FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HH/LDC/2024/0107
Property	:	Seaway Court, Seaway Lane. Torquay, TQ2 6RJ
Applicant	:	Seaway Court (Torquay) Limited
Representative	:	Crown Property Management
Respondent	:	The Leaseholders
Representative	:	
Type of Application	:	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member	:	Judge N Jutton
Date of Determination	:	7 August 2024

DECISION

Summary of the Decision

1. **The Applicant is granted dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements in respect of works to be undertaken at the Property to remove external cladding.**

The application and the history of the case

2. The Applicants applied for 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. The application related to proposed works to remove external cladding from the building. The Applicant indicated that the works were urgent because of a potential risk to life by reason of the cladding being made of flammable material and because of the consequential difficulties in obtaining building insurance.

3. The Tribunal gave Directions on 26 June 2024. The Directions provided that the Tribunal was satisfied that the application may be determined on the papers without an oral hearing and that it would proceed accordingly unless a party objected in writing no later than 12 July 2024. No objections have been received accordingly the Tribunal proceeds to determine the application on the papers.

4. The Directions provided for the Applicant to send to each Respondent a copy of the Directions, the application and supporting documents. The directions made provision for the Respondents to complete a reply form and return that to the Tribunal and to the Applicant stating whether or not the application was opposed, and if so why. No objections have been received from the Respondents.

5. The Directions made it clear that this application does not concern the issue of whether or not service charge costs arising from the proposed works will be payable and if so reasonable in amount or of the possible application or effect of the Building Safety Act 2022. That the Respondent leaseholders have the right to make a separate application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 to determine the reasonableness of the costs of the proposed works, and the contribution payable through the service charges both in general and in particular because of the provisions of and the protections provided by the Building Safety Act 2022.

The Law

6. Section 20 of the Landlord and Tenant Act 1985 ("the Act") and the related Regulations provide that where the lessor intends to undertake major works with a cost of more than £250 per lease in any one service charge year the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has

been dispensed with by the Tribunal. An application may be made retrospectively.

7. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

8. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14.

9. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

10. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

11. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

12. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the Lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

13. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

14. If dispensation is granted, that may be on terms.

15. The effect of Daejan has been considered by the Upper Tribunal in *Aster Communities v Kerry Chapman and Others* [2020] UKUT 177 (LC), although that decision primarily dealt with the imposition of conditions when granting dispensation and that the ability of lessees to

challenge the reasonableness of service charges claimed was not an answer to an argument of prejudice arising from a failure to consult.

Decision

16. The Applicant has provided a paginated bundle of documents running to 259 pages containing a brief statement of case, the application, a fire risk appraisal of the external walls, a form of specification of works, lessee newsletters, correspondence with a fire safety inspector and a quotation for the cost of removing the cladding from the building. References to page numbers in this decision are references to the page numbers in that bundle of documents.

17. The property is described as a 6 storey purpose built building of 34 residential flats (in 3 adjacent blocks) set over ground and 5 upper floors and understood to have been constructed in the 1970s.

18. The fire risk appraisal of the external walls (pages 12 – 164) (FRAEW) identified 5 main external wall types at the property. Of these one, (described as 'wall type 2') is said to present a particular fire risk. It is a form of cladding described in the FRAEW as 'External Wall Insulation (EWI) – Knauf Marmorit Warm Wall 032'. The insulation element of the construction in particular is described in the FRAEW as 'combustible'.

19. The FRAEW summarises (page 77) that '*the nature of the EWI system, together with a lack of consistent fire barriers at all compartment wall locations increases the risk of ignition and fire spread across this wall type. Consequently, the risk assessment categorised it within the 'medium' risk band, positioned towards the mid to high end of this scale due to a perceived potential for extremely rapid fire spread and extent of burning'.*

20. Further the Applicant says, the fire risk problems identified by the FRAEW has created difficulties in obtaining building insurance for the property. An email from an insurance company RSA dated 28 June 2024 (page 242) offers a three month insurance renewal extension but effectively upon terms that works to remove the cladding (in particular the removal of the polystyrene element) are implemented within the 3 months.

21. No leaseholder has objected to the application for dispensation from the statutory consultation requirements.

22. In my judgment it is just and equitable to grant dispensation to the Applicant for the works to remove the cladding (the EWI system identified in the FRAEW as wall type 2) and which works are briefly described in the form of specification of works dated 25 June 2024 from 'Buildx Property Transformation' (page 241). That such works are required as a matter of urgency for both reasons of health and safety

and in order to allow the Applicant to obtain appropriate building insurance cover.

23. In its statement of case dated 3 July 2024 the Applicant also asks the Tribunal to determine in addition that the consultation requirements of section 20 of the Landlord and Tenant Act 1985 be dispensed with in relation to proposed works to re-clad the building once the existing cladding has been removed. The Applicant appears to recognise that does not form part of its original application. Further I am not satisfied that such additional application has been put to the Respondents and that they have been allowed the opportunity to respond. For those reasons the Tribunal does not make a determination in respect of any proposed works to reclad the property. It is open to the Applicant to make a separate application in that regard if it so wishes, albeit that may be a retrospective application.

24. In reaching my decision I have taken account of the fact that no party has objected to the application. The leaseholders have had opportunity to raise any objection and they have not done so. I do however **Direct** that the dispensation is conditional upon the Applicant or their agent sending a copy of this decision to all the leaseholders so that they are aware of the same.

25. For completeness I confirm that in making this determination I make no findings as to the costs of the works and whether they are recoverable form leaseholders as service charges or of the possible application or effect of the Building safety Act 2022.

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 to the First-tier Tribunal at rpsouthern@justice.gov.uk being 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