FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UG/LDC/2022/0024**
Property	**:**	**Waterside, St James Court West, Accrington BB5 1NA**
Applicant	**:**	**Adriatic Land 3 Limited**
Applicant's Representative	**:**	**JB Leitch Limited**
Respondents	**:**	**The various Residential Long Leaseholders of parts of the property**
Type of Applications	**:**	**Landlord and Leaseholder Act 1985 – s 20ZA and s 20C**
Tribunal Members	**:**	**Judge J.M.Going** **S.D.Latham MRICS**
Date of decision	**:**	**23 April 2024**

DECISION

The Decision

The Tribunal decided that those parts of the statutory consultation requirements relating to the Works which have not been complied with, are to be dispensed with, conditionally upon the Applicant keeping the Respondents updated in writing, via an online portal or otherwise, not less than every 6 weeks, as to key milestones, the broad progress of the Works, and their cost, the applications for government or other sources of funding, and any warranty, insurance, or related claims, from now until completion of the Works.

Preliminary

1. By an Application ("the Application") made on 24 June 2021, the Applicant has applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 20ZA of the Landlord and Leaseholder Act 1985 ("the 1985 Act") for the dispensation of the remaining consultation requirements provided for by section 20 of the 1985 Act relating to proposed remediation works to the external wall system ("the Works") at the property ("Waterside").

2. In its initial Directions the Tribunal confirmed, inter alia, the issues to be considered, the steps to be taken, and that it considered that the matter could be decided based on written submissions and evidence without the need for an oral hearing, unless any of parties requested one. None have done so.

3. Various and successive stays in the proceedings were subsequently applied for, and agreed, pending consideration of the implications of the Building Safety Act 2022.

4. The last of the stays was lifted on 4 December 2023.

5. The Applicant's solicitors have confirmed sending, either by email or first-class post, portal details containing copies of the Application (which included and referred to various reports, advice and documents) the Applicant's initial and updated statements of case, and the Tribunal's specified directions to all of the Respondents ("the leaseholders").

6. The Works are described in the updated statement of case dated 28 February 2024 as being: – "Wall Types 3 and 4 (EWS03 and EWS04) require remediation. The timber and rigid foam insulation are to be removed, adequate fire barriers at junctions with compartment floors and compartment walls are to be installed, mineral wool insultation is to be provided and a new cladding system is to be installed that achieves Eurocalss A2-s1,d0 or A l". It is also now noted that: – "Additionally, Thomasons surveyors have provided a programme of works which includes the new requirement for a 'Gateway 2' application to the Building Safety Regulator, outlining the estimated timeline for the works".

7. The time for any of the leaseholders to submit any representations that they might wish to Tribunal came to an end on 22 March 2024, without any having done so.

8. None of the leaseholders have lodged any objection to the Application with the Tribunal.

9. The Tribunal convened on 11 April 2024 to make its determination.

Background

10. The Tribunal has not inspected Waterside but understands from the Application that it is "a seven-storey residential development in Accrington, comprising of 56 flats located on the first to sixth floor, two suites and a car park. The height of the topmost residential storey is approximately 19m with the building itself reaching 21m. The fifth and sixth floors are served by a single escape stair and the first to fourth floors are served by two escape stairs". The Tribunal has also been able to gain useful insights from Google's Street view and satellite images, and from photographs within the papers.

11. Official copies of the registered title from the Land Registry confirm that the Applicant is the owner of the freehold.

12. It is understood that each leaseholder owns an apartment within Waterside and is obliged under the terms of comparable long, 125 year, term leases where a sample copy has been provided, to pay as part of the service charges a percentage of the costs of inter alia maintaining… repairing and replacing the retained parts which are defined as including "the main structure of the Building including the… external walls, the structural timbers… all external decorative surfaces of the Building and external doors, doorframes and window frames", and the landlords obligations as regards its structural parts, foundations, main structural frame, and exterior as well as its common parts.

Facts and Chronology

13. Because of the extent of the paperwork, which is on record and which the parties have access to, it would be superfluous and counter-productive to attempt to relate its full detail in this decision.

14. The Tribunal has highlighted only those issues which it found particularly relevant to, and to help explain, its decision-making.

15. The following core facts and events are confirmed by, or referred to, in the papers or are matters of public record.

References to: –

FSO means The Regulatory Reform (Fire Safety) Order 2005;

ADB means Approved Document B of the Building Regulations;

PAS 9980 means the Guidance standard for Fire Risk Appraisal of External Walls and Cladding of Flats;

DFC means Design Fire Consultants;

BSF means the government's Building Safety Fund; and

RMG means Residential Management Group Ltd, now the Applicant's appointed managing agents.

