FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	HAV/00MS/LDC/2024/0517/ST
Property	**:**	Ocean Village Marina, Channel Way, Southampton, SO14 3QF
Applicant	**:**	Ocean Village Marina Management Company Limited
Representative	**:**	Mr A Brueton
Respondents	**:**	Various leaseholders
Objecting Leaseholder Representatives	**:**	Mr A Patel Mr R Vaughan-Stanley
Type of Application	**:**	To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985
Tribunal	**:**	Judge R Cooper Ms C Barton MRICS
Date of Decision	**:**	18/11/2024

DECISION

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1. The Applicant's application pursuant to s20ZA of the Landlord and Tenant Act 1985 for dispensation from the consultation requirements of s20C is granted subject to conditions.

Background to the application

2. The Applicant is Ocean Village Marina Management Company Ltd (or

OVMMC), and the Respondents are 57 of the 101 leaseholders of houses and flats at Ocean Village Marina (the Marina). The recognised tenants' association of the leaseholders is Ocean Village Marina Residents Association Ltd (or OVMRA). In this decision where documents are referred to the PDF page number is indicated thus [ ]. References to the 1985 Act are to the Landlord and Tenant Act 1985.

3. This application is made in the context of major repair and renovation works being undertaken in phases at the Ocean View Marina ('the Marina'). There is a long history and background to those works, the details of which it is not necessary to go into here. However, the Respondents rely on three survey reports (commissioned in 2006, 2014 and 2016/17). There have also been previous Tribunal proceedings that were determined on 8/03/2019 (CHI/00MS/LSC/2018/0063, CHI/00MS/LSC/2018/0058 & CHI/00MS/LSC/2018/0062). These comprised two s27A applications for determination of the reasonableness of service charge budgets for 2017/18 and 2018/19 (and for s20C orders limiting recovery of costs), and a cross application for an order dispensing with consultation requirements (under s20ZA). The works that were the subject of those applications were repair/replacement of the pontoons, corrosion protection works and dredging works. Dispensation was given subject to conditions. The Respondents' challenges to the service charge budgets were largely unsuccessful, and the s20C order application did not succeed.

4. On 3/03/2023 it is said by the Applicant that a notice of intention to carry out works to the Marina walls was served on the leaseholders, although a copy of that notice has not been produced. It is said that none of the leaseholders responded. This was not challenged by the Respondents. A tendering process then took place.

5. On 15/08/2023 formal notice of consultation under s20 of the 1985 Act was served on the residential leasehold houses and flats of the Marina [609]. This identified three phases of work that were to be carried out to the Marina walls. In summary,

   (a) Phase 1 – repairs to both sections of the river frontage wall,

   (b) Phase 2 – repairs to the sheet pile wall around the Bull Nose promontory, and

   (c) Phase 3 – relates to the sheet steel piles and concrete revetments and suspended deck of the marina wall forming the hotel promontory.

6. The formal s20 consultation notice related only to phase 1 and 2 and the Applicant identified three firms who had tendered for the works. Constructex, who provided the lowest quote, were appointed.

7. On 3/09/2024 the Applicant made an application to the Tribunal for dispensation in relation to additional works that had been identified as

required under phase 1 of the major works at Ocean Village Marina.

8. Directions were given on 11/09/2024 and again on 15/10/2024. In the light of the objections raised to the dispensation application a hearing was listed for the Tribunal to consider and determine it.

The issues

9. The Applicant applies for dispensation from the consultation requirement in relation to the costs of additional works identified and required under phase 1 of the major works at Ocean Village Marina. It is said that in the course of the works being undertaken and, following further inspections and consultations, the initial specification and budget for repairs to the concrete beams was found to be insufficient to complete the identified repairs required to the structure. The Applicant says all options from the contractor and project manager had been considered and an engineered solution had been proposed and accepted as the best course of action. This would involve the use of steel beams in lieu of concrete repairs to transfer structural loads appropriately, offering a design life of 50 years [14].

10. The Applicant, in summary, says the s20 consultation undertaken in 2023 probably covered these additional works, but they had erred on the side of caution in making the application. The total of the proposed amended schedule of works was now estimated to be £494,000 as against the initial concrete repair budget of £311,368 (of which £184,322 had already been spent). In other words, an estimated additional £178,882 was required for the additional river wall works.

