



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

Case Reference : CHI/ 00HN/LDC/2019/0067

Property : 1-14 Snowdon Mount, 4 Snowdon Road,
Westbourne, Bournemouth BH4 9HL

Applicant : RMB 102 Limited

Representative : Rebbeck Brothers Limited

Respondents : Lessees of;
Flat 1
Flat 5
Flat 7
Flat 11

Representative : -

Type of Application : To dispense with the requirement to
consult lessees about major works

Tribunal Member(s) : Mr D Banfield FRICS

Date of Decision : 14 October 2019

DECISION

In accordance with the above the Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 for the provision of a “top hat” scaffold to provide weather protection.

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

Background

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.
2. The Applicant explains that on commencing major works it has become apparent that significant water ingress has affected the structure. Three flats have had to be vacated. The surveyors and engineers have advised that the block should be protected with a top hat scaffold to prevent water ingress, protect the remaining flats, and allow the works to proceed during inclement weather. A Notice of Intention under section 20 of the Landlord and Tenant Act 1985 has been served but the Applicant wishes to proceed with the scaffold urgently, before the section 20 consultation process would be completed. An initial quote for the scaffold is £34,020.00 inc. VAT.
3. The Tribunal made Directions on 3 September 2019 requiring the Applicant to serve a copy of the application and the Directions on each of the lessees. Included with the Directions was a form for the lessees to complete indicating whether they agreed with or objected to the application. The Directions also noted that lessees who agreed with the application or did not return the form would be removed as Respondents. The Applicant's failed to serve the required documents in time and applied for an extension which was granted on 20 September 2019.
4. Four lessees responded objecting to the application. One lessee responded agreeing to the application and as indicated all lessees with the exception of the four who have objected have therefore been removed as respondents.
5. There were no requests for an oral hearing and the application is therefore determined on the papers in accordance with Rule 31 of the Tribunal's procedural rules.
6. The only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. **This application does not concern the issue of whether any service charge costs will be reasonable or payable.**

The Law

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

20ZA Consultation requirements:

- a. (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.

8. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following
 - b. 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.
 - c. 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.
 - d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - f. 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).
 - g. 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.
 - h. 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 non-compliance has in that sense caused prejudice to the tenant.
 - i. 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.
 - j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

Applicant

9. The Applicant explains that having opened up the property to undertake works it has become apparent that water ingress has affected the structure of the property resulting in 3 of the 14 flats being vacated. The surveyors and engineers are preparing a programme of works which will be subject to a separate application to the Tribunal but in the meantime dispensation is required to erect a "top hat" scaffold to prevent further damage.
10. A report from Graham Garner and Partners Limited, structural engineers dated 13 August 2019 following an inspection of the property sets out the works that are required including the provision for adequate weather protection of those areas of the building which will be exposed during the

works. In an email from Graham Garner and Partners Ltd dated 18 September 2019 it is stated that; “The building will require a full perimeter scaffolding system in order to provide access and carry out repairs to the second-floor terrace areas. The building will also need to be protected against rain penetration during the works whilst the first-floor areas are exposed. The provision of a “top hat” scaffold will deal with both the access and waterproofing aspects of the works. I understand that a covered system around the perimeter is being investigated which will extend from the outside walls across to the second-floor roof (which has recently been recovered). The “top hat” will be enclosed using Monarflex reinforced polythene sheeting. This would appear to offer a practical and lightweight solution. I cannot see that the use of a self-adhesive EDPM without some sort of supporting framework would provide a suitable alternative.”

Respondents

11. The following summary objections have been received from the lessees;
 - a) Major water ingress has been reported since 2010, most recently in 2019
 - b) A previous Tribunal determination of 30/3/2017 stated that there was nothing to stop the landlord from carrying out the works. and then claiming payment from the tenants if it was genuinely concerned about the state of the building!
 - c) The apparent urgency so late in the day does not justify dispensation.
 - d) The costs are unreasonable.
 - e) The erection of a top hat scaffold may be wasted as the building may need to be rebuilt.
 - f) A full programme of reinstatement/rebuilding needs to be prepared and by erecting a top hat scaffold with no plan in place will only add to the extended delays.
 - g) A repair needs to be both achievable and preferable, confirmed by the structural engineer and accurately tendered.
 - h) Alternative temporary methods to limit water ingress should be examined.
 - i) No definitive time frame for it to remain in place.
 - j) More cost-effective measures available
 - k) No assurances that structural repairs are economically viable
 - l) The freeholder should have acted in 2014 when the initial issue was first discovered.
 - m) A full appraisal of the building must be undertaken to ascertain all of the defects. There needs to comparative quotes for rebuilding/repair.

Determination

12. Before making my determination, it is necessary to review the purpose of S.20ZA. The guidance provided by the decision in the Daejan case referred to above provides the framework but it is also necessary to

understand the extent to which the right to be consulted benefits the lessees.

13. Whilst Section 20 of the 1985 Act obliges a landlord to consult the lessees on projects over a certain value it remains the landlord's decision as to how any such works are to be carried out in order to satisfy their repairing obligations. Lessees are given the right to be consulted but the landlord is not obliged to accept any observations received. Lessees are also given the opportunity of nominating a contractor from whom tenders may be sought alongside those nominated by the landlord and where dispensation is granted this right is lost. Likewise, the requirement to obtain competitive tenders may be overridden by the granting of dispensation.
14. The likely cost of the works for which dispensation is sought is not a relevant factor in the Tribunal's decision. Whether or not dispensation is granted landlords still need to be able to demonstrate that service charge expenditure complies with Section 19 of the 1985 Act in that they are reasonably incurred and are of a reasonable standard. If lessees consider this not to be the case then their remedy is an application under Section 27A of the 1985 Act.
15. Turning now to this application it is clear that the remaining respondents have doubts as to whether a long-term plan has been formulated and as such whether the envisaged expenditure can be justified. There are suggestions that alternative and cheaper protection could be provided although no such scheme has been identified.
16. It is also pointed out that the landlord has known of the issue for some time and should not therefore be considered as urgent.
17. Whilst I have some sympathy with the Respondents' concerns regarding the apparent lack of a longer-term plan I am not satisfied that this is relevant to the application. I am satisfied that to delay the provision of weather protection to enable consultation to be carried out cannot be justified and if the costs or indeed methods incurred are considered excessive then the lessees have a remedy in Section 27A.
- 18. In accordance with the above the Tribunal grants dispensation from the consultation requirements of S.20 of the Landlord and Tenant Act 1985 for the provision of a "top hat" scaffold to provide weather protection.**
- 19. In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS
14 October 2019

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, which has been dealing with the case. 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.
2. 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.
3. 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 appeal is seeking.