FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/LDC/2019/0011** **BIR/00CN/LLD/2019/0011** **BIR/00CN/LLC/2019/0012**
Property	**:**	**Flats 13 to 59 Elmwood Court, Pershore Road, Birmingham, B5 7PB**
Applicant	**:**	**Mr I Carter**
Representative	**:**	**Proxim Property Management Ltd**
Respondents	**:**	**The long leaseholders of Flats 13 to 59 Elmwood Court**
Type of Applications	**:**	**An Application under Section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the Section 20 consultation requirements.** **Applications for Orders for the Limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing the tenant's liability to pay an administration charge in respect of litigation costs.**
Tribunal Members	**:**	**V Ward BSc (Hons) FRICS** **P Wilson – BSc (Hons) LLB MRICS MCIEH CEnvH**
Date of Decision	**:**	**3 December 2019**

DECISION

BACKGROUND

1. The substantive application, received on 27 September 2019, requests the Tribunal to grant dispensation from the consultation requirements contained within section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") and the Service Charge (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations") in respect of works proposed to Elmwood Court, Pershore Road Birmingham B5 7PB. Under the provisions of the 1985 Act and the 2003 Regulations, the Applicant is required to consult if the cost of the works are in excess of £250 including VAT per leaseholder.

2. The application was originally made in respect of Elmwood Court in its entirety however it was subsequently varied to relate to flats 13 to 59 only.

3. The Applicant's proposals appear to involve the upgrading/repair/replacement of glazed partitions with Georgian wired glass and fire doors and fire doors to electrical cupboards and storage/waste disposal areas to meet fire safety requirements.

4. By way of directions dated 30 September 2019 the Applicant was directed under paragraph 2 to provide a copy of those directions to each leaseholder by no later than 7 October 2019.

5. It appears that the directions were not copied to leaseholders as directed, to the effect that leaseholders were not made aware of the opportunity to oppose the application by 24 October 2019 as per paragraphs 7 and 8. However, the Tribunal was advised that a copy of the application form and ancillary documents were provided to the leaseholder in accordance with those directions. The Tribunal then issued a second directions order dated 22 October 2019. This ordered the Applicant to deliver both the first and second directions orders to the leaseholders by 25 October 2019. The second directions order gave Respondent leaseholders until 8 November 2019 to object and also advised that the Tribunal would inspect the development on 12 November 2019 and that following the inspection, an oral hearing would be held at the Tribunal Hearing Rooms, 13th Floor, Centre City Tower, Hill St Birmingham B5 4UU.

6. Applications for Orders for the Limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing the tenant's liability to pay an administration charge in respect of litigation costs were made by Mr A C Parton, owner of flats 46 and 54.

THE LEASE

7. The Applicant holds the head lease in respect of the development within which the subject properties are situated. The flat owners hold under leases emanating therefrom.

8. Relevant provisions within the under lease, dated 21 September 1979 submitted to the Tribunal on behalf of the Applicant are as follows

   Clause 2 of the lease states:

   "(2) AND to pay the Interim Charge and Service Charge at the times and in the manner provided in the Ninth Schedule hereto both such Charges to be recoverable in default as rent in arrears."

   The Ninth Schedule states:

   "" (1) The Lessee's Proportion means 1.3% of the Lessor's Expenses attributable to the matters mentioned in Part I of the Eighth Schedule hereto and 2.13% of the Lessor's Expenses attributable to the matters mentioned in Part II of the Eighth Schedule……..".

   It is Part II of the Eighth Schedule that relates to this application. This sets out the scope of the service charge to the "Tower Block" – flats 13 to 59. The relevant sections are as follows:

   ""1. Repairing rebuilding repointing improving or otherwise treating as necessary and keeping the Tower Block forming part of the maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof including all cisterns tanks drains pipes wires ducts and conduits including any to be laid within 80 years of the date hereof serving the Tower Block exclusively wherever they may be situate within the Development".

   ""8. The provision maintenance renewal of any other equipment and the provision of any other service which in the opinion of the Lessor or their managing agent (which shall be conclusive) it is reasonable for the Lessor to provide for the Tower Block".

THE INSPECTION

9. The Tribunal carried out an inspection of the subject property on 12 November 2019 accompanied by Ms Louise Andrews and Mr Bill Drake-Lee of Proxim Property Management Limited, the Applicant's representative and the recently appointed managing agents.

10. Elmwood Court comprises a 1960s development of 78 flats. Of these, 48 flats (numbers 13 to 59) are situated in a twelve-storey block ("the Tower Block") and it is works to this block that are the subject of this application.