11. Dispensation was sought because it was not possible to genuinely consult again given that the phase 1 works were already well advanced. No other contractor would be likely to quote as works were already being undertaken, and there were difficulties with access. The costs of a new contractor undertaking the additional works was likely to be prejudicial to the Respondents in terms of costs and delay. Delaying the project would also add demobilisation and remobilisation costs.

12. Following the Tribunal's directions given on 11/09/2024, a copy of the application was provided to the 101 residential leaseholders, and of the 58 who responded it is said 57 objected to the application for dispensation. The objectors relied on the representations made by Ocean Village Marina Residents Association (or OVMRA) [426].

13. In summary, those objections are as follows:

    (a) There were various errors in the application form including the number of properties in Ocean Village Marine (stated to be 110), the name of the recognised tenants' association was wrong, and the Applicant was wrong to say there had been no previous dispensation application.

    (b) There was a dispute as to the amount of the dispensation sought,

whether the net additional costs were £178,882 (as claimed by the Applicant) or £366,964, and

(c) The Applicant's claim that time was of the essence was disingenuous given the Applicant's substantial delay in undertaking the major works identified reports from 2006, 2014, and 2016/17 as being urgently required.

14. The Respondents confirmed, however, they did not wish to delay works further, but asks Tribunal to impose the following conditions on the Applicant if dispensation is given:

(a) Limiting the works to the amount already paid as the works are significantly more extensive and costly given the Applicant's failure to act in 18 years, and

(b) Prohibiting any additional costs being passed on to the Respondents that may arise from possible claims under the current repairs contract in respect of any extension of time, demobilisation or remobilisation.

15. In reply, the Applicant says the Respondents' objection fails to identify any prejudice they would suffer if deprived of a right to be consulted. The attempt by the Respondents to put a 'cap' on the costs of additional works was opposed, as the proper forum for such an application was through an application under s27A of the 1985 Act challenging the reasonableness of service charges.

The Hearing

16. Mr A Brueton (counsel) appeared for the Applicant, Mr A Patel and Mr R Vaughan-Stanley represented the Respondents. Also in attendance at the hearing were Mrs K Abbott and Mr T O'Connor (who are both Respondent leaseholders) but who did not participate.

The Documents

17. The Tribunal had considered an electronic bundle (726 pages), and skeleton arguments from both Mr Brueton and Mr Patel. Shortly before the hearing, Mr Patel provided a copy of the previous Tribunal's determination of 8/03/2019. During the course of the hearing, it became apparent that the Respondents did not have a copy of *Daejan Investments Ltd v Benson & others* [2013] UKSC 14 on which the Applicant relied, and Mr Patel also said they were relying on *Aster Communities v Chapman* [2020] UKUT 177 (LC) copies of which had not been provided. The hearing was, therefore, briefly paused to enable the authorities to be provided. For completeness, Mr Brueton provided a copy of the Court of Appeal decision in *Aster Communities v Chapman* [2021] EWCA Civ 660 dismissing the landlord's appeal.

The Law

18. Section 20ZA of the Landlord and Tenant Act 1985 so far as it is relevant to this application provides as follows:

'(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requiremets in relation to any qualifying works….the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirement'

(4) In…this section "the consultation requirements" mean requirements prescribed by regulations made by the Secretary of State.

(5) Regulations made under (4) may in particular include provision requiring the landlord –

(a) to provide details of proposed works….to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works…,

(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 regartd to observations made by teants or the recognised tenants' association in relation to proposed works….and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works….'

Discurssion and conclusions

19. Having considered the totality of the written evidence before it and the evidence and submissions of the parties, the Tribunal concluded that it is reasonable for dispensation to be given under s20ZA for the following reasons.

20. The majority of the Supreme Court in *Daejan* laid down principles that should guide Tribunals in considering how to determine s20ZA dispensation applications (paragraphs 40 to 69). However, they also confirmed that it would be inappropriate for such guidance to be seen as a fetter on the exercise of discretion and given the almost infinite circumstances in which s20ZA must be applied, the principles outlined should not be regarded as rigid rules (paragraphs 40 and 41). They confirmed proper purpose of the consultation requirements in s20 of the 1985 Act is to ensure that tenants are protected from paying for inappropriate works or from paying more than would be appropriate (paragraph 42). The role of the Tribunal in considering an application

