



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

**Case reference** : **MAN/00CM/LDC/2023/0047**

**Property** : **Echo Building, 1 and 2 West Wear Street, Sunderland**

**Applicant** : **Adriatic Land 1 (GR3) Limited**

**Representative** : **JB Leitch Limited**

**Respondents** : **Various Residential Long Leaseholders**

**Representative** :

**Type of application** : **Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985.**

**Tribunal member(s)** : **Judge J White  
Mr J Elliot**

**Venue** : **Paper (P)  
Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**

**Date of decision** : **26 January 2024**

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**DECISION**

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**The Decision**

- (i) The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 without condition in respect of the specified urgent interim works to make safe high level fascia panels and fire safety works in respect of the replacement of the ACM cladding panels.

- (ii) **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

### **The Application**

1. The Applicant is the landlord of Apartment 1 to Apartment 181, Echo Building, 1 and 2, West Wear Street, Sunderland ("the Property"). The Property is a building constructed circa 2007 with 13 storeys. The height of the topmost habitable floor is at approximately 43 metres. The apartments located within the Property are subject to long residential leases. Service charges are payable under the lease.
2. On 5 July 2023, the Applicant applied for dispensation under Section 20ZA of the Landlord and Tenant Act 1985 (the Act) from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act.
3. The application relates to Interim Works to make safe high level facia panels and Fire Safety Works in the replacement of ACM ???.
4. On 17 October 2023, the Tribunal issued Directions. In accordance with those directions the Applicant submitted a bundle of documents to the Tribunal and each leaseholder. A number of leaseholders responded, some were represented by the Residents Association, The Respondent with the largest number of apartments instructed Blacks Solicitors who submitted a Statement of Response. The Applicants submitted a Statement of Case in reply to all Respondents.
5. The Directions also stated that the Tribunal did not consider an inspection would be needed and it would be appropriate for the matter to be determined by way of a paper determination. Neither party had objected. The Tribunal convened on 26 January 2024 without the parties to determine the application on the papers. It decided that there was enough evidence to determine the application without the need for an inspection or oral hearing. It was in the interests of justice to do so and in accordance with the Overriding Objective.

### **The Law**

6. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

- (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.

7. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson et al* [2013] UKSC 14. In summary the Supreme Court noted the following

- (i) The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
- (ii) The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
- (iii) Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
- (iv) The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
- (v) The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
- (vi) The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
- (vii) The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the noncompliance has in that sense caused prejudice to the tenant.
- (viii) The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
- (ix) Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

### **The background**

8. The Applicants Statement and Blacks Response sets out the history to this application. There is no factual dispute about the background. In November 2020 The managing agents (Kingston) issued a Notice of Intension under s 20 of the Act stating that an

intrusive survey of the cladding and external wall construction would be carried out. On 1 April 2021 the Leaseholders were informed that the survey had identified some works, though no interim safety measures were required, a further survey was required to assess the extent of the works. This further inspection concluded that remediation was not required on any of the observed wall types as confirmed by a EWS1 certificate. The insurance premiums at this time had gone up substantially.

9. The Applicant then instructed CHPK Fire Engineering Limited (“CHPK”) to advise on the panels at roof level. It is unclear why they were instructed at this stage. A copy of CHPK’s note dated 14 October 2022 noted that some panels were detached. It found that:
  - (i) Fascia panels were missing at 4 different locations; one on the south elevation, one on the southwest corner, one on the northwest corner and one on the northeast corner;
  - (ii) Panels were located in the car park albeit CHPK could not confirm whether these belonged to the Premises and if so, the reason for their failure;
  - (iii) Some of the detached panels likely failed during a high wind gust at the corner and then the Revit failed accordingly;
  - (iv) A panel reviewed from a balcony on the top floor appeared to be failing. This is a high risk and should be replaced / removed as soon as possible;
  - (v) The reason for the failures on side 3 predominantly being at the top corner is likely because the panel is folded beyond 90 (acute angle) degrees at the corner, which will increase the stress on that corner and make it more susceptible to failure;
  - (vi) The panels should be reinforced or replaced as soon as possible.
10. It concluded that *“Unless proven otherwise with structural calculations/checks to the as-built configuration, in our opinion, the viewed configuration of the panels would make it likely to failure as it continues to buffet/deflect during various wind speed/gusts. That said, the panels should be reinforced or replaced as soon as possible”* [172/144].
11. On 22 December 2022, a further report stated that they had found Category 3 ACM, *“which is a combustible material that will pose a high risk on the external wall of the building”*
12. On the same date the Applicant sent a stage 1 consultation letter stating *“The current roof cladding boards have recently been identified as being flammable. Because of the location of the roofing boards, the risk is not deemed to be significant, but the materials identified mean that they will require removal and replacement. The Landlord will carry out a survey called a*

