FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HB/LDC/2022/0066
Property	:	Marsh House & Telephone Apartments, Marsh Street, Bristol, BS1 4AQ
Applicant	:	Aviva Investors Ground Rent GP & Aviva Investors Ground Rent Holdco Limited
Representative	:	Martin Nicoll Mainstay Residential
Respondents	:	62 Leaseholders as set out in the Schedule at pages 4 to 6 of the hearing bundle.
Representative	:	Dawn and Mark Walker Leaseholders of 204 Marsh House
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(s)	:	Judge Tildesley OBE Mr D Banfield FRICS Mr E Shaylor
Date and Venue of Hearing	:	Havant Justice Centre 29 November 2022 Hybrid Hearing
Date of Decision	:	23 December 2022

DECISION

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The Application

1. The Applicant seeks 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 was received on 15 July 2022.

2. On 12 September 2022 the Tribunal directed the Applicant to serve the Application and directions on the Respondents. On 19 September 2022 the Applicant confirmed that it had served the Application by email on 71 of the 74 leaseholders and that it had posted the Application and directions by First Class post on the remaining three leaseholders.

3. The Tribunal required the leaseholders to return a pro-forma to the Tribunal and to the Applicant by 3 October 2022 indicating whether they agreed or disagreed with the Application.

4. The Tribunal received objections to the Application from the leaseholders of 48 of the 71 private residential flats, and the property manager of the 14 Housing Association flats. The Tribunal's directions indicated that those parties not returning the pro-forma would be removed as Respondents from the Application.

5. The Tribunal directed the Applicant to supply a hearing bundle by 17 October 2022, and failure to do so would result in the striking out of the Application. On 20 October 2022 the Application was struck out because no hearing bundle had been sent to the Tribunal. On 24 October 2022 the Tribunal on Application decided to reinstate the Application in furtherance of the overriding objective.

6. The Tribunal heard the Application on the 29 November 2022 at Havant Justice Centre. Mr Nicoll of Mainstay Residential appeared in person for the Applicant. Mr and Mrs Walker, the leaseholders of 204 Marsh House. appeared by video link. Mr and Mrs Walker had been authorised to represent the 62 leaseholders who objected to the Application. The Applicant supplied a bundle of documents. The Tribunal heard evidence from Mr Nicoll and Mrs Walker.

The Applicant's Case

7. The property was originally constructed in the 1950's as an office block. In 2008 or thereabouts the property was converted for residential use comprising 71 private residential flats, 14 Housing Association flats and three commercial units. The Tribunal understands that the property is eight storeys high with "recessed" penthouses.

8. In 2018 a build defect was identified with the terraces and balustrades around the penthouse apartments which rendered the balustrades unsafe. The property at that time was still under warranty and the owners claimed the costs of the remedial works against the warranty which had been registered with Premier Guarantee. The claim was

accepted subject to an £85,000 excess which was recovered from the leaseholders through the service charge.

9. The Tribunal understands that the remedial works in respect of the terraces and balustrades commenced in June 2020 and were completed around early 2022. The gross value of the works was assessed at £396,603.39 as on 29 April 2022. The works involved repairs at high levels which required the erection of scaffolding around the building.

10. The Application for dispensation concerned a discrete part of the major works, which consisted of the application of "Envirograf" fire resistant coating to the timber decking in order for the work to be signed off by Building Control and the replacement of some damaged roof deck boards. The Applicant stated that these works were not covered by the warranty. The Applicant referred to a letter from the loss adjustors, Sedgwick International (UK) Limited, dated 17 September 2021 which stated that the warranty did not cover additional claims to limit further the risk of the spread of fire.

11. The Applicant submitted it was necessary to complete these additional works whilst the scaffolding was in situ because they were works at height. Given those circumstances the Applicant engaged the existing contractor for the balustrade works to apply the fire resistant coating and repair the damaged decking boards. The Applicant said that the additional works were carried out in the period between 27 October 2021 to 19 November 2021. The Applicant explained that there was a lead in period for the acquisition of the "Envirograf" paint.

12. The Applicant stated that the estimated costs inclusive of VAT for these additional works were £18,288.16 for the application of the fire resistant coating and for the repair of the damaged boards plus £18,240 for the scaffolding making a total of £36,528.16 including VAT. The Applicant, however, said that the actual costs of the works in total were £42,155.48 inclusive of VAT.