for dispensation under s20ZA is to determine the extent to which the tenants have been prejudiced by the failure to consult (paragraph 44). The factual burden is, therefore, on tenants to identify the prejudice they would not have suffered had the formal requirements been fully adhered to, but which they would suffer if unconditional dispensation was given (paragraph 65). Lord Neuberger in paragraph 45 says '*in a case where it is common ground that the extent, quality and cost of the work were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted*'. The Supreme Court recognised the invidious position tenants may be in if denied their rights of consultation, and accepted the Tribunal should not be unsympathetic to their situation. However, a mere loss of opportunity to be consulted is not sufficient, and tenants are under an obligation to identify what they would have said if given an opportunity to raise objections (paragraph 68 & 69). The Court confirmed that once tenants had shown a credible case for prejudice, the landlord is required to rebut it, and that if the Tribunal decide to grant dispensation, it may do so on whatever terms or conditions it sees fit provided they are in all the circumstances appropriate.

21. Full details of the 'additional works' that are proposed by the Applicant have not been provided either to the Tribunal or the Respondents. It is surprising that in the context of the works apparently required and the nature of the project, that the Applicant has not provided to the Tribunal a copy of the survey report identifying the problem with the original specification and the need for an alternative solution to an apparent problem with the works being undertaken by the contractor in relation to the concrete revetment. The need for this solution appears to have arisen during the course of works that were already well under way in Phase 1 of a major project to repair the walls of the Marina. It is not wholly clear whether the alternative solution was required because the works were already running over budget (and therefore a cheaper solution was found) or because the original scope of repair works proposed was inadequate in some way. The Tribunal is satisfied that the Phase 1 works had stalled prior to the application on 3/09/2024 although neither party could clearly identify the date on which they stopped and there was no agreement (or documentary evidence) on the degree of demobilisation of the site.

22. Mr Patel submitted that the s20ZA application had been made as costs had overrun in the course of the project. He said that while originally the costs for the total Phase 1 and 2 works were estimated in 2014 to be £480,000, the 2023 estimate in the s20 consultation was £1.26 million. Now projections for the final costs figure for those works (including the sheet piling) had increased to over £2.4 million. The Tribunal makes no finding in this regard as there is insufficient evidence before it to do so. It accepts, however, that it is more likely than not the Applicant will seek to recoup in full the additional costs arising from the proposed

engineered solution works and any other costs overrun through the service charge.

23. As to any prejudice caused by lack of consultation, Mr Patel in his evidence to the Tribunal said that as leasehold residents of a marina complex, it was not possible for them to seek alternative quotations for these works (in contrast for example to leaseholders in blocks of flats where roof works are proposed, as in the case of *Aster Community*). These are highly specialist projects, there are a limited number of contractors able to do the work and are willing to tender. He said that those contractors that do in the main are reliant on companies like ODL for the bulk of their work, so are unwilling to respond to leaseholder requests. The Applicant also in their application indicates there could be no genuine consultation under s20 of the 1985 Act as no contractor would be likely to tender for work already underway.

24. The Tribunal has no reason to doubt there may be very real difficulties in this regard for the Respondents.Their ability to demonstrate prejudice is significantly impaired due to the particular nature of the development.

25. The Tribunal finds, on balance, that in reality there was no effective means by which these Respondents could have had any meaningful s20 consultation in relation to the additional works proposed. It is satisfied (and it appeared to be common ground between the parties) that it would not have been possible for the leaseholders to obtain alternative quotations for the solution of installing steel beams in place of the original proposed concrete repair part way through Phase 1 of the project. The Tribunal accepts this difficulty most likely arises because of the highly specialised nature of the work, the fact that a contractor was already on site undertaking the works, and access to the site being by water. Additionally, it is clear the Respondents had no wish to delay the works further and were concerned about the additional costs of demobilising and remobilising or penalty clauses. However, the Respondents could have made observations on the identified problem and the engineered solution being proposed or any other potential solution had they seen any proposed specification(s) of works or been properly informed of the nature of the problem identified. It is clear from Mr Patel's evidence that he had in the past had some experience of working with ODL's technical team, and he confirmed that he would have thoroughly scrutinised any proposal in the light of the leaseholder's experience to date.

26. On the evidence before it, and whilst it has considerable sympathy for their position, the Tribunal finds that the Respondents have not demonstrated they have been prejudiced by the failure to properly consult whether by the alternative works being inappropriate or the associated costs being more than was appropriate. It finds in the particular circumstances of this development it would not be possible

for them to do so. The Tribunal therefore considers it appropriate for dispensation to be given.

