FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/LDC/2024/0156**
Applicant	**:**	**LATYMER COURT FREEHOLD COMPANY LIMITED**
Representative	**:**	**Carl Fain, Counsel**
Respondents	**:**	**LEASEHOLDERS OF FLATS 1 TO 361 LATYMER COURT**
Property	**:**	**Latymer Court, Hammersmith Road, London, W6 7JE**
Tribunal	**:**	**Judge Timothy Cowen** **Mr S Wheeler MCIEH, CEnvH**
Date of hearing	**:**	**19 September 2024**
Date of decision	**:**	**15 October 2024**

SUBSTANTIVE DECISION

Decision of the tribunal

Dispensation is granted to the Applicant in respect of the works which are the subject of this application on condition that the Applicant's costs of this application may not be recovered as service charges, save that the Applicant's costs of the hearing may be recovered as service charges.

REASONS FOR DECISION

1. This is an application by the Applicant freeholder under section 20ZA of the Landlord and Tenant Act 1985 to dispense with the consultation requirements under section 20 of that Act.

2. The application was made on 7 June 2024. The Property is a purpose-built mansion block consisting of 375 flats and 26 commercial units.

3. The application relates to:

   (a) Emergency works already carried out to install a new flue serving the communal boiler for the heating and hot water system; and

   (b) The installation and hire of temporary boilers as an emergency interim measure pending completion of the works to the flue.

The Leases and the Works

4. We have been supplied with a sample residential lease for the Property which contains a covenant by the lessor to keep in repair the communal boiler (clause 5.1) and a covenant by the lessee to pay services charges in respect of the cost of such repair (paragraph 3 of Schedule 3 to the sample lease).

5. The relevant facts were not in dispute. They are, and we find, as follows.

6. There is a communal boiler system in the basement plant room. The communal boiler supplies heating and hot water to all the units. It was originally installed in 2019 by Birdsall Services Limited ("Birdsall").

7. On about 29 March 2024 the fixings of the lining of the boiler flue failed and the lining collapsed into the flue. This caused the entire system to fail so that there was no heating or hot water supply throughout the Property. The entire flue needed to be replaced as a result.

8. On 5 April 2024, the Applicant arranged for the installation and hire of temporary boilers. They were installed by Birdsall in the car park of the Property. The purpose of the temporary boilers was to provide hot water and heating to the flats in the Property pending the completion of the flue replacement works.

9. It is worth pointing out that Birdsall does not habitually provide temporary boiler hire itself nor does it supply fuel. It had to outsource both of those services.

10. Thereafter quotes were obtained for the replacement of the flue. A proposal review was conducted by BMCG Limited and their report is dated 1 May 2024. It shows that three quotes were considered as follows:

    Birdsall - £71,840.60
    Poujoulat - £30,000.00
    Midtherm - £41,128.00

    All figures are exclusive of VAT.

11. BMCG noted that the last two quotes were only for the supply and installation of the new flue and did not include ancillary works. BMCG also recommended that further information be sought from Birdsall about its quote.

12. Following that, the Applicant engaged in correspondence and conversations with Birdsall with a view to resolving the recommended queries. During the course of those communications, the responses from Birdsall were not entirely satisfactory and Birdsall made it clear that they were not in a position to take on works of this nature at that stage.

13. On 11 June 2024 (four days after this application was made to this Tribunal), Birdsall withdrew its quotation.

14. BMCG then obtained a further quote from Edmund Services Limited ("ESL") who estimated £53,449.56 plus VAT for supply and installation of the new flue and for remediation upon servicing the boilers. On 24 June 2024, BMCG recommended the ESL quote and on 27 June 2024, the Applicant instructed ESL to carry out the works. The work was completed on 8 August 2024 and the temporary boilers were removed on 22 August 2024.

15. In the end, the cost of works was £410,000 of which the vast majority, £313,000, was for the hire and installation of the temporary boilers and the supply of fuel to them.

The Hearing and the Evidence

16. At the hearing the Applicant was represented by Mr Carl Fain, counsel, who provided a very helpful skeleton argument. The following Respondents helpfully provided skeleton arguments, attended the hearing and represented themselves:

> Maryia Jorbenaze – leaseholder of Flat 181
> Mario Pellegrini – one of the joint leaseholders of Flat 195
> Mr Kourosh Khakpour – leaseholder of Flat 153[1]

17. We also received a skeleton argument from the leaseholder of Flat 126, who did not attend the hearing.

18. Each of the parties who attended (or were represented) had the opportunity to make submissions. The documentary evidence was contained in a hearing bundle. We were taken by the parties and their representatives to relevant pages in the bundle and we have considered all those documents carefully.