13. The Applicant's reasons for requesting dispensation from consultation requirements were twofold. The Applicant submitted that if it had gone through the statutory consultation it would have taken at least two months which would have increased the costs considerably in respect of the scaffolding. The Applicant pointed out that the cost of the scaffolding was £4,566 including VAT per week which over eight weeks would have been £35,528. According to the Applicant this represented 91.4 per cent of the actual costs incurred in undertaking the additional works. The Applicant asserted that by undertaking the works without consultation was to the benefit of the leaseholders in saving them unnecessary costs.

14. The Applicant also contended that the works were urgent to ensure compliance with fire safety requirements and to secure sign off from Building Control.

The Respondents' Case

15. The Respondents stated that the first they knew of these additional works was on the 19 September 2022 which was when they received notice of the Application for Dispensation. The Respondents pointed out that this was at least 12 months after the Applicant became aware of the need for the works and almost ten months after the work was completed.

16. The Respondents did not accept that the works were urgent. They noted that the works did not start until 27 October 2021 which was almost six weeks after the Applicant's enquiry of Sedgwick, the loss adjustors, about whether the additional works would be covered by the warranty. The Respondents maintained that the Applicants had ample time to consult them about the proposed works.

17. The Respondents contended that they had been denied the opportunity to comment on the appropriateness of the works, the quality of those works and the potential additional costs. The Respondents stated that amongst their number there were persons with considerable experience in these matters including project managers and quantity surveyors. The Respondents asserted that if they had been consulted they would have made the following representations:

    a) There was no need for scaffolding to carry out the additional works. The Respondents asserted that the lifts could have been used for the transfer of materials to the upper floor, and that it was safe to apply the fire resistant coating without scaffolding because the balustrades were in place. The Respondents pointed out that the costs for scaffolding comprised a substantial part of the charge for the additional works. The Respondents also queried whether the additional works had incurred scaffolding costs. The Respondents referred to a response of the contractor to the Applicant's email dated 29 April 2022 which said "'We weren't actually charging weekly hire costs at this time as we were working. I could work out a charge though should you wish".

    b) The Respondents stated it was not clear why the insurers would not have accepted the costs related to the damaged roof boarding works under the policy. The Respondents added that the repairs to the boards were not fire spread related or instructed by the Building Control Officer. The Respondents indicated that one of the leaseholders was an insurance broker who specialised in this field.

    c) The Respondents said that they had not been provided with a copy of the contract with the contractor for these works and no details of the costs had been supplied. The Respondents contended that if they had been provided with this information they would have queried the scope and the costs of the works.

The Respondents considered that the charge for the application of the fire resistant paint were on the high side. The Respondents observed that the additional works have proved to be defective with the result that the finish applied to the decking was now peeling off.

d) The Respondents pointed out that they had not been supplied with the invoices for the additional works. The Respondents asserted that the evidence of costs presented by the Applicant comprised a series of lump sum cumulative valuation invoices.

The Applicant's Reply

18. The Applicant had originally stated that the previous managing agents had notified the Respondents of the additional works on 21 October 2021. At the hearing the Applicant acknowledged that the previous managing agent's letter said nothing about the leaseholders incurring costs for the additional works.

19. The Applicant maintained that it was necessary to retain the scaffolding to access the works to the timber deck, which the Applicant said was on the advice of the contract and the project lead surveyor for the works covered by the warranty.

20. The Applicant accepted that the contractor did not charge access costs when the additional work was undertaken between 27 October and 19 November 2021 and said that the cost of the works included access and there was therefore no need to make a separate charge. However, the Applicant considered that the contractor was entitled to charge costs for scaffolding leading up until the point where the work was undertaken between 18 September to 24 October 2021 because the scaffolding was required to be kept in situ prior to works commencing to avoid further cost in striking and erecting the scaffolding to an eight story building at the highest point.

21. The Applicant contended that it had provided evidence in the form of the loss adjustor's letter to substantiate why the costs of the repairs to the boards did not fall within the terms of the warranty. The Applicant added that in any event the repairs to the boards were a maintenance item and would not be covered by the warranty.

22. The Applicant concluded that all the points raised by the Respondents were not relevant to the Application for Dispensation. In the Applicant's view the Respondents were raising questions about the reasonableness of the costs for which they could make a separate application under section 27A of the 1985 Act.

Determination

23. Before dealing with the substantive application, the Tribunal wishes to address two preliminary points. The Respondents argued that the Application should not be entertained because of alleged defects in procedure. The Tribunal took view that this had been dealt with when a Tribunal Judge had agreed to reinstate the Application. This Tribunal did not consider the overriding objective was furthered by dwelling on the technical procedural points raised by the Respondents.