11. The works proposed are to the communal areas of the Tower Block and essentially are to improve the fire safety in those areas. The works relate to glazed partitions with doors and electricity and utility room doors. The Tribunal inspected the communal area on each floor.

12. The block has a single stairwell serving all twelve floors which also acts as the protected escape route in the event of fire. There are fire resisting partitions between the stairwell and communal landing to each floor. The partitions are constructed of hardwood framing each with a glazed fire door with self closing device and glazed screens. The partitions are of substantial size (typically in excess of 8m² in area) with the vast majority of the area glazed. All glazing is Georgian wired glass.

13. To the first floor and above, four flats open off each communal landing. At the opposite end of the landing, a fire resisting door opens onto a communal utility area with individual storage cupboards for each flat and access to the refuse chute. Also opening off the landlord area are cupboards housing the electrical distribution boards, cupboards that formerly housed hose reels and dry riser cupboards. To the top floor is the lift machinery room and to the ground floor a large electrical cupboard with the incoming main supply and associated distribution equipment.

14. Inspection of the fire resisting partitions and the doors to the utility area show that a limited number are ill fitting (primarily through warping) leaving gaps between door and frame and there are instances of damage to frames following repairs. None of the doors/frames have intumescent strips or smoke seals and do not comply with modern requirements for fire resisting doors in other respects (hinges and door furniture). The doors to the electrical cupboards and lift room appear to have had thin sheet material cladding (possibly a fibrous cement based sheet) fixed to both sides presumably to increase fire resistance. The door thickness was measured at 44mm including the boarding. There are no self closing devices to these doors and again no intumescent strips, smoke seals, suitable door furniture etc. Damage was noted to several of these doors.

THE HEARING

15. A hearing was held following the inspection at the Tribunal Hearing Rooms, Birmingham. Present at the hearing were Ms Andrews and Mr Drake – Lee of Proxim Property Management Limited ("Proxim") on behalf of the Applicant. No Respondents were in attendance.

Submissions on behalf of the Applicant.

16. Submissions on behalf of the Applicant were as follows. Ms Andrews and Mr Drake – Lee explained at the hearing that Proxim had only been appointed as managing agents in April 2019 and had found significant wants of repair at the development. As a result of this, they set out a phased repair programme which incorporated fire safety works which was sent to all flat owners in September 2019. As Proxim were of the opinion that no works had been done to the development under the Regulatory Reform (Fire Safety) Order 2005 (which came into force on 1 October 2006), and noting that the communal area doors may be deficient in fire safety terms, they commissioned a report by FastR Solutions entitled "Fire door assessment report" and dated 22 August 2019.

17. Extracts from this report are as follows:

"Tower block has pedestrian fire doors separating the stairwells from the communal landings, doors to the resident's storage cupboards, redundant bin chute cupboards, meter rooms and bin stores.

The tower block has a dedicated fire escape stairwell serving all floors; separation to the communal hallways is provided by fire doors in hardwood frames and Georgian wired glass. Communal fire doors the block are commensurate with the age of the building and they would have been compliant at the time of construction/installation

Initial observations:

None of the doors have any labels or indicators to show what the fire rating of the doors may have been.

- *Doors are not fitted with intumescent or cold smoke seals.*
- *Doors are hung with two hinges only; current installations should have three hinges.*
- *Doors are 44 mm thick*
- *It cannot be confirmed if the hardware is fire rated meaning doors may fail due to incorrectly installed locks, handles etc.*

All the doors are suffering from age-related issues and poor maintenance meaning the doors will no longer provide the levels of protection necessary. These issues will need to be addressed in order to maintain the fire compartmentation of the building.

Conclusions

Tower Block

Pedestrian fire doors to the communal areas in the tower block have significant issues which could potentially be addressed. However, given the number and type of issues identified it may be more economical to replace the door leaves with modern FD doors with cold smoke/intumescent seals fitted.

Doors and the surrounding wall to the meter room on the ground floor of the tower block need to be removed and replaced with a surround built to current fire safety standards offering a minimum of fire resistance equal to the surrounding structure with a fire door set offering a minimum of 30 minutes fire rating.

Doors to the resident's (sic) storage areas should be fire rated in order to increase the protection from the spread of smoke into the escape routes.

Cupboard doors need to have the boarding checked for Asbestos Containing Materials. The significant amount of damage done to the door leaves and door frames would suggests (sic) that replacement may be a more economical approach rather than repair.
Doors to the bin storage areas should be upgraded to offer a minimum of 60 minutes fire resistance.