It is believed that between 2008 and 2015	Waterside was constructed. (There is a reference in a fire risk assessment to it being 12 years old in 2020. The leaseholders' leases consistently refer to the lease term dates being computed from 1 January 2015).
21 May 2015	The Applicant acquired the freehold.
14 June 2017	72 people died and more than 70 others were injured in the Grenfell Tower fire in London.
2019 4 August 2019	Extensive fire compartmentation issues were identified during a Lancashire Fire and Rescue Service site visit. A Passive Fire Protection Survey conducted by 'Quantum Compliance' indicated that extensive compartmentation works were required to bring the level of passive fire protection back up to an acceptable state to meet ADB standards and promote a "safer to stay" emergency strategy.
17 October 2019	The Applicant obtained a report from DFC, utilising inspection reports from Thomasons, an independent multidisciplinary civil and structural engineering consultancy employed by the Applicant. This confirmed that the "external walls of the building comprise constructions that have combustible materials". The report recommended that the timber and rigid foam insulation be removed, adequate fire barriers at junctions with compartment floors and compartment walls be installed, mineral wool insulation provided and a new cladding system is installed that achieves Euroclass A2-sl,do or Al.
20 January 2020	The Ministry of Housing, Communities and Local Government ("MHCLG") issued the document "Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings" ("the MHCLG guidance").

Between 2 and 5 March 2020	'Optimum Contractors' completed inspections of 31 fire doors and found them to be in poor condition throughout the building.
25 March 2020	A Fire risk assessment report was produced by Osterna.
11 March 2020	The Government announced ("inter alia") that £1 billion would be available for owners to apply for the removal of non-ACM combustible Cladding.
26 May 2020	The Government's Building Safety Fund for remediation of non-ACM Cladding systems ("BSF") registration prospectus was published and confirmed various deadlines in order to be able to access funding, including the need to register expressions of interest between 1 June and 31 July 2020 and to submit a full funding application based on a tender price before December 2020. It also confirmed a requirement that any government funded works commence on site prior to April 2021, and that the fund would be managed on a "first-come first-served basis".
July 2020	The Government published its BSF application guidance, with it confirmed that the application portal would open on 31 July 2020. The deadline dates previously referred to were extended with it stated "to maximise the amount you receive from the fund you must be able to submit a full cost funding application by 30 June 2021, including a construction tender price. Projects must start on site by 30 September 2021…".
2020	The Applicant, via RMG, registered Waterside with the BSF.
16 September 2020	A fire risk assessment was carried out by Osterna.
18 September 2020	The Waking Watch was curtailed following installation of a fire alarm system extending to individual apartments.
21 January 2021	BSF wrote to RMG stating that ""we have reviewed the information you submitted to look at the eligibility of the "Brick with foam insulation (Construction type 2)", "timber with foam insulation (Construction type 3)", "Render with EPS insulation (Construction type 4) ", "Stair cladding with foam insulation (Construction type 5)", "Sixth floor cladding with foam insulation (Construction type 6)" and "Isolated timber with foam insulation (Construction Type 7)" cladding systems. The information submitted to date does not provide sufficient information for us to make a determination as to the eligibility of these systems."

26 February 2021	DFC reviewed the construction and produced a design note within which it identified additional fire safety issues and assessed the construction as being eligible under the BSF requirements, and not compliant with ADB. "DFC's assessment concluded the external wall constructions did not achieve the adequate standard and remediation is required"
1 February 2021	RMG issued a Notice of Intention to carry out work to each of the leaseholders (being the first stage required under the statutory consultation regulations). The notice described as the works as being "the removal and remediation/ replacement of cladding" and under a heading of "Rem*(e)*diate the non-compliant external wall system".
6 February 2021	RMG received one observation from Waterside Leaseholders' Association which nominated a contractor, Global Enterprise Ltd. The nominated contractor has been included in the tender. No further responses were received from the leaseholders in respect of the Notice of Intention.
February 2021	The Government announced a further £3.5 billion extension of funding to the BSF.
May 2021 and updated again in April 2022	In revised and updated BSF fund application guidance the deadlines were again referred to with it now said "we recognise however that meeting these deadlines may not be possible in all circumstances, for instance where applicants find that they do not have sufficient time to complete a robust and satisfactory procurement process in order to meet the June deadline. In these cases, if more time is needed to be able to complete the required steps… this will be permitted on a case-by-case basis, providing applicants continue to provide delivery partners with realistic but ambitious project delivery timetables…
24 June 2021	The Application was made to the Tribunal to dispense with the section 20 consultation requirements in respect of the Works.
14 February 2022	The Secretary of State outlined new measures and proposals for legislation aimed at removing cladding costs from leaseholders with its stated "in the small number of cases where building owners do not have the resources to pay, leaseholders will be protected. The cap will be set at.. £10,000 for homes outside London…"
28 April 2022	The Building Safety Act 2022 ("the 2022 Act") was passed containing six parts and eleven schedules.