*PAS9980 assessment which will be a holistic review of the safety of the building which will confirm the works required. The anticipated outcome will be that the cladding panels will require removal and replacement, together with all other works identified at survey or whilst on site to ensure the safety of the building, and the Landlord wishes to advise you of its intentions to carry out this work, via this Notice.” [174/146].*

13. On 1 February 2023 a meeting was held by Kingston with various leaseholders in order to discuss the observations received in respect of the notice.
14. On 18 May 2023, CHPK produced a Fire Risk Appraisal External Walls and Attachments (“FRAEW”) report in line with the PAS9980 guidance. The FRAEW states that the hazard of rapid fire spread over the surface of the wall systems is present in the ACM cladding on the building due to the cladding being Category 3 which is highly combustible. CHPK also identified a hazard of fire spread within the external wall system in the concrete panel substrate due to its combustible rigid foam insulation, and the spandrel panels due to its combustible plywood backing. CHPK concluded that the Premises has a high risk for external fires. Accordingly, CHPK have recommended the following works take place:
  - (i) Identify, remove, and replace all ACM cladding in the building such that it complies with the current Building Regulations.
  - (ii) Replace the plywood backing in the external wall to 12mm backing material that achieves Euroclass A2-sl, dO or better.
  - (iii) Carry out periodic maintenance inspections of cavity barriers / closures as a matter of good practice when maintaining / replacing windows etc facilitate access.
  - (iv) Ensure that all actions from the most recent Fire Risk Assessment have been rectified.
  - (v) As an interim measure, utilise a waking watch or a building management system (which may include an intelligent fire alarm that can facilitate evacuation). If a waking watch is implemented it should be replaced as soon as possible by an intelligent fire alarm.
15. Following the application, the Applicants have now instructed Avalon Abseiling Ltd to carry out the Interim Works at a cost of £40,351.60 plus VAT to install infill panels to the high-level fascia cladding where isolated sheets have come loose and left gaps to the cladding. These fabricated panels are to be fixed to the building as a temporary measure until such time the panels can be removed and replaced. Each panel is to be fabricated off site and installed into position on the building to prevent further failings to the panels in situ. Panels to be fabricated as per the designs received and based on measurements given. Avalon to install approx. 20 panels around the top perimeter covering any visible openings to the building.

16. The Applicant had applied for funding from the Building Safety Fund and explore recovery from the developer who had subsequently gone into administration. Some of the Leaseholders are not qualifying leaseholders for the purpose of the Building safety Act 2022.