18. Following receipt of this report, they invited contractors to submit quotations to remedy the defects highlighted in the report. At the time of the hearing, three quotations had been received from two companies; two quotes to replace the principle doors in question and one to repair them.

19. The quotations received were as follows:

Quotation 1 provided by LRG Services Ltd

REPAIR 22 Communal doors & glazing replace beading	£23,500.80
Replace riser doors	£7,248.00
Replace Electric Cupboard GF	£1,636.80
Replace Lift Room Door	£1,636.80
Total cost of works	£34,022.40

Quotation 2 provided by LRG Services Ltd

REPLACE 22 Communal doors & glazing replace beading	£32,140.80
Replace riser doors	£7,248.00
Replace Electric Cupboard GF	£1,636.80
Replace Lift Room Door	£1,636.80
Total cost of works	£42,662.40

Quotation 3 JNR Fire Protection Specialists Ltd

Replace 9 Communal doors	£10,794.00
Replace 13 Glazing partitions	£27,222.00
Replace riser doors	
Replace Electric Cupboard GF	£21,492.00
Replace Lift Room Door	
Total cost of works	£59,508.00

20. Proxim were obtaining further quotations at the time of the hearing, however, notwithstanding a further estimate being more competitive, the intention was to proceed with the LRG quote in the sum of £34,022.40.

Submissions on behalf of the Respondents.

21. Two written objections were received prior to the hearing. Of these, one (representing several leaseholders) was withdrawn prior to the Tribunal considering the matter. The objection that remained was submitted my Mr Neil Baillie, the owner of flat 33. The points of contention raised by Mr Baillie can be summarised as follows:

- If dispensation is granted the leaseholders will have no input into the upgrading exercise, the cost of which is likely to exceed £50,000.

- Documentation obtained from the Association of Resident Management Agents' website considered by Mr Baillie, stressed the importance of compartmentation in flats as the likely source of a fire would be an individual flat. Therefore, the security of this compartment should be of paramount importance; everything else is secondary. In this regard whilst he was aware that Proxim had obtained reports in respect of the flat doors, he had not seen a copy of the report. Continuing, this document stated that it wholly inappropriate to impose current guidance for new blocks of flats onto existing buildings and further there is no requirement under building regulations for upgrading existing fire safety measures to current standards.

- There was no mandatory obligation to undertake any work aimed at bringing current fire safety precautions to current regulation levels.

- A full consultation process would have enabled everyone to be aware of the current situation and a Fire Safety plan of action could be presented. Owners could also undertake their own research.

- Flat owners currently face paying around £4,000.00 each for other major works and affordability may become an issue.

22. The Tribunal put Mr Baillie's objections to Ms Andrews and Mr Drake – Lee at the hearing. They advised that they were fully aware of the issue with the flat entrance doors as they had commissioned a report and had found many were defective in fire safety terms. Under the terms of the lease, flat doors are the owner's responsibility hence whilst Proxim had advised owners of the deficiency of the flat doors in August 2019 and encouraged rectification, enforcement was difficult and may fall to the Local Authority – Birmingham City Council – under the provisions of the Housing Act 2004. Proxim had in fact already contacted the City Council whose response was disappointing. The apartment doors and works to the communal areas, are due to the lease, two separate issues

23. Further, Ms Andrews and Mr Drake – Lee disagreed that the works to the communal areas were not needed, the FastR Solutions reported had confirmed that. A Fire Risk Assessment had been carried out by the previous agents, but which had not yet been passed over to Proxim.

24. Proxim were acutely aware that due to many years of neglect there were works required at the development, the costs of which would be significant. Wherever possible these would be phased but fire safety works had to be a priority. Proxim were hopeful that the works could be carried out before Christmas. The costs of the same would probably initially be borne by the Applicant and recovered later.

THE LAW

25. Section 20 of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution to "qualifying works" (defined under section 20ZA (2) as works to a building or any other premises) unless the consultation requirements have been met. Under the Regulations, section 20 applies to qualifying works which result in a service charge contribution by an individual tenant in excess of £250.00.

26. There are essentially three stages in the consultation procedure, the pre tender stage; Notice of Intention, the tender stage; Notification of Proposals including estimates and in some cases a third stage advising the leaseholders that the contract has been placed and the reasons behind the same.

27. It should also be noted that the dispensation power of the First-tier Tribunal under section 20ZA of the 1985 Act only applies to the statutory consultation requirements and does not confer any power to dispense with any contractual consultation provisions which may be contained in the lease.

THE TRIBUNAL'S DETERMINATION

28. The provisions cited from the lease enable the cost of the works to be recovered from the lessees/leaseholders by way of the service charge.