28 June 2022	Sections 116 – 125 and Schedule 8 of the 2022 Act came into force. These include definitions of what is a "relevant building", a "qualifying lease" and the various conditions to determine whether a leaseholder qualifies for various protections and contribution caps.
23 March 2023	A further Fire risk assessment report was produced by Osterna.
15 January 2024	DFC carried out a Fire Risk Assessment for the External Wall Construction in accordance with PAS 9980. The report found that the overall level of risk is considered to be high. The PAS 9980 Report, included findings (inter alia) that:… c. Due to uncertainty with the as-built construction it is unknown whether the EWSO03 Timber construction (vertical strips from the first to fifth floor on the front and rear elevation and small architectural details on the ground and first floor on the south elevation) meets an adequate standard. d. The EWS04 Render construction (located on the south elevation from the first to fifth floor) does not include full thickness fire barriers and therefore, there is a pathway around fire resisting elements.
28 February 2024	The Applicants solicitors sent their updated statement of case to the Tribunal confirming that copies had also been served on all the leaseholders.

Submissions

16. It was stated in the Application that "Following guidance relating to the construction of the external wall system it has been discovered that the construction comprises combustible materials and poses a risk of fire spread. Accordingly, works are required including, but not limited to, the brick with foam insulation, timber with foam insulation, rendered EPS, Stair cladding with foam insulation, sixth floor cladding with foam insulation, isolated timber with foam insulation. The Applicant's agent began the consultation process in relation to the Works. Due to the nature of the Works and the Design & Build method adopted, the Applicant is unable to complete the consultation process".

17. The Applicant with its initial statement of case explained that it had instructed Thomasons, who in turn appointed DFC to identify the external wall construction details and to provide an opinion as to whether they complied with the FSO, using the ADB as the benchmark. Copies of the DFC reports and the Thomason reports identifying required remediation works were included with papers. It was confirmed that Waterside had been registered with the

BSF and that to adhere to its timescales it was initially required to submit a full cost application by 31 December 2020. That deadline was subsequently extended by MHCLG to 30 June 2021.

18. In its updated statement of case was confirmed that "the Applicant is aware of its obligations and the leaseholder protections under the Building Safety Act 2022. However, a percentage of leaseholders within the development do not hold qualifying leases for the purposes of the 2022 Act, and a further percentage are currently assumed not to hold qualifying leases".

19. It summarised the grounds for the applications for as follows:

    "a. The Works are required to be carried out as soon as practicable and the Applicant does not wish to do anything which may prejudice any funding of the Works (via the Building Safety Fund..) including by way of having to carry out a full consultation. This application is made, therefore, in the interest of the leaseholders.

    b. The Works are instructed via a Design & Build procurement route which is incompatible with the strict requirements of section 20 consultation.

    c. There is no prejudice to the Respondents which might be caused by the relaxation of the requirements of consultation that the Applicant is aware of.

    d. If lessees have concerns or questions, RMG remain willing to attempt to address these".

The Law

20. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual leaseholder in respect of a set of qualifying Works.

21. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to go through a 4-stage process: –

    - Stage 1: Notice of intention to do the Works

      Written notice of its intention to carry out qualifying Works must be given to each leaseholder and any tenants association, describing the Works in general terms, or saying where and when a description may be inspected, stating the reasons for the Works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought, allowing at least 30 days. The Landlord must have regard to those observations.

- Stage 2: Estimates

  The Landlord must seek estimates for the Works, including from a nominee identified by any leaseholders or the association.

- Stage 3: Notices about estimates

  The Landlord must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed Works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Landlord must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent, allowing at least 30 days. The Landlord must then have regard to such observations.