19. The Applicant called one witness, Ms Aisling Ampada, who is the estates manager for Wilmots Property Services, agents for the Applicant. She gave evidence about her decision making around the time of the works.

[1] Mr Kourosh Khakpour also claimed to be representing the owner of Flat 51, Mohammed Khakpour, who is deceased. There was no evidence of any probate or letters of administration, so it was not clear on what basis he could claim to represent the estate of the deceased leaseholder. Since Mr Kourosh Khakpour is also the leaseholder of another flat in his own right and since the objections to the dispensation application relate to the buildng as a whole rather than any specific flat, this did not make any practical difference to the hearing.

She said that the provision of temporary boilers to supply interim heating and hot water was urgent and necessary. She said that her first port of call was to Birdsall, who had installed the flue five years earlier, because her client had a continuing maintenance contract with them. She asked them to supply and install the temporary boiler because the Applicant had an existing relationship with them and the temporary boilers needed to be installed as quickly as possible. They told her that the Applicant would have to commit to hiring two boilers for a minimum of two months and thereafter they would be charged on a monthly basis.

20. In fact, by the beginning of May, after just under one month, heating was no longer required for the building, because it was the usual time of year for the heating to be switched off. So the use of one of the two temporary boilers was discontinued, leaving only one boiler needed to supply hot water to the flats. However, because the temporary boilers had been hired for a minimum of two months, the Applicant continued to pay for the hire (but not the fuel) of a boiler which was not being used for the second month.

21. On the issue of the flue replacement works, Ms Ampada explained that Birdsall told the Applicant that it did not have the capacity for large works. She said that the reason why Edmund was recommended and then instructed was because they could get the work done very quickly, they had proved (unlike Birdsall) to be very communicative and they had a very good reputation for project management.

22. Each of the Respondents who attended had the opportunity to cross examine Ms Ampada.

23. Many of them put to her that they had not been kept informed about what was going on. They said that this was typical of how they were usually treated by the Applicant. Ms Ampada's reply was that she had sent emails to all of the leaseholders throughout the process of these works informing them what was happening. She took us to some of those emails in the bundle. Most of the attending Respondents stated that they had not received these emails. It was not clear to us why that had happened. Each party seemed to be doing their best to give an honest account. Nevertheless, because of the legal framework in which we have to decide this application (set out below), it is not necessary for us to resolve this factual dispute.

The Legal Framework

24. We must consider whether to grant dispensation. The relevant statutory provisions are found in subsection 20ZA (1) of the 1985 Act under the heading "Consultation Requirements: Supplementary". That subsection reads as follows:

> "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 it is reasonable to dispense with the requirements".

25. In the light of the decision of the Supreme Court in *Daejan Investments v Benson* [2013] UKSC 14 and several subsequent decisions, the Tribunal must consider whether dispensation, and thereby lack of consultation, would cause prejudice to the leaseholders. The burden of identifying relevant prejudice falls on the leaseholders who are seeking to resist the application. Furthermore, the decision in *Daejan* made it clear that the purpose of the statutory consultation requirements was to ensure (a) that the leaseholders were protected from paying for inappropriate works and (b) from paying more than was appropriate **as a result of the failure of consultation**. If no such prejudice can be identified and proved, then the Tribunal should grant dispensation because the leaseholders would effectively be in the same position as if there had been consultation. It is clear that simply being deprived of the opportunity to participate in consultation is not sufficient prejudice in this context.

26. In *RM Residential v Westacre Estates* [2024] UKUT 56, the Upper Tribunal held that urgency by itself is not a reason to grant dispensation and went to say as follows:

> "On many occasions the urgency of the work will have been such that the landlord obviously did the right thing, and acted in the tenants' best interests, in going ahead without waiting to go through the consultation process; see for example *Holding and Management (Solitaire) Limited v Leaseholders of Sovereign View* [2023] UKUT 174 (LC), where the landlord acted swiftly to get a fire alarm system installed so as to put a stop to the financial haemorrhage caused by the maintenance of a waking watch. Whether or not the work was urgent, if the tenants have not been prejudiced as a result of the failure to consult then dispensation should normally be granted, and it can be granted subject to conditions."

27. In other words, there are some cases where the urgency is such that the leaseholders would suffer greater prejudice as a result of the delay required to enter into a consultation. In such cases that prejudice may well outweigh and cancel out any prejudice suffered by the lack of consultation itself.