### **The Determination**

17. A significant number of leaseholders have responded, all making similar points.
18. The Consultation requirements provides important safeguards for leaseholders and should not be dispensed with unless the Tribunal is satisfied that it is reasonable to dispense with the requirements as set out in the case of *Daejan* set out above.
19. The Respondents correctly say that on an application for dispensation the focus of the Tribunal must be on the relevant prejudice if any suffered by the lessees as a direct result of the lessor's failure to consult: *"Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(l) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements."* Daejan Investments Ltd v Benson [2013] UKSC 54 [44] per Lord Neuberger.
20. *"As the Supreme Court made clear in Daejan, the consultation requirements are not an end in themselves; they can be dispensed with if there is no relevant prejudice to the leaseholders, meaning prejudice that arose because of the lack of consultation rather than any reason. "* Holding & Management (Solitaire) Limited v Leaseholders of Sovereign View [2023] UKUT 174 (LC) [21].
21. It is worth noting that Sovereign View involved fire safety issues and the tribunal allowed dispensation on the requirements relating to an alarm system and imposed conditions that the landlord pay for the waking watch. This was set aside by the UT. This is because any prejudice must arise **because of** the lack of consultation, and not for any other reasons. Other conduct issues including delay are not relevant. In that case the waking watch, as in this case, was not part of the dispensation application. Similarly, the Upper Tribunal also set aside the costs condition. It held that the leaseholders did not suffer any relevant prejudice from the absence of consultation, observing: *"It was clearly sensible and in everyone's interests to get the fire alarm system installed; in that sense this was not a petition for an indulgence but a matter of practical importance for all concerned."*

### Alleged Prejudice not as a result of lack of consultation

22. **Waking watch and fire alarm system:** The Respondents state that, had consultation been carried out, they would have chosen the alternative fire alarm system instead of the waking watch. This was suggested as an option in the safety reports. Though it is not clear why this option was chosen, the waking watch is not the subject of this application for dispensation and consequently not connected. We do note however, that the report recommends that any waking watch does not last long and is replaced by a fire alarm system. We also note that other important fire safety measures were recommended and some the Respondents raise important issues relating to other safety measures.
23. **Delays:** The leaseholders say that there have been avoidable delays, since at least December 2022, if not from the date of the first survey in 2021. This has meant that consultation could have happened in that time, waking watch costs and insurance costs have gone up considerably due to the continuing fire safety risks. The landlord says that the last report was not obtained until 18 May 2023 and this application was made on 5 July 2023. The waking watch is not included in the dispensation application. These are irrelevant considerations.
24. We have found that, if there was any delay and subsequent impact on charges, this is not connected to the dispensation request.
25. **Liability for costs:** Leaseholders who do not hold qualifying leases for the purposes of the Building Safety Act 2022 state that if dispensation is granted, they will be held liable for a proportion of the Fire Safety Works and the Interim Works. The Applicant should pursue the administrators of the developer for costs.
26. We have found the liability for the cost of the work is not a relevant consideration connected to the dispensation request.

### **Relevant considerations:**

27. **The interim works were not necessary as not a safety issue:** This involves unnecessary additional costs and should have been incorporated into the main Fire Safety Works. The Applicant says that these works were necessary for health and safety of all leaseholders and occupiers.
28. We find that the report commissioned on 14 October 2022 recommends that “the panels should be reinforced or replaced as soon as possible” as set out above. [172/144]. These works have already been commissioned and this will be well ahead of the main works that will involve design and build. Safety risks of this type, where high winds could dislodge panels at height, should be taken seriously due to the likely levels of harm it would cause.

29. **Opportunity to be consulted:** The Respondent states that they should have been given an opportunity to comment on the design and build procurement route. The Applicant says they have not said what the prejudice is and have had opportunities following the stage 1 consultation. This type of procurement route is not amenable to a consultation process.

30. We have found that none of the Respondents have identified how they may be prejudiced and what alternatives they have suggested following on from the stage 1 consultation or otherwise. No one has appeared to specifically criticise the recommendations. This type of procurement route saves time and transfers some of the costs risk. It is appropriate in the circumstances. It is a highly specialised area, involving protracted inspections and expert recommendations. Though it is not clear why there was a change of approach as set out above, the current approach to risk taken, following on from Grenfell, is understandable, and follows current guidance.

31. For the reasons set out above the Tribunal grants dispensation from the consultation requirements of S.20 the Act in respect of the Application of

- (i) Interim works to be undertaken by Avalon to repair and replace the fascia; and
- (ii) Fire safety works connected to the cladding as recommended in the report dated 23 May 2023

32. **In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

**Judge J White**  
**1 March 2024**

### ***RIGHTS OF APPEAL***

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.