29. Section 20ZA of the 1985 Act does not expand upon or detail the circumstances when it may be reasonable to make a determination dispensing with the consultation requirements. However, following the Supreme Court's judgment in *Daejan Investments Limited v Benson et all* [2013] UKSC 14, the Tribunal in considering whether dispensation should be granted in this matter should take into account the extent to which lessees/leaseholders were prejudiced by the landlord's failure to consult.

30. The Tribunal notes Mr Baillie's objections. It is clear that the compartmentation of the flats is important however it is not the only fire safety measure required. It is clear to the Tribunal from the information supplied by the Applicant and the evidence gleaned from the inspection that the proposed works are urgently required in order to increase the overall level of fire safety within the property.

31. Relevant guidance, in particular that issued by the Local Government Association "Fire safety in purpose-built blocks of flats" issued in May 2012, acknowledges that there have been changes in what it refers to as 'benchmark standards' as time has gone on. The guidance accepts that it is not appropriate to impose the standards applied to present day new builds retrospectively to all existing flat blocks. However, the guidance does state that, whilst is important to consider the benchmark standards prevailing at the time a block was built when assessing the adequacy of fire protection, equally is important to establish just how far removed the original standards are to what is considered acceptable today, and whether this has given rise to an unacceptable level of risk.

32. The Tribunal has to consider the works proposed in the context of the development itself; the building is of 12 storeys. In these circumstances any deficiency in fire safety is a matter of significant concern and could potentially have serious or indeed fatal consequences. The fire safety works proposed to the communal areas are to protect the single staircase in the event of a fire and allow occupiers to escape safely. The need for these works is exacerbated by the fact that some of the flat doors are not fully compliant. It is unfortunate that the flat owners have not been able to engage with the process as they would have been if the formal consultation procedures had been followed however the Tribunal considers that the prejudice suffered in this regard is not significant and in any event, is overshadowed by the paramount need for the building fire safety measures to be upgraded without any delay in what is a potentially vulnerable high rise building.

33. The Tribunal is satisfied that the works are required and that, on the evidence provided, it is reasonable to dispense with the consultation requirements of section 20 of the 1985 Act. Accordingly, dispensation is duly granted.

34. Parties should note that this determination does not prevent any later challenge by any of the respondent leaseholders under sections 19 and 27(A) of the 1985 Act on the grounds that the costs of the works when incurred had not been reasonably incurred or that the works had not been carried out to a reasonable standard.

Section 20C Application and Paragraph 5A Application

35. As indicated above, applications for Orders for the Limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing the tenant's liability to pay an administration charge in respect of litigation costs were made by Mr A C Parton owner of flats 46 and 54.

36. Section 20C is concerned with the limitation of a service charge by reference to the cost of tribunal proceedings. The purpose of an application under section 20C is to prevent a landlord from recovering his costs in tribunal proceedings through the service charge. The guidance given in previous cases is to the effect that an order under section 20C is to deprive the landlord of a property right and it should be exercised sparingly see *Veena SA v Cheong*_Lands Tribunal [2003] 1 EGLR 175. The only submissions made by Mr Parton in this regard were contained within his application form and were as follows:

    "*I am concerned that as our landlord has applied for S20 dispensation he may burned (sic) the service charge with very large legal costs to support his application should leaseholders challenge him. Elmwood Court is not a wealthy development and leaseholders would not be able to afford large legal costs.*"

37. The Tribunal put these comments to Ms Andrews and Mr Drake – Lee at the hearing. They advised that they had incurred no legal costs in making the dispensation application; the only costs incurred were the costs of distributing the Tribunal directions and associated documents to leaseholders, and the application fee.

38. These costs are in the opinion of the Tribunal reasonable and it is perfectly understandable for a dispensation application to be made therefore the Tribunal will not make a section 20C Order.

39. An application for an Order under paragraph 5 A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation

costs was also made by Mr Parton. Litigation costs in this context means costs incurred or to be incurred by the landlord in connection with proceedings before a Court, First-tier Tribunal, Upper Tribunal or arbitral Tribunal.

40. The only comments made by Mr Parton in this regard were contained within his application form and were as follows:

"I am concerned that as the landlord has sort (sic) s20 dispensation he incur large legal costs and charge them to the service charge."

41. The Tribunal was advised that no legal costs have been involved in this process and accordingly this application has no substance; therefore the Tribunal will not make an Order.

42. In making its Determination, the Tribunal has had regard to its inspection, the submissions of the parties, the relevant law and its knowledge and experience as an expert Tribunal, but not to any special or secret knowledge.

APPEAL

43. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V WARD