28. We have kept in mind all of those principles when considering this case.

Jurisdictional Issue: Are the temporary boilers qualifying works?

29. Before considering the substantive issue, it is necessary to address a jurisdictional issue raised by the Applicant. As noted above, the

application relates to two separate elements of work: (a) the replacement of the flue and (b) the installation and hire of temporary boilers pending the completion of the replacement works.

30. The application is expressed such that dispensation is sought for the flue replacement works and dispensation is sought, **if necessary**, for the temporary boiler installation and hire. This is because Mr Fain's primary submission on behalf of the Applicant is that the provision of temporary boilers during the course of the works does not by itself amount to "qualifying works" for the purposes of the 1985 Act. He accepts that the replacement of a flue amounts to qualifying works, but he submits that providing temporary heating facilities pending the completion of those works is simply the provision of an incidental service. It is not, he says, part of the works, nor does it amount to qualifying works in its own right. The consequence of his submission succeeding would be that the Applicant only needs to apply for dispensation for the flue replacement works. It would not need dispensation for the cost of the temporary boilers.

31. This point is especially significant because the cost of the temporary boilers (c£300,000) vastly exceeds the costs of the flue replacement.

32. "Qualifying works" are defined in section 20ZA(2) as follows:

> *"qualifying works"* means works on a building or any other premises.

33. Mr Fain submitted that the provision of temporary boilers in a car park adjacent to a building are not "works on a building or any other premises" at all. He says that they are the provision of services. He gave the example of a hypothetical case where the toilets are not working in a building and temporary toilet cubicles are placed in the car park while the remedial works are carried out in the building. Putting the toilets in the car park would not amount to "works on a building or any other premises".

34. Without expressing our view about whether the installation of temporary toilet cubicles amounts to "qualifying works", we must consider on which side of the line these temporary boilers fall for the purposes of the definition of "qualifying works".

35. In our judgment, the determining factors are:

- that the temporary boilers were substantial pieces of equipment which needed to be professionally delivered and installed

- they needed to be connected to the existing pipes and conduits of the building in order to serve their function. They were therefore works to "the building" as well as being installed on "the premises".

- They provided one of the essential functions of the building itself, namely the provision of heated water to the taps and radiators inside each of the residential units.

36. There is another issue to consider before deciding this issue. Does it make a difference that the boilers were temporary rather than permanent for the purpose of the definition of "qualifying works"? This question was addressed in *Philips v Francis* [2014] EWCA Civ 1395. Lord Dyson MR said at para 38*:*

> "I agree that qualifying works will often be significant or substantial as opposed to minor and insignificant. But I do not see why they must also have a permanent effect modifying what was there before. For example, it is difficult to say of a substantial programme of redecoration or repair that it has a permanent effect modifying what was there before."

37. In other words, substantial works of a temporary nature can be qualifying works. Mr Fain in this case properly drew our attention to this principle by citing paragraph 11.06 of the Service Charges and Management textbook. He accepted as a result that temporary acts can amount to qualifying works.

38. Applying that test and having regard to all of the factors listed above, we think that the installation of permanent boilers in a boiler house external to the building (eg in the car park), but connected to the pipes inside the building, would unquestionably be qualifying works. So if the only difference here is that the external boilers are temporary, then their installation must in our judgment be "qualifying works".

39. If we are wrong about that, (ie if the temporary boilers are not by themselves qualifying works) there is the additional question of whether the temporary boiler installation is part of a "set of works" together with the flue replacement.

40. The *Philips v Francis* case confirmed the "sets approach" developed in *Martin & Seale v Maryland Estates* (2000) 32 H.L.R. 116 at 126, in which the relevant question is: do the works constitute one or more sets of qualifying works?

41. Here Mr Fain submitted that the provision of temporary boilers was not part of the same "set" of works as the flue replacement. He distinguished it from the case of temporary scaffolding or a temporary roof, because each of those would be a necessary requirement for getting the works done and therefore cannot be separated from the "set" of works.

42. He says that temporary boilers are not part of the same "set of works" because the flue can be replaced perfectly easily without temporary boilers being in place to supply interim heating and hot water to the flat occupiers.

43. In our view, Mr Fain's approach to what is included in a "set of works" is unnecessarily restrictive. In real practical terms, the replacement of part of an essential service such as heating and hot water cannot be carried out in an occupied building without making some alternative provision. That alternative provision in our judgment is part of the "set of works".