- Stage 4: Notification of reasons

  The Landlord must give written notice to the leaseholders within 21 days of entering into a contract for the Works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the leaseholders' nominee.

22. Section 20ZA(1) states that: –

"Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying Works… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

23. The Supreme Court in *Daejan* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting leaseholders in relation to service charges;

- The purpose of the consultation requirements, which are part and parcel of a network of provisions, is to give practical support to ensure leaseholders are protected from paying for inappropriate Works or paying more than would be appropriate;

- In considering dispensation requests, the Tribunal should therefore focus on whether the leaseholders have been prejudiced in either respect by the failure of the landlord to comply with the requirements;

- The financial consequences to the landlord of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord;

- The legal burden of proof in relation to dispensation applications is on the landlord throughout, but the factual burden of identifying some relevant prejudice is on the leaseholders;

- The more egregious the landlord's failure, the more readily a Tribunal would be likely to accept that leaseholders had suffered prejudice;

- Once the leaseholders have shown a credible case for prejudice the Tribunal should look to the landlord to rebut it and should be sympathetic to the leaseholder's case;

- The Tribunal has power to grant dispensation on such terms as it thinks fit – provided that any such terms are appropriate in their nature and their effect, including a condition that the landlord pays the leaseholder's reasonable costs incurred in connection with the dispensation application;

- Insofar as leaseholders will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord to reduce the amount claimed and compensate the leaseholders fully for that prejudice.

The Tribunal's Reasons and Conclusions

24. The Tribunal began with a general and careful review of the extensive papers, to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

25. None of the parties has requested an oral hearing and, having reviewed the papers, the Tribunal is satisfied that this matter is suitable to be determined without a hearing. The issues to be decided are clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact. The Tribunal was assisted by the clarity of the written submissions. The Tribunal is also, as explained below, persuaded of the urgency of the present situation.

26. The Tribunal has every sympathy with all the parties, and particularly individual leaseholders staring at costs of thousands of pounds, exacerbated by multiple factors, stemming from the use of dangerous materials, and what the Secretary of State in a letter dated 10 January 2022 to the Residential Property Developer Industry described as a broken system.

27. The Tribunal's jurisdiction is, however, limited, and its focus has to be specific.

28. Before turning to a detailed analysis of the evidence, the Tribunal reminded itself of the following considerations: –

- The only issue for the Tribunal to decide is whether or not it is reasonable to dispense with the statutory consultation requirements.

- In order to grant dispensation the Tribunal has to be satisfied only that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably, although the landlord's actions may well have a bearing on its decision.

- The Application does not concern the issue of whether or not service charges will be reasonable or payable. The Respondents retain the ability to challenge the costs of the Works under section 27A of the 1985 Act.

- The consultation requirements are limited in their scope and do not tie the Applicant to follow any particular course of action suggested by the Respondents, and nor is there an express requirement to have to accept the lowest quotation. As Lord Neuberger commented in *Daejan* "The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are done by, and what amount is to be paid for them".

- Albeit, as Lord Wilson in his dissenting judgement in the same case also noted "What, however, the requirements recognize is surely the more significant factor that most if not all of that amount is likely to be recoverable from the leaseholder."

- Experience shows that the consultation requirements inevitably, if fully complied with, take a number of months to work through, even in the simplest cases.

- The Office of the Deputy Prime Minister in a consultation paper published in 2002 prior to the making of the regulations explained "the dispensation procedure is intended to cover situations where consultation was not practicable (e.g. for emergency works)…."

29. Having carefully considered the evidence before it, and using its own knowledge and experience, the Tribunal has concluded as follows.

30. The Works were and, insofar as they have not been completed, remain urgent for a number of compelling reasons. The first, most obvious and most important, is the inherently dangerous state of a high-rise building occupied by many individuals. The total number of flats increases the number of people at risk.

31. Expert reports identified a catalogue of issues which, particularly when taken together, presented a clear and continuing danger to life and limb. No one could argue otherwise following the tragic events at Grenfell Tower. Whilst it appears that a number of the issues which were first identified have been

subsequently addressed or ameliorated with fire detection systems, significant and serious concerns remain about various combustible materials within the building and its design.

32. The Tribunal finds that whatever the reasons for any delays to date, and notwithstanding the steps have been taken, they have not fully eradicated the continuing dangers.

