



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

Case reference : **CHI/43UB/LDC/2023/0109/AW**

Property : **The Heart, New Zealand Street, Walton-on-Thames KT12 1GH**

Applicant : **O&H (Walton) Limited**

Representative : **Mr Timothy Foot of Counsel**

Respondent : **The Leaseholders of The Heart, New Zealand Street, Walton-on-Thames KT12 1GH**

Representatives : **Ms Christine Banks, Mr John Assersohn**

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

Tribunal Members : **Judge Hugh Lumby
Mr MJF Donaldson FRICS**

Venue : **Havant Justice Centre (via CVP)**

Date of Hearing : **11 October 2023**

Date of Decision : **16 October 2023**

DECISION

Decision of the Tribunal

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). The dispensation is made on the condition that the Applicant investigates the works can incorporate appropriate protections against tampering, shares the results with the Respondent and properly considers such incorporation.

The background to the application

1. The Heart Apartments is a purpose built residential property development built over the Heart Shopping Centre and constructed in 2006/2007. There are 8 floors that includes the subbasement and basement levels which are accessible from road level via ramp. There are 279 Private residential apartments and 100 flats demised to A2 Dominion Housing.
2. The proposed works relate to the operation of the Automatic Opening Vent (AOV) system for the communal areas in the residential parts of the Property. The AOV system is a key part of the fire safety strategy at the building as it assists the ventilation of smoke in the event of a fire and assists the evacuation of the building. Following risk assessments and a technical report, the AOV system has been found to have several faults requiring urgent attention in order to maintain the safety of the building. The Applicant is therefore looking to carry out a like-for-like replacement in order to provide a fully functioning system in line with current building regulations and British Standards.
3. The existing AOV system installed at the Property relies on a series of chain driven actuators which operate to open windows within stair lobbies in order to achieve ventilation. A fire risk assessment for the building and a recent engineer's report both show that upon inspection approximately 80% of the actuators are damaged and not operational. This appears to have been caused by the windows being forced open and shut, breaking the chain element of the system. In some instances, the windows have been taped or even screwed shut. This means there is no mitigation being in place for the dangers highlighted above and the system is not effectively operational in the event of a fire. It also means that the windows themselves now present a safety risk as some no longer have any restraint in the event that someone were to lean on or apply pressure to them.
4. The Applicant argues that the AOV system is a key part of the fire safety strategy on site and making sure that it meets current guidelines and is operational is essential for compliance on site. In the interest of regularising the situation at the earliest opportunity, in keeping with professional advice the need to ensure fire safety compliance, it is not practical for the Applicant to comply with the consultation requirements.

If a full consultation were to be undertaken prior to commencing works, additional health and safety patrols would need to be arranged in the meantime. While the site has twenty four hours security, the current patrols in the residential parts take place only once a day and would need to be increased. It contends that the cost of this would exceed the cost of the proposed remedial works.

5. Three objections have been received to the proposed works. They do not object to the principle of the works and wish them to be carried out urgently. However, they are concerned that without appropriate anti-tampering measures, the problem will arise again. The objectors also sought greater transparency on the proposed contracts for the works.
6. 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.
7. The hearing was held online, using CVP. Mr Timothy Foot of Counsel appeared for the Applicant, with two representatives of the managing agent (Savills) in attendance. Ms Christine Baker appeared as spokesperson for the Respondents together with Mr John Assersohn, who was one of the objectors. The documents that were referred to are a bundle of 233 pages and a skeleton argument provided on behalf of the Applicant, the contents of which we have recorded.
8. 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). It has made two identical applications, one in respect of the private unit leaseholders and the other in relation to the units demised to A2 Dominion Housing.
9. 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.”

10. Whilst no consultation has been carried out, the leaseholders have been made aware of the application to seek dispensation and three objections were received. As referred to above, these were that the replacement system should be tamperproof to prevent future breakages and seeking more details of the tender process/quotes received for the proposed works. More details were provided by the Applicant.
11. As one of the objectors requested a hearing for the case, the Tribunal proceeded on that basis rather than as a paper determination.

The issues

12. 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 the resultant service charges will be reasonable or payable.
13. The Respondent’s representatives said that the two objections were to ensure that the system was tamperproof and transparency on costs. They accepted that the tamperproof issue was the only one remaining to be addressed. They wanted a condition added to the dispensation that this would be addressed in the works.
14. Ms Banks argued that the original feasibility for the works had envisaged the possibility that windows would open automatically when specified temperatures were exceeded. However, this was not covered by the quotes for the works which only covered tamperproof boxes over the control buttons; these would not prevent windows being opened manually which appeared to be a cause of breakage.
15. Mr Assersohn were concerned that without a consultation, the leaseholders would suffer prejudice as that consultation would give leaseholders the opportunity to explain the importance of a tamperproof

system. His concern was that the issue had been around for a long time without a solution being found and they would again end up with a system that quickly broke. He accepted that if this occurred, the leaseholders might be able to object to the cost being charged to them.

16. In response to the points made on behalf of the Respondent and in discussion with Ms Banks and Mr Assersohn, the Applicant via Counsel offered that a condition be added to the dispensation that it would investigate further tamperproof options, reveal the results to the Respondent and properly consider those results. This was accepted by both Ms Banks and Mr Assersohn who confirmed that they did not object to the dispensation being granted on that basis.

Findings

17. Having read the evidence and submissions from the parties, listened to their submissions to the hearing 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.
18. 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.
19. 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.
20. 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.
21. The Supreme Court came to the following conclusions:
 - a. The correct legal test on an application to the Tribunal for dispensation is: ^[1]_[SEP]“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.
22. 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.
23. The Tribunal is of the view that, taking into account the comments on behalf of the Respondent at the hearing and the agreement of the proposed condition to the dispensation, it could not find prejudice to any of the leaseholders of the property by the granting of dispensation relating to the urgent works required for the building's safety.
24. The Applicant believes that the works are urgent to ensure the safety of the building and to avoid the additional cost of walking patrols. 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.
25. The Applicant shall be responsible for formally serving a copy of the Tribunal's decision on the leaseholders. 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.

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
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.