27. The Tribunal, therefore, considers whether it is appropriate for conditions to be imposed. The Applicant submits that uncontional dispensation to be given.

28. The Respondents' concerns relate principally to the costs which ultimately will be borne by the leaseholders through the service charge. As set out above, they say costs have increased substantially because of the Applicant's significant delay in undertaking the repair and remedial works required. The Respondents also object to the additional legal and other charges which they say will be added to the service charge. They, therefore, ask the Tribunal to impose conditions if dispensation is granted. They rely on *Daejan* where the Court made a reduction of £50,000 to the overall costs of £400,000 a condition of the dispensation. However, the Tribunal accepts Mr Brueton's submission that this was a reduction that had been offered voluntarily by the landlord in that case throughout. No such offer has been made by this Applicant.

29. The Tribunal has given consideration to the Respondents' request for the Tribunal to impose conditions on any dispensation limiting the works to the amount already paid given that they are more extensive and, therefore, costly as a consequence. However, the Tribunal is satisfied that imposition of such a condition would not be appropriate in this s20ZA dispensation application.

30. As Mr Brueton submitted, those arguments can be raised in an application under s27A of the Landlord and Tenant Act 1985 as to the amount of any service charge that is payable. This is because a service charge is only payable to the extent that costs have been reasonably incurred and if the services or works are of a reasonable standard (s19 of the 1985 Act). This may include consideration of whether the extent of, or the works required, or the extent of costs being recovered through the service charge have increased due to a landlord's unreasonable delay in carrying out works.

31. The Tribunal has also considered the Respondents' request for a condition to be imposed that no additional costs be passed to the residents arising from any claims relating to the current repair contract in respect to extensions of time, or costs of demobilising or remobilising as the delay is not of their making. Again, the Tribunal is satisfied that the proper forum for such a challenge is an application under s27A of the 1985 Act rather than this dispensation application.

32. Whilst the Tribunal does have a wide discretion to impose conditions, there was insufficient information before the Tribunal to make such a determination.

33. The Respondents confirmed they had incurred no costs in attending the Tribunal hearing other than their time and had not incurred legal fees.

34. However, Mr Patel also indicated that the Applicant's costs of the current s20ZA dispensation application had already been added to the prospective budget for 2025/26 received shortly before the hearing, before the outcome or the application was known. From the evidence before us, it was clear the previous Tribunal had as, Mr Patel said, made it a condition of granting dispensation in 2019 that the Applicant's direct costs of the dispensation application. The decision also makes clear this had been an offer made by the Applicant (paragraph 139). No such offer had been put forward in this application.

35. Whilst the Tribunal was satisfied that, for the reasons set out above, it was not possible for the Respondents to demonstrate prejudice given the current state of the works and the highly specialised nature of the work in view of the environment, had the consultation process been followed the residents would have been able to voice concerns or objections to the proposed solutionwhich the Applicant had a duty to take into consideration. Certainly, Mr Patel's evidence is that the Respondents would have scrutinised the specification more thoroughly in the light of their experience to date. It appeared to us, however, that there had not only been a failure to consult but also a failure of communication between the parties more generally, and a failure by the Applicant to divulge the nature of the problem that had led to cessation of the works or provide a copy of the survey report. On that basis the Tribunal was satisfied that it was appropriate that as a condition of dispensation it would be reasonable for the Applicant's direct costs associated with this dispensation application not to be added to the service charge. The Tribunal also makes it a condition that the Applicant provide a copy of all surveys or reports obtained by the Applicant in connection with (a) the initial inadequacy of the specification for the concrete revetment repair and (b) all the proposed alternative solution(s).

Decision

36. The Applicant's application under s20ZA to dispense with the consultation requirements dated 3/09/2024 is granted subject to the following conditions:

    (i) that the Applicant will not pass onto the leaseholders through the service charge the costs that are directly associated with this application, and

    (ii) that the Applicant provide to the OVMRA within 28 days a copy of all surveys or reports obtained by the Applicant in connection with (a) the initial inadequacy of the specification for the

concrete revetment repair and (b) all the proposed alternative solution(s) and any associated costings obtained.

Signed: Judge R Cooper

Note: Appeals

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 the Regional office that 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, and should be sent by email to rpsouthern@justice.gov.uk.

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.