33. There are also a number of other compelling reasons as to why the Works should continue to be regarded as urgent. These include a set of circumstances where time may be of the essence in order to satisfy shifting criteria relating to deadlines set as regards possible sources of funding from the Government or others, insurance, the need to mitigate losses, the salability or otherwise of the flats and the need for the homeowners to get on with their lives. Unnecessary delay profits no one.

34. Applying the principles set out in *Daejan* the Tribunal has focused on the extent, if any, to which the leaseholders have been or would be prejudiced by a failure by the Applicant to complete its compliance with the consultation requirements.

35. As the Upper Tribunal has made clear in the case of *Wynne v Yates [2021] UKUT 278 (LC) 2021* there must be some prejudice to the leaseholders beyond the obvious facts of not being able to participate in the consultation process, or of having to contribute towards the costs of works.

36. The Tribunal has not been presented with any evidence of any actual relevant prejudice to the leaseholders resulting from the lack of completion of the consultation requirements in respect of the Works; it is clear that the leaseholders have been all too painfully aware of the core issues for years; a Stage 1 consultation notice was issued in 2021; it is stated in the papers that the Waterside Tenants association leaseholders nominated a potential contractor or contractors, and that this was taken into account; and there is no evidence that the Respondents dispute the extent of the present defects.

37. As *Daejan* confirms the factual burden of identifying some form of relevant prejudice falls on the Respondents, and the Tribunal finds the Respondents have not identified any relevant prejudice, within the context of the regulations, in the Applicant's actions to date. Indeed, none of the Respondents has lodged any objection to the Application with the Tribunal.

38. The Tribunal is not surprised that there has been no suggestion or evidence from any of the Respondents that the Works are unnecessary or inappropriate. The Tribunal is clear that the Works are needed for their ongoing safety.

39. The Tribunal thereafter considered the position going forward. It has had to weigh the balance of prejudice between, on the one hand, the need for swift remedial actions, and on the other hand the legitimate interests of leaseholders in being properly consulted before major works begin.

40. In this case the Tribunal finds that the Applicant has made out a compelling case as to why dispensation should be granted. The Tribunal is also persuaded of the practical need for flexibility in proceeding with a multifaceted and complex building project, and the commercial realities of having suitable contractors available, when required. To restart and complete the consultation requirements will inevitably involve delay. It is widely known contractors for cladding remedial works are in short supply and will continue to be whilst there are a multitude of buildings in the UK which require substantial works to their exterior wall systems. Such works are likely to take place at same time to comply with the terms of the BSF if successful.

41. Insistence on continuing the consultation requirements must be seen in the context of both the ongoing monetary costs, and the ongoing risks of further delay - in order to implement a process which in large part will duplicate what has gone before.

42. The Tribunal has concluded, based on the evidence before it, that far greater prejudice is likely to accrue if dispensation is not granted. Indeed, quite apart from the paramount safety concerns posed by the inherent dangers, with ongoing costs and the potential un-saleability of the flats until the necessary works are completed, the Tribunal is convinced that there is an imperative that there should be no ongoing unnecessary delays.

43. The Tribunal finds that the Applicant was clearly acting in the leaseholders' best interests by seeking to secure funding from the BSF and to keep to the timeframes set by it. The Tribunal found that it was prudent and entirely reasonable for the Application to be made particularly at a time when eligibility for funding from the BSF remained in question. Sadly, it has always been and remains the case that government or other funding will not necessarily cover all the potential costs. That is particularly so for those leaseholders who do not hold qualifying leases as defined by the 2022 Act.

44. For the reasons stated, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements in respect of the Works which relate to fire prevention measures and are urgently required for the health and safety of the occupants and users of Waterside, insofar as they have not already been completed.

45. Having decided that it is reasonable that dispensation be granted, the Tribunal turned to the question of what, if any, conditions should be attached to the dispensation.

46. The Tribunal has the power to grant dispensation on such terms as it thinks fit – provided that any such terms are appropriate in their nature and effect.

47. The Tribunal understands that it must be of great concern to the leaseholders, and a potential cause of friction, if they do not know what is going on, or what is being done. The Tribunal considers it reasonable and appropriate that they should be kept informed of progress. As such the Tribunal decided to attach a condition to that effect.

Concluding comments

48. It is emphasised that this Decision relates solely to the Application and the Works. Nothing within it, should be taken as an indication that the Tribunal considers that any service charge costs resulting either from the Works or respect of the Application will be reasonable or indeed payable or, removes the parties' right to make a further application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 in respect of such matters at a later date, should they feel it appropriate.