24. The Tribunal noted that the leaseholders had acquired the right to manage the property. The Respondents stated that the Right to Manage Company was formed in late October 2021. The Tribunal took the view that the Applicant was still entitled to recover the costs of the additional works because it appeared on the evidence that they were incurred before the date of the acquisition of the Right to Manage.

25. Turning now to the substantive application the 1985 Act provides leaseholders with safeguards in respect of the recovery of the landlord's costs in connection with qualifying works. Section 19 ensures that the landlord can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 requires the landlord to consult with leaseholders in a prescribed manner about the qualifying works. If the landlord fails to do this, a leaseholder's contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

26. In this case the Tribunal's decision is confined to the dispensation from the consultation requirements in respect of the works under section 20ZA of the 1985 Act. The Tribunal is not making a determination on whether the costs of those works are reasonable or payable. If a leaseholder wishes to challenge the reasonableness of those costs, then a separate application under section 27A of the Landlord and Tenant Act 1985 would have to be made.

27. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, the Tribunal is given a broad discretion on whether to grant or refuse dispensation. The discretion, however, must be exercised in the context of the legal safeguards given to the Applicant under sections 19 and 20 of the 1985 Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54 which decided that the Tribunal should focus on the issue of prejudice to the ltenant in respect of the statutory safeguards.

28. Lord Neuberger in *Daejan* said at paragraph 44

> "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 s 20ZA(1) 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".

29. Lord Neuberger added at paragraph 67.

> "As to the contention that my conclusion would place an unfair burden on tenants where the LVT is considering prejudice, it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption JSC said during the argument, if the tenants show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice".

30. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the leaseholders would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the leaseholders to identify any relevant prejudice which they claim they might have suffered. If the leaseholders show a creditable case for prejudice, the Tribunal should look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the leaseholders fully for that prejudice.

31. The Tribunal now turns to the facts. The Tribunal is satisfied that the Respondents if given the opportunity to consult would have raised their concerns about (1) the necessity for scaffolding for the additional works; (2) whether the contractor would incur the costs for the scaffolding and (3) the scope of the warranty in relation to the replacement of the deck boards. The Tribunal finds that those concerns were relevant to the protections given to leaseholders by statutory consultation against costs of inappropriate works and or paying more than would be appropriate, and that those concerns were not confined to issues about the reasonableness of the costs incurred. The Tribunal is mindful that the factual burden on the Respondents to establish a prima facie case of relevant prejudice is not a high one, particularly in the circumstances of this Application when the Respondents did not learn about the possibility of additional costs until 12 months had

elapsed after the Applicant had first become aware of the need to carry out the additional works. The Tribunal is also mindful that the costs of the scaffolding constituted a substantial part of the actual costs for the additional works. The Tribunal, therefore, concludes that the Respondents have established a prima facie case of relevant prejudice.

32. The Applicant in rebuttal stated that the contractor and the principal surveyor had required scaffolding in order for the works to be carried out. The Applicant accepted that the contractor had not charged for scaffolding during the period the works were actually undertaken but that the charge had related to the period of four weeks immediately before the commencement of the works on 27 October 2021. The Tribunal after looking at the photographs of the decking area with the balustrades in place was not convinced that it was essential for scaffolding to undertake the additional works. Also whilst some explanation has been given the Tribunal remained puzzled by the contractor's charging arrangements for the use of scaffolding. It would have made more sense if the contractor had charged for scaffolding when the works took place. The Tribunal considered that the issue about the scope of the warranty was not significant as the costs for the repair of the boards were minimal. The Tribunal took into account the Applicant's 12 month delay in informing the Respondents about the costs of the additional works. In the Tribunal's view, the delay enhanced the egregiousness of the Applicant's failure to consult. The Tribunal, therefore, holds to resolve in the Respondents' favour any doubts as to whether the works would have cost less or would have been carried out in a different way.

Decision

33. The Tribunal decides that the Respondents have established that they suffered relevant prejudice from the Applicant's failure to consult. The Tribunal is satisfied that this is not a case where the prejudice can be ameliorated by the imposition of conditions. **The Tribunal, therefore, refuses the Application for dispensation of consultation requirements, and makes an Order preventing the Applicant from recovering the costs of the proceedings from the Respondents.**

34. The effect of this decision is that the Applicant cannot recover more than £250 from the Respondents as a contribution to the costs of the additional works. The Respondents have the right to make a separate application under section 27A of the 1985 Act to challenge the reasonableness of the costs of the additional works.

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