44. For all the above reasons, we have decided that the cost of providing and operating the temporary boilers were either "qualifying works" or were part of a set of "qualifying works" and therefore require either consultation or dispensation from consultation.

The Parties' Positions

45. In relation to the dispensation claim as a whole, the Applicant's position was straightforward. The works were urgent. The Respondents suffered no prejudice as a result of the lack of consultation. Any challenge they have to the cost of the works (which is not admitted by the Applicant) can be raised in a subsequent application under section 27A of the Landlord and Tenant Act 1985 (if appropriate). In other words, the Respondents are not prejudiced by any alleged unreasonable costs as a result of the absence of consultation, because they have the power to challenge them later.

46. The Respondents have a number of issues they raised in opposition to the application for dispensation:

    (a) They complained about the lack of information which was provided to them (as noted above).

    (b) They submitted that Birdsall should not have been consulted at all because the flue lining collapse may have been the result of their negligence during installation.

    (c) They submitted that Birdsall should not have been engaged to supply temporary boilers and fuel because they do not provide those service directly and simply subcontracted them to others who could have been approached directly.

    (d) They submitted that the Applicant should not have accepted the condition that temporary boilers had to be hired for a minimum of two months. They should have searched for an alternative supplier who could give them a shorter minimum hire period.

    (e) They submitted that the works took so long that there was plenty of time for consultation.

47. Mr Pellegrini raised some further specific issues. He said that he is an engineer with long experience of boiler maintenance in Italy. He said that he offered the benefit of his experience to the managing agents, but they did not take him up on that offer. He said that in his experience the temporary boiler could have been hired at a price 10-15% lower than the

Applicant has paid and the fuel could have been purchased at a price about 15% less. He did not provide any documentary evidence in support of his claims.

Decision: whether or not to grant dispensation

48. We have carefully considered all the parties evidence and submissions. We have decided to grant dispensation because in our judgment the leaseholders suffered no identifiable prejudice which can be attributed to the lack of consultation and they will not be prejudiced by the grant of dispensation.

49. Mr Fain helpfully reminded us that if the Applicant had consulted (as required by section 20) before entering into the contract to install temporary boilers, then the 375 flats would have been without hot water and heating for at least two to three months to allow for the full section 20 procedure to be followed.

50. We have already noted that urgency, by itself, is not a ground for dispensation, but we think that this is a case where the leaseholders would have suffered much greater prejudice if the Applicant had delayed all of the works pending the consultation process.

51. We have considered all the leaseholders' objections to dispensation and we have decided that many of them can all be addressed later on either as part of a section 27A application (if appropriate) or through other avenues and in other forums. In particular, the way in which the cost of the temporary boilers was structured (2 month minimum and the cost of the hire and fuel) can be dealt with under section 27A. In other words, the lack of consultation has not deprived them of the opportunity to pursue those matters.

52. In any event, we do not have any evidence to prove that any identifiable saving was possible if the temporary boilers had been hired in a different way from a different supplier and that consultation would have made a difference to that.

53. The Respondents' objections relating to the delays caused by Birdsall dropping out of the tendering process are not attributable to lack of consultation in our judgment. We also do not think that consultation would have made any difference to whether Birdsall were approached at all in the first place.

54. For all the above reasons we conclude that it is appropriate to exercise the discretion conferred by section 20ZA of the 1985 Act by dispensing with the consultation requirements in relation to the Works.

Conditions

55. We must also consider whether any it would be appropriate to impose any conditions on the grant of dispensation.

56. The Respondents asked us to impose a number of conditions. Many of them were understandable requests from their point of view. For example, they want an independent investigation into the works and they want independent advice on whether they can obtain compensation from Birdsall.

57. However, our powers to impose conditions are limited to those which can be said to alleviate any prejudice resulting from the absence of section 20 consultation. None of the conditions requested by the Respondents fell into that category and so we have decided not to impose any of them.

58. The Respondents also said that the Applicants should be deprived of their legal costs because it was unnecessary and disproportionate to instruct lawyers. We disagree. But Mr Fain did concede that the Applicant would submit to a condition that it cannot recover the costs of the application through service charges. However, he says that the application could have be dealt with on paper and the hearing itself was caused by the Respondents' writing to the Tribunal to request a hearing, so the Applicant should be entitled to recover the costs of the hearing though the service charges. We accept that submission and we have ordered accordingly.

59. For all the above reasons, we have made the order set out above.

Name: Judge Timothy Cowen **Date:** 15 October 2024

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).