copyright 2023

Decision

The Tribunal grants dispensation from the consultation requirements of section 20 Landlord and Tenant Act 1985 in respect of the Works to remove the top section of asbestos debris in the void below apartment 1 and seal the area to make safe.

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Reasons for decision

Introduction

1. By application dated 24 May 2023, the Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act') of the consultation requirements provided for by section 20 of the same Act.
2. The application relates to the need to remove asbestos urgently.
3. Directions were made on 27 July 2023. Direction 6 required the Respondents to complete a form which indicated whether they consented or opposed the application and if the latter, the reasons why. It directed that if a Respondent failed to return the form, the Tribunal would assume that the Respondent did not oppose the dispensation application.
4. No forms from Respondents have been received by the Tribunal and they are therefore assumed to consent to the application.
5. The only issue for determination is whether we should dispense with the statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be payable or reasonable.

Property

6. The Property is a Grade II listed converted house comprising of 6 self – contained apartments located over three floors.

Leases

7. The Applicant is the freeholder of the Property. The representative has been the managing agent since May 2014.
8. The Respondents are the residential leaseholders of the apartments within the Property. The apartments are subject to long residential leases granted on similar terms. We have been provided with a copy of the Lease of the apartment which are affected by the Works. By lease dated 3 August 2000 between City Village Limited and Mr D A Morgan, Mrs S Morgan and Miss P J Morgan, Apartment 1 of the Property is demised for a term of 125 years commencing 22 May 2000. We have been provided with a copy of the Lease. The Applicant is entitled to demand service charges in relation to expenses under Third Schedule Clause 1 of the Lease.

Background

9. The owner of Apartment 1 was experiencing difficulties with the bathroom flooring. A surveyor confirmed that the floor was rotten and required urgent replacement. Floorboards are the responsibility of the Lessee as they are specifically included in the demise under Clause 1.2.7 of the Lease.
10. The Respondent's representative instructed air monitoring by an asbestos specialist who would be in attendance when the floorboards were lifted by the apartment owner's contractor. This was due to the removal and encapsulation of asbestos containing materials from the basement in 2015. There were concerns that dust particles may dislodge during the bathroom repair.
11. The asbestos contractor stopped works and advised that asbestos was still present in the void below the apartment and required removal of the top section of asbestos debris and sealing of the area to make safe. This was immediately instructed with a company so that works may progress with the replacement of the rotten flooring in Apartment 1.

Proposed Works

12. The works are to carry out the removal of the top section of asbestos debris in the void below apartment 1 and sealing of the area to make safe.

Procurement Process

13. The Applicant received quotes although they have not been provided to the Tribunal. The Applicant instructed a company in the sum of £1,980 including VAT.

Consultation

14. The Applicant issued a Notice of Intention to the Respondents on 30 May 2023. The application for dispensation was submitted on 24 May 2023 to ensure the safety of the occupiers of apartment 1 in relation to the rotten bathroom flooring.

The Law

15. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularized, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to 'qualifying works' (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250. In accordance with section 20ZA (1) of the 1985 Act, the Tribunal may dispense with the consultation requirements 'if it is satisfied it is reasonable' to do so.
16. The proper approach to the Tribunal's dispensation power was considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854. In summary, the Supreme Court noted the following:

- i. Prejudice to the tenants from the landlord's breach of the requirements is the main, and normally the sole question for the Tribunal in considering how to exercise its discretion under section 20 ZA (1).
- ii. The financial consequences to the landlord of not granting the 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 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 tenant. It is not appropriate to infer prejudice from a serious failure to consult.
- v. 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.
- vi. Once the tenants have shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
- vii. Compliance with the requirements is not an end in itself. Dispensation should not be refused solely because the landlord departs from the requirements (even seriously). The more serious and/or deliberate the landlords' failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- viii. In a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, the dispensation should be granted in the absence of some very good reason.
- ix. The Tribunal can grant a dispensation on such terms as it thinks fit provided that they are appropriate in their nature and effect.
- x. 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 application under section 20 ZA (1).

Submissions

The Applicant

17. The Applicant's representative submitted a Statement of Case. The Applicant's representative says that the asbestos is a risk to residents in the apartment. The residents sought to replace the floorboard and air monitoring noted the presence of asbestos and the work had to be postponed. The floorboard has suffered extensive water damage and must be replaced as soon as possible. The replacement of the

floorboard is the leaseholder's responsibility. The asbestos needs to be removed as a matter of urgency so the floorboard replacement may resume.

The Respondents

18. The Tribunal has not received any objection to the application from the Respondents.

Deliberations

19. We are satisfied that it is reasonable to dispense any outstanding consultation requirements in the circumstances of the present case, for the following reasons:

- i. The Works relate to asbestos removal and are required for health and safety purposes to ensure the safety of the residents and contractor's carrying out the bathroom works.
- ii. We do not consider that the Respondents are prejudiced or will suffer any loss of opportunity as a result of the dispensation of the statutory consultation requirements.

Determination

20. The Tribunal therefore determines that, to the extent that the statutory consultation requirements were not complied with, the consultation requirements are dispensed with in relation to the Works.

21. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are payable or reasonable.

Appeal

22. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson
10 November 2023